The New Zealand Bill of Rights experience: lessons for Australia

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A notable feature of constitutional and law reform in countries I know something about is the value of learning from others. It is flattering to a New Zealander to think that our larger and older sibling might be able to learn from us.

A little comparative history

It certainly is the case that over the past forty or so years New Zealand has learned a great deal from others in constitutional and law reform, in addition of course to the UK, or really England, which for much of our legal history — certainly the first half or more of the twentieth century — was essentially our sole teacher. From about 1960 we have drawn on Scandinavian, Canadian, Australian, German and American sources, for instance in respect of the office of Ombudsman, judicial review, freedom of information, control of delegated legislation, treaty making, electoral systems, indigenous rights, compensation for personal injury and of course Bills of Rights. And the learning, or some of it, has not just been one way: the office of Ombudsman is a major export (even if it does not appear in our balance of payments), the developing treaty making practice (which borrows heavily from Australian practice) influences proposals and thinking in the UK, and our Bill of Rights has had a central part in debates there.[1]

The developing body of international human rights law is also a critical teacher. It is more than that since New Zealand, like Australia, is legally bound by the human rights conventions which it has accepted and indeed by much related customary international law (see Seventh Judicial Colloquium on the Domestic Application of International Human Rights Norms, *Anniversary of the Universal Declaration of Human Rights* (Special Issue 1999 and Palmer 1999). The international element has, I think, played a different part in our histories to which I now turn.

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1 Compare Lester (2000: 99) with Butler (1997: 323).

As many excellent accounts show, the Australian reluctance about rights or the constitutionalising of them was apparent a century ago when the founding fathers who were greatly influenced by the American model in structuring the constitution set their faces firmly against any general equivalent to the US Bill of Rights (see Williams 1999 and Charlesworth 2002). The parliamentary and democratic process was to provide the means by which rights were affirmed, defined, limited and protected. To the extent that New Zealand politicians and lawyers considered the matter, they too would have had Parliament at the centre, as with the major legislative experiments copied across the Australasian colonies in the 1880s to 1890s — consider for instance labour law, women's suffrage and other enhancements of electoral law, family law and the beginnings, in New Zealand at least, of the welfare state (see Reeves 1969). It was through the legislative process, supported by popular will manifested in periodic elections that major rights issues were to be resolved — and adjusted, for matters were not to be set in stone. To come forward a century to the report of a committee of the NSW legislature submitted within the last year and to sharpen the focus, what perhaps was being said is that 'it is ultimately against the public interest for Parliament to hand over primary responsibility for the protection of human rights to an unelected judiciary' (NSW Standing Committee on Law and Justice 2001).

But I have got ahead of my chronology. Let me go back to 1948 when Dr H V Evatt, that towering Australian lawyer politician of the mid-twentieth century, was President of the UN General Assembly. Building on the critical recognition in the Charter of the UN and recent horrific history that human rights protection would not be left solely to national authority, that Assembly adopted the *Universal Declaration of Human Rights*.

That document appears to have had a greater influence in the 1950s and 1960s in professional and official thinking in New Zealand than in Australia. It was, for instance, translated into Maori soon after its adoption (Department of External Affairs 1951); the Western Samoan Constitution, shortly before that country became independent, was amended at the United Nations' urging to include a Bill of Rights. The Declaration provided a reason for some of us in 1963 to oppose a legislative Bill of Rights based on the Canadian Bill of Rights 1960 (Cleveland and Robinson 1972); and it was the subject of a published series of lectures on its twentieth anniversary in 1968 (Keith 1968).[2] By contrast it makes only limited appearances in Enid Campbell and Harry Whitmore's two valuable editions on civil liberties in Australia published in 1966 and 1973 (Campbell 1966), and even as late as 1981 in his preface to Geoffrey

2 Note the positions taken by Mulgan and Palmer (1999: 57).

Flick's book (1981) on the same topic, Justice Michael Kirby makes no reference to the international treaty texts or even to the idea of a Bill of Rights (Flick 1981).[3] For many years now he has been a major promoter and practitioner of the use of international material.

One explanation of the greater New Zealand interest may simply be our size, including the small size of our law schools. Those who taught international law often taught constitutional law as well and the New Zealander who made the principal New Zealand speech in 1948 taught both subjects, was a principal drafter of the Western Samoan Constitution and continues to speak about the linkages (Aikman 1999).

