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SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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CONTENTS

SPECIAL CONFERENCE ISSUE: THE NEW ZEALAND BILL OF RIGHTS ACT

Foreword
Petra Butler and Claudia Geiringer vii

The New Zealand Bill of Rights Act 1990 – An Account of Its Preparation
K J Keith 1

The New Zealand Bill of Rights Act 1990 and Constitutional Propriety
Janet McLean 19

The Moral Force of the United Kingdom's Human Rights Act
Rabinder Singh 39

Dissent, the Bill of Rights Act and the Supreme Court
Andrew Geddis 55

The European Court of Human Rights and Religion: Between *Christian* Neutrality and the Fear of Islam
Alicia Cebada Romero 75

The Interpretive Obligation: the Socio-Political Context
Kris Gledhill 103

Sources of Resistance to Proportionality Review of Administrative Power under the Bill of Rights Act
Claudia Geiringer 123

Property Rights and Public Law Traditions in New Zealand
Richard Boast 161

Māori and the Bill of Rights Act: A Case of Missed Opportunities?
Fleur Adcock 183

The Case for a Right to Privacy in the New Zealand Bill of Rights Act
Petra Butler 213

The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?
Rt Hon Sir Geoffrey Palmer QC 257

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The week of twenty-first birthday celebrations at which preliminary versions of most of these articles were originally presented was hosted by the New Zealand Centre for Public Law, and was made possible with the generous support of Judge Ian Borrin and the New Zealand Law Foundation.

THE NEW ZEALAND BILL OF RIGHTS ACT 1990 – AN ACCOUNT OF ITS PREPARATION

K J Keith[*]

This is a personal recollection of the thinking and actions which led to the enactment of the New Zealand Bill of Rights Act 1990. I also comment on some recent proposals for change.

In this paper I give a personal account of the thinking, debate and action which led to the enactment of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). While the account emphasises the period through to 1990, I also comment, in part by reference to that early process, on more recent proposals for change. The subject matter of the other papers in this issue and my own practice of not commenting in any specific way on cases in which I have been involved as a judge explain the limited references to the application of the Bill in the courts over the last two decades.

The received "wisdom" about bills of rights of lawyers in New Zealand and much of the common law world well into the middle of the twentieth century was that articulated a century earlier by Jeremy Bentham and AV Dicey. For the former, reacting to the French Declaration of the Rights of Man, bills of rights were "nonsense upon stilts"[1] and for the latter, the very many foreign constitution-makers who had begun with declarations of rights were "often … in no wise to blame."[2] Further, according to Dicey, the "Habeas Corpus Acts declare no principle and define no rights but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[3] Despite this recognition of a role for legislators in enacting those statutory protections, for

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* I was an adviser to the Minister of Justice from 1984 to 1990 on the proposed Bill of Rights. I have written about some of the issues in KJ Keith "A Bill of Rights for New Zealand? Judicial Review versus Democracy" (1985) 11 NZULR 307; and KJ Keith "Concerning Change: The Adoption and Implementation of the New Zealand Bill of Rights Act 1990" (2000) 31 VUWLR 721. Thanks to Peter Hogg and Geoffrey Palmer for comments and to Ellie Fogarty for research assistance.

1 Jeremy Bentham "Anarchical Fallacies" in *The Works of Jeremy Bentham* (William Tait, Edinburgh, 1843) vol 2 at 489 at 501.

2 AV Dicey *Introduction to the Law of the Constitution* (8th ed, Macmillan, London, 1915) at 194.

3 At 195.

Dicey (but not for Bentham), it was the judges rather than the legislators who provided that guarantee of liberty:[4]

> We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

My sense, considering for instance the very extensive legislative output in New Zealand of the early years of Crown colony government and the "legislative experiments" in the 1870s to 1890s – notably education, labour law, the widening of suffrage (notably women's suffrage) and other enhancements of electoral law, land settlement, liquor control, family law and the beginnings of the welfare state[5] – is that the new settlers, so far as they thought about the matter at all, looked more to the legislators than to the judges for the enhancement and protection of their rights. The Chief Justice, writing recently about the contribution of the judiciary to New Zealand law, has said:[6]

> Our early reliance on statute law has continued. Perhaps as a result, the role of judge-made law may have been partly eclipsed in popular consciousness. We have remained comfortable with legislative amendment and restatement of core common law subjects, as the contractual reforms of the 1970s demonstrate. Our legislature at times has had an enormous output, sometimes of pioneering law reform without parallel in other jurisdictions. In many such reforming statutes, the legislature has been content to confer wide jurisdiction upon the courts, which have been left to develop principles for their implementation in application of common law method. Where legislation has been passed in areas developed by common law, the impulse has often been to achieve systemisation and accessibility rather than reform of the law. It is rare to detect in such legislation any suspicion about judicial function. Rather, what emerges is a working relationship between statute and common law method in which both combine to produce New Zealand law.
>
> For their part, the New Zealand courts have generally been free of the suspicion that in other jurisdictions has hampered legislative initiative.

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4 At 191.

5 See for example William Pember Reeves *State Experiments in Australia and New Zealand* (Allen and Unwin, London, 1902).

