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 United Kingdom, or really England, which for much of our legal history – certainly the first half or more of the 20th 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 United Kingdom, and our Bill of Rights has had a central part in debates there.[1]

[1] Compare Anthony Lester "Human Rights and the British Constitution" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (OUP, Oxford 2000) 4th ed 89 at 99 with Andrew Butler "The Bill of Rights debate : why the New Zealand Bill of Rights Act 1990 is a bad model for Britain" (1997) 17 *Oxford Jnl of Legal Studies* 323.

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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.[2] The international element has, I think, played a different part in our histories to which I now turn.

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 United States Bill of Rights.[3] 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.[4] 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 this legislature submitted within the last year and to sharpen the focus, what perhaps

[2] Eg Seventh Judicial Colloquium on the Domestic Application of International Human Rights Norms, Georgetown 3-5 September 1996 *Developing Human Rights Jurisprudence Volume 7* (1998), Anniversary of the Universal Declaration of Human Rights: special issue (1999) 29(1) VUWLR and Geoffrey Palmer, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 VUWLR 57. A majority in the United States Supreme Court has very recently used international practice and opinion in support of a ruling limiting the use of the death penalty; *Atkins v Virginia* (00-8452) (20 June 2002).

[3] Eg George Williams *Human Rights Under the Australian Constitution* (OUP, Melbourne 1999). And Hilary Charlesworth *Writing in Rights Australia and the Protection of Human Rights* (UNSW Press, Sydney 2002).

[4] Eg William Pember Reeves *State experiments in Australia and New Zealand* (Allen & Unwin, London 1902; E P Dutton, New York 1925; Macmillan of Australia, Melbourne 1969).

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".[5]

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 20th century, was President of the United Nations General Assembly. Building on the critical recognition in the charter of the United Nations 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;[6] the Western Samoan Constitution, shortly before that country became independent, was amended at the United Nations' urging to include a Bill of Rights.[7] 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;[8] and it was the subject of a published series of lectures on its 20th anniversary in 1968.[9] By contrast it makes only limited appearances in Enid Campbell and Harry Whitmore's two valuable editions on civil liberties in Australia published in

[5] New South Wales Standing Committee on Law and Justice *A NSW Bill of Rights* (Parliamentary Paper No 893; Report 17, Sydney 2001).

[6] *Universal Declaration of Human Rights : Ko te Whakapuakitanga o nga Mana Whakatika i te Noho a te Tangata i te Ao* Publication No 87, Dept of External Affairs, Wellington 1951.

[7] The Constitution of the Independent State of Western Samoa, Part II Fundamental Rights.

[8] 1965 AJHR I14 reprinted in L Cleveland and A D Robinson (eds) *Readings in New Zealand Government* (Reed Education, Wellington 1972).

[9] K J Keith (ed) *Essays on Human Rights* (Sweet and Maxwell, Wellington 1968). But note the positions taken in that series by Richard Mulgan and Geoffrey Palmer.

1966 and 1973[10] and even as late as 1981 in his preface to Geoffrey Flick's book[11] 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.[12] 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.[13]

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.[14] 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

[10] *Freedom in Australia* (Sydney University Press, Sydney 1st ed 1966, entirely rewritten and reset edition 1973).

[11] *Civil Liberties in Australia* (The Law Book Company Ltd, Sydney 1981).

[12] 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. Justice M D Kirby "The Role of the Judge in Advancing Human Rights by Reference to Human Rights Norms" in Judicial Colloquium in Bangalore 24-26 February 1988 *Developing Human Rights Jurisprudence : The Domestic Application of International Human Rights Norms* pp 67-90.

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

[14] *John Marshall Memoirs Volume One : 1912-1960* (Collins, Auckland 1983) pp 288-91.

relationship between the Government and the Maori people acknowledged.[15]

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 United States 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 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.[16] By 1976 even I was indicating a change of view[17] but more significantly in 1979 Geoffrey Palmer, in the first edition of *Unbridled Power*[18] published on the day he 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.[19] It is appended to this paper. 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

[15].1965 AJHR I14 reprinted in L Cleveland and A D Robinson (eds) *Readings in New Zealand Government* (Reed Education, Wellington 1972).

[16] Eg Williams and Charlesworth op cit.

[17] K J Keith "A Lawyer Looks at Parliament" in Sir John Marshall (ed) *The Reform of Parliament : Papers presented in Memory of Dr Alan Robinson* (New Zealand Institute of Public Administration, Wellington 1978) p 26.

[18] Geoffrey Palmer *Unbridled Power* (1st ed OUP, Auckland 1979).

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.[20] 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.[21]

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.

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

[19] 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 *Rights and Freedoms* (Brookers, Wellington 1995) p 1.

[20] See eg Peter Hogg *Constitutional Law of Canada* (4 editions between 1977 and 1997).

[21] See Charlesworth op cit.

a set of navigation lights to the executive and legislature when they prepare legislation.[22] 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.

It has provided that marker for the executive in preparing and proposing legislation and for Parliament in processing it. The *Cabinet Manual* 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.[23] 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 United Kingdom one[24] – 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 United States Supreme Court when

[22] *A Bill of Rights for New Zealand : a white paper* (Department of Justice, Wellington 1985) p 6.

[23] *Cabinet Manual* para 5.35. *Legislation Advisory Committee Guidelines* : *guidelines on process and content of legislation* (issued 1987, revised 1991 and 2001).