I mentioned 1963 a moment ago. In 1960, the National Party — our conservative party or party of the right — came into office with proposals for a Citizens Protector (adopted as the Ombudsman), controls over regulations (which were introduced although in a limited form) and a Bill of Rights based on the then recent Canadian measure (Marshall Memoir 1983: 288-91). The Bill of Rights proposal was almost unanimously opposed — by the Solicitor-General who told the Parliamentary Committee that the Lord Chief Justice of England was opposed, the Law Societies, academics young (very young) and old and the New Zealand Maori 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 Maori people acknowledged (Cleveland and Robinson 1972).

The more general arguments were that the legislative process was to be trusted, it was democratic, subject to the public will, the judges did not have democratic legitimacy, the US experience was not encouraging, unnecessary uncertainty would be created and, as mentioned earlier, the *Universal Declaration of Human Rights* already existed if an educational and evaluative measure was needed.

But by the 1970s things were changing. The International Covenant on Civil and Political Rights (ICCPR) was complete. New Zealand became bound by it in 1978 and Australia a little later. Lionel Murphy, as Attorney-General in 1973, in that remarkable time — in New Zealand as well — when ideas were really bubbling and coming from all sources, introduced a Bill of Rights which referred to the international text (see Williams 1999 and Charlesworth 2002). By 1976 even I was indicating a change of view (Keith 1978: 26), but more significantly in 1979 Geoffrey Palmer, in the first edition of *Unbridled Power* (Palmer 1979) published on the day he

3 As he has often described, it was because of his participation in 1988 in the first Judicial Colloquium organised by A Lester he saw the real significance of the international material (Kirby 1988: 67-90).

was nominated for a safe seat in Parliament, called for a Bill of Rights. By 1984 Labour governments were in power on both sides of the Tasman and Geoffrey Palmer and Gareth Evans as the responsible Ministers had similar policies. The New Zealand policy led in early 1985 to a White Paper on a Bill of Rights for New Zealand and, after five years of debates similar to the earlier ones, the 1990 Act was passed.[4] But while the debates were similar to the earlier ones, at their best they were not the same. They were not put in such sharp either/or terms — especially not either parliamentarians or judges. They also gave greater emphasis than before to our international obligations — as is reflected in the title to the Act. They recognised that we would be able to learn from Canada which had adopted its Charter of Rights just a few years earlier. That learning was not just professional. It was also personal. Professor P W Hogg, a New Zealander and Canada's great constitutionalist, was able to advise us on several critical matters (Hogg 1977–1997). Although progress was difficult, Geoffrey Palmer, who was Prime Minister for most of the last year of that Government, did get the Bill through the Labour caucus and through Parliament, while in Australia after the proposed Bowen Bill of Rights there was the melancholy business of the 1988 referendum (see Charlesworth 2002) .

A Bill directed at the Executive and legislature, as well as at the courts

I highlight some major features of the Bill which may provide you with some lessons.[5]

The first relates to the not either/or point I made earlier. We should not think of a Bill of Rights as simply requiring a choice between parliament and the courts or elected politicians and non-elected judges. We should see it as being directed at the lawmaking process as a whole and indeed as having a wider public and educational process. On the last, it can be said, I think, that the text is easy to read and to understand, at least in broad terms. It does provide at least a beginning point for public debate, say on anti-terrorism laws. Parliament has provided a marker.

In his introduction to the White Paper, Geoffrey Palmer downplayed the likelihood of legislation being struck down by the courts. He emphasised that the Bill of Rights was a set of navigation lights to the executive and legislature when they prepare legislation (Department of Justice 1985: 6). The related processes give effect to the obligation which members of the Executive and Parliament should recognise to comply with the law and Constitution of New Zealand.

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4 For a valuable account of the process see Rishworth in Rishworth and Huscroft (1995: 1).

5 The bill is now the subject of a comprehensive book: Rishworth, Huscroft, Optician and Mahoney (2003).

It has provided that marker for the Executive in preparing and proposing legislation and for Parliament in processing it. The *Cabinet Manual* (2001: para 5.35) requires Ministers in proposing legislation to certify that it complies (or not) with the Bill of Rights — and indeed with international obligations, the principles of the Treaty of Waitangi and other matters. Section 7 of the Act requires the Attorney-General to inform the House if she considers any provision of the Bill to be inconsistent with the Bill of Rights. The provision could be broader — like the UK one (*Human Rights Act 1998*, s 4 — and require a positive statement when appropriate and it could extend to amendments made to Bills in the course of their progression through Parliament. There is of course nothing to stop statements that the proposed legislation is consistent with the Bill and statements about amendments.