6 Sian Elias "Interweavers – Contribution of the Judiciary to New Zealand Law" in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission: Papers from the Twentieth Anniversary Seminar* (LexisNexis, Wellington, 2007) 55 at 58–59. The direction given as early as 1851 by the legislature that the judges were to give effect to the purpose of an enactment in interpreting it must also be significant: Interpretation Ordinance 1851 15 Vict 3, cl 3; see Law Commission *A New Interpretation Act* (NZLC R17, 1990).

It was through that legislative process, supported by the popular will manifested in periodic elections (based on universal suffrage from 1893) that major rights issues were to be resolved – or adjusted, for matters were not to be set in stone.

I must venture beyond the British (or really English) and New Zealand contexts. Developments in the wider world have had a significant and growing impact on the understanding of the position of human rights in New Zealand and more widely. While the major international developments are to be seen from 1945 when "we, the peoples of the United Nations" stated their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women",[7] the international legal requirements established in the interwar period in respect of victims of war (updating treaties from 1864 and 1906 and extending them to give greater protection to prisoners of war), minorities, the mandated territories and labour should not be neglected. On the last, for instance, the preamble to the Constitution of the International Labour Organization, adopted in 1919 and amended in 1944 by the International Labour Conference, with Walter Nash, deputy Prime Minister of New Zealand, in the Chair, declares:

> Whereas universal and lasting peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist involving such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required.

In 1948, the General Assembly of the United Nations, building on the reaffirmation of human rights in the United Nations Charter and reflecting on the recent horrors of the Holocaust and the World Wars, adopted the *Universal Declaration of Human Rights*.[8] In it, the world community clearly states that the protection of human rights is no longer simply a matter for national action falling within the domestic jurisdiction of each state. The Declaration had some influence in the 1950s and 1960s on professional and official thinking in New Zealand. It was translated into Māori soon after its adoption;[9] the Western Samoan Constitution, shortly before that country became independent, was amended at the urging of the United Nations to include a bill of rights based on the Declaration;[10] the Declaration provided a reason for some of us in 1963 to oppose a legislative

7 Charter of the United Nations, preamble.

8 *Universal Declaration of Human Rights* GA Res 217, III (1948).

9 Department of External Affairs *Universal Declaration of Human Rights: Ko te Whakapuakitanga o ngā Mana Whakatika i te Noho a te Tangata i te Ao* (Publication No 87, 1951) reprinted at (1999) 29 VUWLR xiii; also in Tokelauan at xxi.

10 Constitution of the Independent State of Samoa 1960, pt II.

bill of rights based on the Canadian Bill of Rights 1960;[11] and it was the subject at Victoria University of Wellington of a published series of lectures on its twentieth anniversary in 1968.[12]

The small size of the New Zealand legal community may provide one explanation of that interest in the international developments. Those who taught international law often taught constitutional law as well. Colin Aikman is a notable example. He made the principal New Zealand speech in support of the *Universal Declaration* in 1948, he was a principal drafter of the Western Samoan Constitution and he continued to speak about the linkages between the Declaration and action at the national level, for instance, as late as the fiftieth anniversary of the adoption of the Declaration.[13]

I return to the 1963 debates on the proposed Bill of Rights. In 1960, the National Party came into office with proposals for a Citizens' Protector (adopted as the Ombudsman),[14] controls over the making of regulations by the executive (introduced, although in a limited form) and a bill of rights based on the then recent Canadian measure.[15] That package usefully reminds us that concerns about the growth and possible misuse of governmental power are not to be addressed by judicial controls alone. The changes to regulation making apply at the stage of the drafting of the empowering statute, with the prospect of closer judicial review of the regulations made under the narrower power, and also with enhanced parliamentary monitoring of the regulations, made by reference to

11 Canadian Bill of Rights SC 1960 c 44; "Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights" [1965] III AJHR I14.

12 KJ Keith (ed) *Essays on Human Rights* (Sweet and Maxwell, Wellington, 1968). But note the negative positions taken in that series by Richard Mulgan and Geoffrey Palmer, just returned from Oxford and Chicago respectively.

Australian writing over the 30 or more years following 1948 provides an interesting contrast. The *Universal Declaration of Human Rights* makes only limited appearances in Enid Campbell and Harry Whitmore's two valuable editions on civil liberties in Australia published in 1966 and 1973: Enid Campbell and Harry Whitmore *Freedom in Australia* (Sydney University Press, Sydney, 1966); and Enid Campbell and Harry Whitmore *Freedom in Australia* (2nd ed, Sydney University Press, Sydney, 1973). Even as late as 1981 in his preface to Geoffrey Flick's book, *Civil Liberties in Australia* (The Law Book Company, Sydney, 1981), Justice Michael Kirby makes no reference to the international treaty texts or even to the idea of a bill of rights. For many years now he has been a major promoter and practitioner of the use of international material. As he has often described, it was because of his participation in 1988 in the first Judicial Colloquium organised by Anthony Lester QC (of Interights) and the Commonwealth Secretariat that he saw the real significance of the international material: see MD Kirby "The Role of the Judge in Advancing Human Rights by Reference to Human Rights Norms" in *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* (Human Rights Unit, Commonwealth Secretariat, London, 1988) 67.

13 Colin Aikman "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1.

14 Initially, Parliamentary Commissioner (Ombudsman) Act 1962.

15 See John Marshall *Memoirs: Volume One – 1912–1960* (Collins, Auckland, 1983) at 288–291.

standards beyond those applied by courts. That monitoring role was further enhanced in the late 1980s.[16] The establishment of the Office of the Ombudsman recognised that less formal, more flexible and less costly processes, with wider access to official information, and involving, in some measure, review of the merits of administrative decisions, will often have real advantages over the court process. There is a danger, to which too many lawyers succumb, of thinking that the courts can provide all the answers.[17]

The Bill of Rights proposal was almost unanimously opposed and did not proceed. The Solicitor-General Richard Wild QC, who was later to become Chief Justice, told the parliamentary committee to which the Bill was referred that "this Bill is not only unnecessary: its enactment would be positively against the public interest."[18] He reported that the Lord Chief Justice of England was opposed and that very senior Canadian judges advised against it.[19] Also opposed were the Law Societies, academics young and old and the New Zealand Māori Council, which was concerned that the Treaty of Waitangi should be referred to in the proposed Bill of Rights and its importance as the basis for the relationship between the government and the Māori people be acknowledged.[20] The more general arguments made to the committee were that the legislative process was to be trusted as it was democratic and subject to the public will, the judges did not have democratic legitimacy, they were not experienced in the areas of law and policy which would arise, the United States experience was not encouraging (no other experience was seen as significant, the early Canadian experience with its Bill being seen as negative), unnecessary uncertainty would be created and, if an educational and evaluative measure was needed, the *Universal Declaration of Human Rights* already existed.

Soon after participating fully in that negative position, I had the great good fortune of studying constitutional law at the Harvard Law School in 1964, in Professor Paul Freund's section, a fortune which was enhanced by recent decisions of the United States Supreme Court which challenged the opinion so confidently and virtually unanimously asserted in the New Zealand process. Four cases

16 See Regulations (Disallowance) Act 1989 and the work of the Regulations Review Committee, established in 1986, assembled in Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington, 2012).

17 See for example KJ Keith "Administrative Law Developments in New Zealand as Seen through Immigration Law" in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, Toronto, 2006) 125.

18 "Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights", above n 11, at 52.

19 At 53. Thirty years on, due in large part to the unstinting efforts of Anthony Lester (Lord Lester of Herne Hill QC), the influence was in the reverse direction with the New Zealand Bill of Rights Act 1990 having a prominent role in the United Kingdom debates and proposals which led to the Human Rights Act 1998 (UK). The attitude of senior British judges was by then sharply different and many supported a bill.

20 At 17.

in particular stood out – *Baker v Carr* (1962) and related cases, requiring electoral reapportionment;[21] *NAACP v Button* (1963), holding public litigation relating to racial discrimination to be political speech;[22] *New York Times v Sullivan* (1964), placing substantial limits on defamation liability in respect of political speech;[23] and *Escobedo v Illinois* (1964), according the right to counsel of persons charged with serious offences.[24] All but the last were opinions written by Justice Brennan.[25] I came to understand that a distinction in principle was to be made between the protection by courts through a bill of rights of governmental *processes* and of the *product* of those processes. I already understood that one critical aspect of governmental process – the basic elements of the electoral process – had long been closely regulated by law in New Zealand. Since 1893, the process for the fixing of electoral constituencies had been carefully controlled, with a commission including independent members and political representatives working within tight substantive and temporal limits to enable generally equal representation between constituencies. Since 1956 those requirements, along with the secrecy of the ballot, the voting age and the three year term, had been entrenched: they could be amended only by a three quarters majority of the House of Representatives – essentially by agreement between the major parties – or by a referendum of the electorate.[26]

For that reason, the United States reapportionment cases surprised me. Surely Tennessee had a system, like the New Zealand one, for the regular realignment of constituencies as populations grew and moved, to provide for fair elections? My question was naive. There had not been a reapportionment for 60 years in Tennessee (and even that of 1901 was stigmatised by some as unfair).[27] I came to understand that in that case and others from the South, court intervention was essential if all citizens, especially Afro-Americans, were to have the prospect of equal protection under the law, in the particular case at the ballot box ("the prospect of", because equal voting rights will not always protect the rights of minorities). Far from the judges standing in the way of the public will, as manifested through the electoral process (of 1901 as it turned out), by the *Baker v*

21 *Baker v Carr* 369 US 186 (1962); *Wesberry v Sanders* 376 US 1 (1964); and *Reynolds v Sims* 377 US 533 (1964).

22 *NAACP v Button* 371 US 415 (1963).

23 *New York Times v Sullivan* 376 US 254 (1964).

24 *Escobedo v Illinois* 378 US 478 (1964).

25 One measure of the significance of these cases appears from the fact they take up one third of the 225 pages of the 1964 Supplement to Freund, Sutherland, Howe and Brown, the case book used in Professor Paul Freund's course: Paul Freund and others *Constitutional Law: Cases and other Problems - 1964 Supplement* (2nd ed, Little Brown and Co, Boston, 1964). Federalism and safeguards of liberty and property take up most of the rest of the volume.

26 Electoral Act 1956, s 189; re-enacted as Electoral Act 1993, s 268.

27 *Baker v Carr*, above n 21, at 192, n 13.

Carr decision of 1962, they were facilitating that manifestation by restoring and protecting the political process.