I mention one early example of the process. The Attorney-General thought that proposed breath screening amendments to our traffic law would confer unreasonable powers of search and seizure. Others did not. They brought relevant facts and figures to the attention of the Transport Committee. That Committee preferred their view. That Committee consideration was based on extensive information, beyond that apparently available to the Attorney-General or indeed to the US Supreme Court when shortly before it gave a judgment upholding similar powers (*Michigan Department of State Police v Sitz*).[6] That select committee process could be enhanced by the establishment of a human rights committee. In that respect the work of Lord Lester and his colleagues in the UK Committee provides us with a lesson (see Feldman 2002: 323).

An entrenched Bill or a legislative one?

A Bill of Rights in our tradition is directed, or is also directed, at the courts. What should their role be? Should they have the power:

- to strike down legislation, as of course Australian courts may in distribution of powers cases, or the US courts do, in addition, in Bill of Rights cases;
- to strike down legislation, but subject to the possibility of legislative override — or pre-emption as in Canada in most areas; or
- simply to interpret the law consistently with the Bill if that is possible, as in the UK.

You will see from ss 4 and 6 of the New Zealand Bill that it is also at the bottom of that list. The original 1985 Bill was at the top of the list. The courts were to have the power of strike down. But the submissions were strongly against that. The judges should not have that power. The political, parliamentary process was to have priority

6 See Keith (1994) in response to criticism of Elkind (1993); Rishworth (1993).

(Interim Report of the Justice and Law Reform Committee 1987 and Justice and Law Reform Committee 1988).

Within that third, interpretative approach there are choices to be made. The interpretative direction can be stronger than the New Zealand provision, as the UK one appears to be. I say 'appears' because the words are not the only factors at work. The UK Act also confers a most interesting legislative power on the Executive. If a court finds an incompatibility between the European Convention on Human Rights (to which the *Human Rights Act* gives effect) and the relevant UK legislation, the court can make a declaration of incompatibility (*Human Rights Act 1998*, s 54). If it does, the executive has power, with parliamentary approval, to alter the law to achieve consistency.

The New Zealand and UK models do provide a greater recognition of parliament's role compared with those of Canada and the US. The courts have less power. Parliament has the last word and indeed the first word. Does such a Bill involve a fundamental change in the relationship between representative democracy and the judicial system, as some would say? (NSW Standing Committee on Law and Justice 2001).

Others, including New Zealand critics, and in a sense the Human Rights Committee elected under the ICCPR, would say on the contrary that for the rights to be effectively protected the courts should have the power to strike down legislation (Butler 2002: 47; Ministry of Foreign Affairs and Trade 1995).

It is not for me to say whether I prefer one model to another. Rather I make three points about the choice.

The first is that in this area, as with the rights to be protected, the relevance of the Bill to legislative and executive processes, and the remedies available for breach, a balance is to be struck and not necessarily once and for all, but possibly from time to time; documents like this may evolve.

The second is that I wonder about the Human Rights Committee's position. Under the ICCPR the obligation of each state party is an obligation of result, to protect the right and, if not, to provide an effective remedy. The ICCPR does not itself expressly require an entrenched Bill of Rights or indeed a Bill of Rights at all.[7]

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7 Draft articles 30-41 on State Responsibility adopted by the International Law Commission in 2001 set out the obligations of States responsible for internationally wrongful acts to cease the act and, if required, guarantee non-repetition and provide full reparation for injury caused by the act in the form of restitution, compensation and/or satisfaction.

The third point is that the attitude, skills and judgment of the legal profession and the judges in applying any model is critical. I come back to this matter at the end of this address. Here I might mention two recent cases in our court on legislation which appeared to increase a criminal sentence retrospectively in plain breach of principle (*R v Poumako* and *R v Pora*). Our lives might have been much easier had we had the power to strike that legislation down, but one way or another the legislation was not applied to the disadvantage of the criminals who brought the issue to the Court of Appeal and it has now been repealed (*Sentencing Act 2002*, s 164): you might think that justice has been done without a difficult confrontation occurring across Molesworth Street, the street in Wellington that separates Parliament and the Executive from the court.