Much the same analysis was to be made of the protection of political speech in the *NAACP* and *Sullivan* cases.[28] Those cases again are to be seen as protecting the political processes and, with the reapportionment cases, protecting process writ large. Process writ small, the procedural protections accorded to the individual in their dealings with the state (in the particular case in the criminal justice system) is to be seen in the *Escobedo* case.[29] In none of those categories of cases did the Supreme Court confront a substantive product of the political process.

To recall the submissions on the 1963 proposal, these recent United States cases were to be sharply distinguished, at least as I saw the arguments, from earlier decisions of the United States Supreme Court striking down laws fixing maximum hours of work, prohibiting child labour, requiring minimum wage standards for women, or regulating the coal industry by fixing prices, prohibiting unfair practices and prescribing labour conditions.[30] Laws such as those, the opponents to the 1963 New Zealand proposal thought, were matters for the legislature – for those elected by the people and responsible to them.[31] Judges by reference to their understandings of substantive due process, freedom of contract or the concept of commerce between the states should not be taking those decisions. A further factor relating to those different categories was that, in the categories of process cases I was considering as a student in 1964, common law judges were in familiar territory, particularly when dealing with freedom of speech and with due process in criminal cases.

By the 1970s the wider scene was changing.[32] The European Convention on Human Rights was being applied by the United Kingdom to colonial territories for which it was responsible and being

28 *NAACP v Button*, above n 22; and *New York Times v Sullivan*, above n 23.

29 *Escobedo v Illinois,* above n 24. From about 1965, I was clear in my mind about the process/product distinction, but the adjectives "writ large" and "writ small" I did not focus on, so far as I can recall, until the publication in 1980 of John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, 1980). Jeremy Waldron, a long term critic of strong judicial review, may be seen paradoxically as recently supporting the position in "The Core of the Case against Judicial Review" (2006) 115 Yale LJ 1346.

30 *Lochner v New York* 198 US 45 (1905); *Hammer v Dagenhart* 247 US 251 (1918); *Adkins v Children's Hospital* 261 US 525 (1923); and *Carter v Carter Coal Co* 298 US 238 (1936).

31 "Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights", above n 11.

32 In 1964 Stanley de Smith had already captured the changing practice and attitudes, or at least their beginnings, in ch 5 of his excellent *The New Commonwealth and its Constitutions* (Stevens and Sons, London, 1964) in which among other things he coins the phrase "the austerity of tabulated legalism" and stresses the need to rise above it, at 194.

incorporated in their constitutions, including their post-independence constitutions.[33] The International Covenant on Civil and Political Rights (ICCPR)[34] and the International Covenant on Economic, Social and Cultural Rights were complete.[35] New Zealand became bound by them in 1978. British judges, sitting in the Privy Council in bills of rights cases, mainly from the Caribbean, and British counsel in the European Court of Human Rights, as well as in Downing Street, were growing in experience with such matters.[36]

In New Zealand, there were growing concerns about the use or abuse of executive power. In 1979, Geoffrey Palmer, in the first edition of *Unbridled Power*,[37] published on the day he was nominated for a safe seat in Parliament, called for a bill of rights. By 1984, the Labour Government was elected to power and Geoffrey Palmer, as the responsible Minister, promoted a bill of rights along with many other major constitutional changes. In early 1985, a White Paper on a Bill of Rights for New Zealand, including a draft Bill which was to be entrenched, was published and referred to a select committee.[38]

I was one of a small group which prepared the White Paper. The group included BJ Cameron (Deputy Secretary for Justice and one of New Zealand's great, if scarcely acknowledged, law reformers) and DAR Williams (a talented barrister who had also studied at Harvard). In our early work we gave a central place to the Canadian Charter of Rights and Freedoms, which had been adopted only four years before and which was a major advance on the 1960 Canadian Bill of Rights, which had provided the basis of the failed 1963 measure in New Zealand. The drafting of the New Zealand Bill and the text of the White Paper itself presented several challenging questions to which I will return. In the course of that work, I was in touch with Professor Peter Hogg QC, a notable Victoria graduate and already recognised as Canada's leading academic constitutional lawyer and one with growing litigation experience.[39] During the course of a family visit to Wellington, he

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33 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953).

34 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

35 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

36 See KJ Keith "The Interplay with the Judicial Committee of the Privy Council" in Louis Blom Cooper, Brice Dickson and Gavin Drewry (eds) *The Judicial House of Lords 1876–2009* (Oxford University Press, Oxford, 2009) 315 at 332–336.

37 Geoffrey Palmer *Unbridled Power* (Oxford University Press, Auckland, 1979). Compare the negative position he had taken in 1968 in Keith *Essays on Human Rights*, above n 12.

38 Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985) [*The White Paper*].

39 See PW Hogg *Constitutional Law of Canada* (Carswell, Toronto, 1977). I was also greatly assisted by three Victoria students: Christine Jurgeleit, Janet McLean and Joe Williams.

joined our small group at a meeting on Christmas Eve, 1984, a Monday. The offices of the Department of Justice, sensibly, were closed and the meeting was held around the Keiths' dining table. Geoffrey Palmer arrived at the end of the day and generally endorsed the conclusions we had reached.

A primary issue was the scope of the Bill and, as advisers, we quickly reached the conclusion that it should be largely limited to process writ large and process writ small. "Largely" because prohibitions on the arbitrary taking of life, torture and related outrages, the affirmation of the rights stated in the Treaty of Waitangi (a commitment in the new Government's electoral programme) and a narrowly defined prohibition on discrimination were included in the proposals. It would not, in our view, be for the courts to consider and possibly to strike down legislation of the kind in issue in the United States cases which were uppermost in the minds of those opposing the 1963 proposals. We accordingly happily agreed with Peter Hogg's advice not to include in our proposals the right not to be deprived of liberty, except in accordance with principles of fundamental justice, with its possibilities of substantive review, included in s 7 of the Canadian Charter.[40] The narrow drafting of the provision prohibiting discrimination resulted from several factors.[41] The principal one was the concern that a broad protection of equality before the law could be used to invalidate many legislative measures regulating economic activity. That concern was reflected in the delay in the bringing into effect of the equivalent provision in the Canadian Charter, a delay designed to enable the federal and provincial governments to check through their legislation for possibly offending legislation. The experience of New Zealand lawyers sitting in the Courts of Appeal of Western Samoa and Cook Islands in dealing with such broad guarantees added to the doubts,[42] as did an excellent recent scholarly article whose title gave the message: "The Empty Idea of Equality".[43]

Once the issue of which rights were to be included had been settled, we faced the question: how, if at all, were the limits on those rights to be stated? Three possibilities were considered. The first

40 See for example *Reference re Section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486. See also PW Hogg *Constitutional Law of Canada* (5th ed, Thomson, Scarborough, 2007) at [47.10(a)].

41 The provision did not use the language of "equality" at all but, instead, focused on freedom from discrimination on the basis of a closed list of grounds.

42 *Attorney-General of Western Samoa v Saipa'ia Olomalu* [1982] WSCA 3; and *Clarke v Karika* [1983] CKCA 5.

43 Peter Westen "The Empty Idea of Equality" (1982) 95 Harv LR 537. See also Steven Burton "Comment on 'Empty Ideas': Logical Positivist Analyses of Equality and Rules" (1982) Yale LJ 1136; Peter Westen "On Confusing Ideas: A Reply" 91 Yale LJ 1153; Kent Greenawalt "How Empty Is the Idea of Equality" (1983) 83 Colum LR 1167; and Peter Westen "To Lure the Tarantula from Its Hole: A Response" 83 Colum LR 1186. Even the narrower provision, once enacted, has presented major challenges, notably in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA). The parliamentary responses to the challenge presented in that particular case now include the Civil Union Act 2004 and the Marriage (Definition of Marriage) Amendment Act 2013.

was to stipulate no express limits, leaving the matter to the courts – the United States model ("Congress shall make no law … abridging freedom of speech …").[44] The second was to spell out detailed exceptions to specific articles, reflecting the approach taken to those specific rights and freedoms in the ICCPR. The bills of rights included in many Commonwealth constitutions, and based on the European Convention, provided many models along that line. The third was to provide a single limitation provision on the model of s 1 of the Canadian Charter.[45]

The view of the group was that providing no guidance, along the lines of the United States provisions, would not be acceptable to legal or political opinion. The second proposal had the advantage of facilitating reference to rulings on comparable limitations by the Strasbourg Court and the Privy Council, but much of the apparent precision, compared with the Canadian model, was illusory and the limits differed from one article of the ICCPR to another in a somewhat haphazard way. There had been no toilettage by a drafting committee following the substantive drafting of the ICCPR, which had lasted from 1949 to 1966, and the Canadian courts were already elaborating the ways in which the generally applicable limitation provision was to be applied. Moreover, the Strasbourg and Privy Council jurisprudence on specifically drafted exceptions could still be drawn on when it appeared to be helpful. Accordingly, a provision based on s 1 of the Charter was proposed and, in due course, became s 5 of the 1990 Act.

A third, more confined issue concerned the consequence of breach of a right in the course of criminal investigation and trial. Should the Bill attempt, as did s 24(2) of the Canadian Charter, to state a test? That provision required the courts to exclude evidence obtained in breach of the Charter from a trial if, "having regard to all the circumstances, the admission of it … would bring the administration of justice into disrepute." The early Canadian experience indicated that the generality of that statement provided no real assistance to judges and the matter was left in the first instance in the hands of the judges.[46]

A much broader issue of consequence of breach – that the courts would have power, in effect, to strike down offending legislation – had been decided for the moment by the Labour Party policy. The Bill was to be entrenched and capable of amendment only by a three quarters majority of the House of Representatives or by a referendum. The White Paper recognised that entrenched status could be achieved only were the Bill to have "practical sanctity", that is, only if it were adopted with

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44 Constitution of the United States of America, amend I.

45 Section 1 provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

46 There has been much judicial development of New Zealand law in that area since, now facilitated by s 30 of the Evidence Act 2006.

broad support.[47] In the event, that support did not appear in the process following the publication of the White Paper, with the consequence that the Bill as enacted was accorded a statutory force and no more.