Content of the Bill

So far I have hardly mentioned the content of a Bill. What rights should it protect? What should it omit? Here we face directly the issues of paternalism or presumption or arrogance, if you like. What possible justification does the present generation have for imposing on future generations a current view of rights which are to be protected? This is a very large topic. I make three points about it, the first by reference to the New Zealand Bill. It is a point that relates as well to the balance to be struck in a Bill of Rights between the legislature and the judiciary. The point turns on the difference between process and product, between *how* the state exercises its great powers and *what* the state produces as an outcome of the exercise of those powers (Keith 1985). Process rights can be divided into two, following the wording of an American scholar (Ely 1980: 307). The process writ large rights are those in ss 12–18 — democratic and civil rights, the right to participate as we wish in our society and in its political and other processes. When the courts protect these rights, they can be said to be supporting the democratic processes. They are certainly not thwarting it. It might be said for instance that voting rights should not be subject to the temporary whim of a majority in Parliament — and indeed in New Zealand for more than forty years they have not been.[8] Sections 21–27 set out process writ small — the rights that protect us in our own dealings with the state. These rights have the further feature that the judges have had a major hand in their development. For them it is familiar country. The enactment of a Bill of Rights also provides an opportunity to state some of the rights with greater precision: see ss 23(1)(b) and 23(4) for example. Contrary to a common argument, the New Zealand Bill of Rights in those areas produces greater certainty rather than less.

8 The entrenching provision s 189 of *Electoral Act 1956*, carried forward into the *Electoral Act 1993*, s 268.

But some substantive rights or rights which may be affected by the product of State processes are protected by ss 8–11 and ss 19–20. The latter recognise that minorities may have to be protected from majorities. Relevant here are the continuing questions of how best to recognise and protect the rights of Maori, including their rights under the Treaty of Waitangi in our law and Constitution. The original proposal would have affirmed and protected rights under the Treaty. There was widespread Maori opposition and the provisions were dropped (Interim Report of the Justice and Law Reform Committee 1987).

Sections 8–11 include very basic rights (especially ss 8 and 9) which have long been recognised in our law and culture. That introduces my second point about the arrogance argument which is that the rights chosen should be those which are long established and widely accepted. Matters of controversy which are the subject of intense political and community debate should not be resolved on a semi-permanent basis by judges under a Bill of Rights. Consider abortion and euthanasia for instance. We tried in our drafting in New Zealand to keep such matters firmly in the public, political arena.[9]

The word 'semi-permanent' relates to my third point. No human construction, especially not laws on paper, is immutable. Even entrenched Bills of Rights contain amendment procedures which may not always be used to protect or strengthen rights as the unhappy histories at different times of South Africa and Zimbabwe show (see Seventh Judicial Colloquium on the Domestic Application of International Human Rights Norms and *Harris and Others v (Donges) Minister of the Interior and Another*). And judicial understandings change as well.

Remedies in the event of breaches

I have spoken so far of a Bill's impact on the preparation of legislation, of its legislative or constitutional status, and of its content. I turn now to the relatively technical but critical question of remedies. It is all very well to have words on paper, but what happens if they are breached?

There are the remedies which courts routinely provide: damages, for instance, for wrongful or arbitrary arrest and injunctions to protect rights of fair trial. The expectation that the generally available remedies would provide the primary response to breach has been borne out in practice.

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9 Frank Brennan has made a similar argument in his recent valuable contributions to the Australian debate. See (Brennan 1996: 152–3). For a criticism of the New Zealand attempt see Huscroft in Huscroft and Rishworth (2002: 3).

The fact that the right breached is affirmed in the Bill of Rights may of course enhance the prospect of a remedy being applied. That is to be seen in the staying of long delayed trials in breach of s 25(b) — a decision which had a salutary effect on the earlier scheduling and trying of cases (*Martin v Tauranga* District Court). It is also to be seen in the difficult law relating to the exclusion of evidence obtained in breach of the Bill of Rights, for instance through unreasonable search and seizure or a failure to accord suspects their rights and to inform them of those rights (*R v Shaheed* 2002).

Some criticism has been directed at the Court for suggesting that it might indicate that there is an inconsistency between a statute and the Bill of Rights — something that it has not yet done in fact (*Moonen v Film and Literature Board of Review* 2000 and 2002) — and for holding that it could award compensation for breaches of provisions particularly when tortious damages might not be available (*Simpson v Attorney-General (Baigent)*).[10] The criticism is based in part on the removal from the original proposal of a remedies provision and a statement by Geoffrey Palmer as the Minister responsible for the Bill that the courts would not have new remedies.[11] It is part of a broader criticism that the Court of Appeal has engaged in a series of judicial upgradings of the Bill of Rights from one of the most enervated Bills imaginable and that we have shown remarkable audacity in inflating the status and policy of the Bill. That argument is made by James Allan in a recent article in the *Deakin Law Review* titled 'Take heed Australia : A statutory bill of rights and its inflationary effect' (2001: 322).

Attitudes and skills

It would not be proper for me to comment on Professor Allan's article but this view leads me directly into my final topic — public, political and professional attitudes and skills. Another way to introduce the topic is to recall Alexander Pope's famous couplet:

> O'er forms of government let fools contest

10 The Law Commission recommended that no change be made to the law stated in *Baigent*, noting that overseas experience suggested that the remedy would be appropriate in certain situations where tort damages were not available and that the increase in payments by the State for breaches would be modest (New Zealand Law Commission 1997). Subsequent experience appears to support that prediction, see (Butler 2002: 134).

11 While parliamentary statements, especially by the responsible Minister, may be relevant to the interpretation of legislation they are not necessarily decisive as a major High Court of Australia judgment demonstrates: *Re Bolton; Ex parte Beane* (1987).

What'er is best administered is best

By the late 1980s professional attitudes, knowledge and understanding of the issues, in New Zealand, had moved from what they were in the 1960s. The solid opposition to the 1963 measure had in part at least melted away. Several reasons can be given for that — what many saw as the excesses of government in New Zealand in the late 1970s and into the 1980s, a better understanding of what a Bill of Rights might properly do, graduate study in the US, the growing Canadian experience, the increasing appreciation of the role of international obligations and standards and the Bangalore and later colloquia organised by Anthony Lester. Much the same changes can be seen elsewhere. James Allan, for instance, claims that no Bill of Rights is likely to stay weak and enervated for long (Allan 2001: 322). But yet John Diefenbaker's Bill did. The Canadian winds in the 1960s were too chill for it to take root. But by the 1980s things had changed there and we have seen much the same occurring more recently in the UK.

It is not enough to study the lessons provided by others. The lessons also have to be accepted, in full or part, and to be understood to be right for your own society.

To conclude, what would I say about the value of the Bill of Rights for New Zealand? For what they are worth, I give you these summary conclusions:

1. the legislative process has been improved — but more remains to be done;
2. the judicial task has been enhanced with certain values which the courts used to draw on in any event now having greater legitimacy as a result of Parliament affirming them (Keith 2001: 77) and with greater certainty being introduced in some areas, especially of police powers; and
3. public debate has to some extent been helped — although like many in this country I do worry about the state of civics education.

Overall, important rights, particularly of citizens in their dealings with the police, courts and public authorities[12] and of freedom of speech, have been given greater protection both through Parliament and through the Courts.[13] I repeat that this is not

12 See notably *Taito v R* and related legislative amendments to criminal appeal procedures.

13 In 'Concerning change : The adoption and implementation of the New Zealand Bill of Rights Act 1990' (2000: 721), I tested Schwartz's (1998) 'tragic death' Thesis against recent judgments. My article cites six judgments given in the year before the article was completed in which the Bill was significant and nine Court of Appeal judgments which followed that article that suggested the obituary came too soon. To these can be added *Drew v Attorney-General* (2002) (right to natural justice supported the proposition that legal representation cannot be totally denied; conviction quashed and regulation declared ultra vires), *Living Word Distributors Ltd v Human Rights Action Group Inc* (balancing of public's right to

an either/or matter. A major defamation case which had an Australian parallel, brought by David Lange, a former New Zealand Prime Minister, illustrates the point. The New Zealand judgments emphasise the protection of speech in the Bill of Rights, international and comparative material and related New Zealand legislation which emphasises freedom of political debate (*Lange v Atkinson* 1998, 2000). The enterprise of protecting rights should generally be seen as a cooperative rather than a divisive one. ●

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