The matter of entrenchment has continued to be raised in New Zealand and beyond. The Human Rights Committee, the monitoring body elected under the ICCPR, has called on New Zealand to entrench the Bill of Rights Act[48] and the Government has responded by recalling the history of the process leading to the Bill and the range of means by which provisions of the ICCPR are implemented: through legislation, policy, executive action and court decisions.[49] The Government's position appears to me to be the more persuasive: in international law terms, the obligations under the Covenant are obligations of result, not of conduct; of ends not of means. New Zealand after all was a party to the Covenant for 12 years before the Bill of Rights Act was even enacted. The assessment made in 1978 was that, with four reservations being made on ratification, just two changes to New Zealand law were needed to give full effect to the Covenant and those changes were made before New Zealand became bound by it.[50] Anthony Lester has recently made a most valuable broader point about the Human Rights Act 1998 (UK) – a point which, with minimal adaptation, is equally applicable to the New Zealand Act. The genius of the legislation is that it is holistic – not

47 *The White Paper*, above n 38, at [7.18]–[7.24]. The issue of "practical sanctity" might usefully be elaborated here. The entrenching provisions in the Electoral Acts of 1956 and 1993 were not themselves entrenched (in part because of the understanding in 1956 that double entrenchment could not be effective). While, in theory, they could, as a matter of law, be repealed (and the protected provisions in the Electoral Act 1993 and the Constitution Act 1986 could then themselves be repealed or amended by ordinary legislation), the requirements have in fact been complied with for the last 55 years. That practice of compliance, along with the underlying principle, strongly supports the opinion expressed in 1986 by the Royal Commission on the Electoral System that the entrenchment has conventional force: *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at 288. The consolidating practice now includes the referendums of 1990, 1992, 1993 and 2011. To the extent that the subject matter of those referendums extended beyond the entrenched provisions, the referendums may be seen as contributing to a broader convention about important constitutional change: see especially the important statement made by the Attorney-General Paul East at (3 August 1993) 537 NZPD 17140 and *The White Paper*, above n 38, at [7.20]. Standing orders now also provide that an entrenched provision should be introduced only by way of the same vote in the House which would be required for the amendment or repeal of the provision being entrenched: Standing Orders of the House of Representatives 2011, SO 263. See generally "Changing the Constitution" in the final part of the introduction to the *Cabinet Manual* (Cabinet Office, *Cabinet Manual 2008* at 5).

48 See for example United Nations Human Rights Committee *Concluding Observations on New Zealand's Fifth Periodic Report* CCPR/C/NZL/CO (2010) at [7].

49 New Zealand Government *Replies to the List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of New Zealand* CCPR/C/NZL/Q/5/Add1 (2010).

50 They concerned, first, procedural protections and independent review before residents were deported for serious criminal offending and, secondly, a ban on retrospective criminal liability and penalties.

exclusively court-based but applying to all three branches of government.[51] Twenty-five years earlier, in the introduction to the White Paper, Geoffrey Palmer, speaking of the proposed (entrenched) Bill, similarly expressed the opinion that courts would only infrequently declare provisions of Acts of Parliament contrary to the Bill of Rights. The Bill, he declared, is a most important set of messages to the machinery of government itself. It provides "a set of navigation lights for the whole process of government to observe."[52]

Others have given extensive accounts of the parliamentary select committee and surrounding debates on the White Paper.[53] I record the conclusion of the select committee, which was divided on whether any Bill should proceed.[54] The majority, reflecting the heavy weight of the submissions, rejected the proposal for entrenchment, recommended the exclusion of the provisions relating to the Treaty of Waitangi, and proposed the inclusion of certain economic and social rights.[55] Geoffrey Palmer persisted with his caucus and Cabinet and, near the end of the Parliament and of his Prime Ministership, the Bill, no longer entrenched and with the Treaty provision deleted, was passed by a divided House of Representatives.[56] It faced an uncertain future, given the opposition to it of the party which was soon to form the Government.

Other papers in this issue address the Bill of Rights Act's role over the last 21 years. As indicated at the outset, I comment on recent proposals for change by reference to the earlier process and make some concluding comments.

Proposals that property rights, the right to privacy, and economic and social rights be incorporated would involve a departure from the process/product distinction which I see as

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51 Lord Lester of Herne Hill "Human rights rulings: a restrictive and insular view of the judicial function; Judges should not be criticised for trying to interpret United Kingdom laws in line with the European Convention on Human Rights" *The Times* (online ed, London, 22 December 2011).

52 *The White Paper*, above n 38, at 6.

53 For a valuable account of the process see Paul Rishworth "The Birth and Rebirth of the Bill of Rights" in Paul Rishworth and Grant Huscroft (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 1 at 1; and for the principal insider's view see Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) at ch 3; see also KJ Keith "Concerning Change: The Adoption and Implementation of the New Zealand Bill of Rights Act 1990" (2000) 31 VUWLR 721 at 722–726.

54 *Final report of the Justice and Law Reform Committee on a White Paper on A Bill of Rights for New Zealand* (1988).

55 Specifically, the rights to an adequate standard of living, to work, to education, to property and to participate in cultural life.

56 The Bill as introduced included the Attorney-General reporting provision (now s 7), reinforcing the "navigation lights" role of the Bill. In the course of the Bill's progress through the House, s 4 was added, with its purpose of emphasising Parliament's full law-making powers. More attention should have been given to the consequences of the non-entrenched status of the Bill in the drafting of ss 5 and 6.

fundamental. That distinction is not, however, seen as decisive by some.[57] Indeed, as noted already, the Bill of Rights Act in its present form does not adhere to it completely. But a departure from the distinction may at least be seen as raising a warning flag.

I consider the three reform proposals in turn. What is property? And once it is identified, is it not a creature of the state and its law? Consider the very nature of title to land under the common law – the various tenures from the Crown – and under the land transfer system. Consider next the regulation of the use of land under planning legislation: restraint may be placed on the use or the restraint may be relaxed. Is the owner always to be entitled to compensation in the former case – and in the latter to pay the state for the windfall? Can those matters sensibly be resolved by courts applying a generally stated standard?

Next, what legal rights and interests beyond land are to be considered property? To take just one of many different situations, consider the rights of an investor in a mining enterprise, with concessions and licences granted by the state. Would a protection of "property" in a bill of rights stand in the way of changes in the tax law affecting mining, or changes in health and safety laws, or changes in the length of the concession, or changes in the royalty rate or changes to protect the environment? From at least the 1960s, when attention in New Zealand began to focus on constitutional protection of rights, such questions have been prompted, for instance, by the cancellation of the Nelson Cotton Mill Agreement,[58] by a United States Supreme Court decision that welfare benefits were property for the purpose of the Fourteenth Amendment,[59] by the preparation of the International Convention on the Settlement of Investment Disputes[60] and by scholarship on "The New Property".[61]

So far as privacy is concerned, I have already emphasised judicially and extra-judicially the many different interests and issues which fall under that broad heading and the manifold ways in

57 Laurence H Tribe contends that the theory is radically indeterminate and fundamentally incomplete; that it must be supplemented, he says, by a full theory of substantive rights and elements: "The Puzzling Persistence of Process Based Constitutional Theories" (1980) 89 Yale LJ 1063. Tribe's senior colleague at Harvard, Archibald Cox, provides a much more positive assessment in "Book Review" (1981) 94 Harv LR 700. For a brief discussion in the New Zealand context, see Grant Huscroft "Rights, Bills of Rights, and the Role of Courts and Legislatures" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives for Domestic and International Law* (Hart Publishing, Oxford, 2002) 3 at 6–8.

58 See for example Glenese J Adams "The Nelson Cotton Mill Agreement – a lesson from 1960 for 1978" (1978) 9 VUWLR 465.

59 *Goldberg v Kelly* 397 US 254 (1970).

60 International Convention on the Settlement of Investment Disputes 575 UNTS 159 (opened for signature 18 March 1965, entered into force 14 October 1966).

61 Charles A Reich "The New Property" (1964) 73 Yale LJ 733 as cited in Fred R Shapiro "The Most Cited Articles in *The Yale Law Journal*" (1991) 100 Yale LJ 1449 and with the distinction of being the most cited article in the Yale Law Journal as at 1991!

which the law deals with those matters.[62] The difficulty, I would say impossibility, of capturing all those matters in a useful and workable way in a general formula has been emphasised more recently by the extensive and valuable work of the Law Commission.[63] The lack of value of a general legislative protection has also been clearly demonstrated by experience over the last 100 years in the United States.[64]

The proposal to include economic, social and cultural rights is sometimes associated with the contention that New Zealand has failed to incorporate into its law the rights stated in the International Covenant on Economic, Social and Cultural Rights by which it became bound in 1978. That contention fails, in the first place, to take account of the standard New Zealand practice of not undertaking international obligations unless and until law and policy is in force giving effect to those obligations. To take just some of the rights in that Covenant, the right to primary education (along with the obligation to undertake it) had been written into New Zealand law 101 years earlier,[65] the right to old age pensions in 1898,[66] the right to social security entitlements in 1938[67] and the right to health care soon after.[68] A further critical element is that the obligations in that Covenant have a programmatic form. States parties undertake to take steps to the maximum of their available resources with a view to achieving progressively the full realisation of the rights recognised in the Covenant. It is true that from the 1930s, some of those rights began appearing in constitutions, for instance in Ireland and India, but as directive principles of state policy, not enforceable through court process. It is also the case that the South African constitution does take the further large step of making such rights justiciable. Quite apart from the basic arguments made earlier in this paper about the constitutional role of the judges, on the one side, and the elected and responsible Parliament and executive, on the other, I wonder whether in the circumstances of the often cited South African cases relating to HIV drugs and housing,[69] a New Zealand court would not have come to much the same conclusions and made much the same orders (requiring the

62 *Hosking v Runting* [2005] 1 NZLR 1; and KJ Keith "Privacy and Constitutions" in Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, Cambridge, 2006) 229.

63 For the final stage of the review, see Law Commission *Review of the Privacy Act 1993* (NZLC R123, 2011).

64 See for example Diane Zimmerman "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell LR 291.

65 Education Act 1877.

66 Old Age Pensions Act 1898.

67 Social Security Act 1938.

68 Social Security Amendment Act 1941.

69 *Government of Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46; and *Minister of Health v Treatment Action Campaign (No 1)* [2002] ZACC 16, 2002 (5) SA 703.

government to develop and implement plans and programmes to deal with the problems presented in the two cases) on orthodox judicial review grounds.

CONCLUDING COMMENTS

I do not mean by the views I have just expressed about the place of economic, social and cultural rights in the Bill of Rights Act to suggest that they are of less importance than civil and political rights. On the contrary, they are essential to human dignity and wellbeing. The two sets of rights are interdependent. I am concerned in this paper with limited aspects of how rights are to be provided, in particular, through courts under a bill of rights. The essential character of economic, social and cultural rights has long been recognised in New Zealand law and policy, as appears from the few legislative illustrations I have just given and the 25 per cent of gross domestic product which the government applies each year to health, education and social welfare.[70] That character was also clearly emphasised in the New Zealand speech on the adoption of the *Universal Declaration of Human Rights* in 1948, a speech which built clearly on New Zealand's own experience but also, for instance, on Anatole France's saying about the majestic equality of the law (which forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread), on the object stated in the Atlantic Charter of 1941 of "securing, for all, improved labour standards, economic advancement and social security"[71] and on United States President Franklin Roosevelt's four freedoms – freedom of speech, freedom of religion, freedom from fear and freedom from want.[72] Colin Aikman said this:[73]

> My delegation … attaches equal importance to all the articles … At the same time we regard with particular satisfaction the place which is given in the declaration to social and economic rights. Experience in New Zealand has taught us that the assertion of the right of personal freedom is incomplete unless it is related to the social and economic rights of the common man. There can be no difference of opinion as to the tyranny of privation and want. There is no dictator more terrible than hunger. And we have found in New Zealand only with social security in its widest sense can the individual reach his full stature. Therefore it can be understood why we emphasize the right to work, the

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70 At a seminar at the Victoria University of Wellington Faculty of Law on 26 August 2010, just two days before the twentieth anniversary of the enactment of the Bill of Rights Act, where I shared the platform with Rayhan Langdana, a 17 year old, I recalled the importance when I was his age, to my family and me, of good (in fact excellent) schooling, health care, housing and pensions.

71 Atlantic Charter 204 LNTS 381, United States–United Kingdom (signed and entered into force 14 August 1941). Gerald Hensley says that that phrase was probably added at the urging of Peter Fraser, who was in London at the time the text was being drafted by Franklin Roosevelt and Winston Churchill on USS Augusta, which was off Newfoundland: Gerald Hensley *Beyond the Battlefield: New Zealand and its Allies 1939–1945* (Viking, Auckland, 2009) at 143–144.

72 Franklin D Roosevelt "State of the Union (Four Freedoms) Address" (Washington DC, 6 January 1941).

73 Quoted in Aikman, above n 13, at 5.

right to a standard of living adequate for health and well-being, and the right to security in the event of unemployment, sickness, widowhood and old age. Also the fact that the common man is a social being requires that he should have the right to education, the right to rest and leisure, and the right to freely participate in the cultural life of the community.

These social and economic rights can give the individual the normal conditions of life which make for the larger freedom. And in New Zealand we accept that it is the function of government to promote their realization.

A second related comment, made earlier in this paper, is to recall the danger of focussing on court-enforced bills of rights as the sole or even principal means of protecting human rights and fundamental freedoms and more generally promoting human dignity.

Third is the importance, when legislative change is in prospect, of maintaining and developing the relevant processes and principles. This larger topic is addressed in some detail by other papers in this issue but I may make two points about it, the first more general and the second specific. Twenty-five years ago the Legislation Advisory Committee, reflecting the experience of a number of its members in preparing and commenting on legislation (and bearing in mind the legislative directive to the Law Commission that the law be made as understandable and accessible as practicable, and its expression and content be simplified as far as practicable), prepared the LAC Guidelines.[74] The passages in the Guidelines on consistency with basic principles extended far beyond the matters later included in the Bill of Rights Act. It was quickly endorsed by ministers, and the Cabinet Manual continues to require compliance with it in the preparation of legislation (beginning in many cases with the question whether a proposed Bill is even necessary). If they were to be effective, the guidelines had to be just that – a guide, not an encyclopaedia or a textbook with many footnotes. They had to be accessible to senior officials. They were certainly not written for lawyers alone. The slender volume had a simple format with a two page list of issues to be addressed by those responsible for developing legislative proposals. Has the document not now become far too lengthy and complex? Is there any good reason for extensive, or indeed any, footnoting? I leave the questions for those who are now much more closely involved than I. A related question is whether there is a case for adding to the Bill of Rights Act and the Fiscal Responsibility Act 1994 comparable provisions dealing with social responsibility. Or is it better to depend on robust executive and parliamentary processes?

The more specific point concerns the vetting processes under the Bill of Rights Act, within the executive when legislation is being prepared, by Attorneys-General and their advisers in terms of s 7 of the Act, and within the legislative process. There is evidence that these processes are not always as rigorous as they might be. Do ministers always take the process as seriously as they might? The

74 Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (Department of Justice, 1987).

same question is to be asked of those making submissions. Should the legislative process be strengthened by the establishment of a parliamentary select committee on human rights, as proposed by Lord Steyn in the first Robin Cooke lecture,[75] as well as by Lord Lester?[76] Should not greater control also be exercised over the granting of urgency?[77]

To conclude, I link that emphasis on procedure with the earlier discussion of process writ large and writ small. The history of freedom, it has been wisely said, is largely the history of the observance of procedural safeguards.[78]

75 Lord Steyn *Democracy Through Law* (New Zealand Centre for Public Law, Occasional Paper No 12, Wellington, 2002) at 16.

76 Lord Lester of Herne Hill "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" (2002) 33 VUWLR 1.

77 See Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011).

78 *McNabb v United States* 318 US 332 (1943) at 347 per Frankfurter J for the Court.