[24] *Human Rights Act 1998* (UK) s4.

shortly before it gave a judgment upholding similar powers.[25] 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 United Kingdom Committee provides us with a lesson.[26]

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 preemption as in Canada in most areas, or
- simply to interpret the law consistently with the Bill if that is possible, as in the United Kingdom

You will see from ss4 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

[25] *Michigan Department of State Police v Sitz* 110L ed 2d 412 (1990). K J Keith "Road Crashes and the Bill of Rights" [1994] NZ Recent LR 115 in response to criticism of J B Elkind "Random breath testing, the Bill of Rights, and the International Covenant" [1993] *NZ Recent Law Review* 335. See also Paul Rishworth "Random Breath Testing: A brief response" [1993] NZ Recent LR 341.

[26] Eg David Feldman "Parliamentary Scrutiny of Legislation and Human Rights" [2002] *Public Law* 323.

should not have that power. The political, parliamentary process was to have priority.[27]

Within that third, interpretative approach there are choices to be made. The interpretative direction can be stronger than the New Zealand provision, as the United Kingdom one appears to be. I say "appears" because the words are not the only factors at work. The United Kingdom 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 United Kingdom legislation, the Court can make a declaration of incompatibility.[28] If it does, the executive has power, with parliamentary approval, to alter the law to achieve consistency.

The New Zealand and United Kingdom models do provide a greater recognition of parliament's role compared with those of Canada and the United States. 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?[29]

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.[30]

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[27] Interim Report of the Justice and Law Reform Committee *Inquiry into the White Paper : A Bill of Rights for New Zealand* (1987) AJHR I.8A and Justice and Law Reform Committee *Final report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1988) AJHR I.8C.

[28] *Human Rights Act 1998* (UK) s4.

[29] *A NSW Bill of Rights* op cit.

[30] A Butler "Judicial Review, Human Rights and Democracy" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights : Perspectives from Domestic and International Law* (Hart Publishing, Oxford 2002) p 47; *Human Rights in New Zealand : New Zealand's third report to the United Nations Human Rights Committee on implementation of the International Covenant on Civil and Political Rights* (Ministry of Foreign Affairs and Trade, Wellington 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.[31] The ICCPR does not itself expressly require an entrenched Bill of Rights or indeed a Bill of Rights at all. [32]

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.[33] 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[34] : 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

[31] Article 2.

[32] 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.

[33] *R v Poumako* [2000] 2 NZLR 695 (CA) and *R v Pora* [2001] 2 NZLR 37 (CA) on the *Crimes (Home Invasion) Amendment Act 1999*.

[34] *Sentencing Act 2002* s164.

Executive from the Court.

The 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.[35] Process rights can be divided into two, following the wording of an American scholar.[36] The process writ large rights are those in ss12-18 – 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.[37] 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

[35] See *A Bill of Rights for New Zealand : a white paper* op cit and eg K J Keith "A Bill of Rights for New Zealand? Judicial Review versus Democracy" (1985) 11 NZULR p 307.

[36] John Hart Ely *Democracy and Distrust : A Theory of Judicial Review* (Harvard University Press, Cambridge 1980).

[37] The entrenching provision s189 of *Electoral Act 1956*, carried forward into the *Electoral Act 1993* s268.

opportunity to state some of the rights with greater precision : see ss23(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.

But some substantive rights or rights which may be affected by the product of state processes are protected by ss8-11 and ss19-20. 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.[38]

Sections 8-11 include very basic rights (especially ss8 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.[39]

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

[38] See Interim Report, op cit.

[39] Frank Brennan has made a similar argument in his recent valuable contributions to the Australian debate; see eg "Thirty years on, do we need a Bill of Rights?" (1996) 18 Adel LR 123, at 152-153. For a criticism of the New Zealand attempt as naïve see Grant Huscroft "Rights, Bills of Rights and the Role of the Courts and Legislatures" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights : Perspectives from Domestic and International Last* (Hart Publishing, Oxford 2002) p 3.

the unhappy histories at different times of South Africa and Zimbabwe show.[40] 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.

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 s25(b) – a decision which had a salutary effect on the earlier scheduling and trying of cases.[41] 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.[42]

Some criticism has been directed at the Court for suggesting that it might indicate that

[40] See eg the Georgetown Colloquium op cit, xiii para 16 and the litigation in South Africa including *Harris and Others v (Donges) Minister of the Interior and Another* (1952) (2) SA 428 (Appellate Division of the Supreme Court).

[41] *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA).

[42] *R v Shaheed* (2002) 19 CRNZ 165.

there is an inconsistency between a statute and the Bill of Rights – something that it has not yet done in fact,[43] – and for holding that it could award compensation for breaches of provisions particularly when tortious damages might not be available.[44] 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.[45] 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".[46]

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
> What'er is best administered is best

[43] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *Moonen v Film and Literature Board of Review* CA238/01 (16 April 2002).

[44] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA). 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 *Crown liability and judicial immunity : a response to Baigent's case and Harvey v Derrick* (NZLC R37, Wellington 1997). Subsequent experience appears to support that prediction; eg Andrew Butler "Compensation for violations of the New Zealand Bill of Rights Act 1990: where are we at?" (2002) 6 *Human Rights Law and Practice* 134.

[45] 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) 162 CLR 514.

[46] (2001) 6 Deakin LR 322.

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 United States, 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.[47] 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 United Kingdom.

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

[47] Ibid.

affirming them[48] and with greater certainty being introduced in some areas, especially of police powers;

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[49] and of freedom of speech, have been given greater protection both through Parliament and through the Courts. [50] I repeat that this is not 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.[51] The enterprise of protecting rights should generally be seen as a cooperative rather than a divisive one.

[48] K J Keith "Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington 2001) p 77.

[49] See notably *Taito v R* [2002] UKPC 15 (2002), 19 CRNZ 224 (PC) and related legislative amendments to criminal appeal procedures.

[50] In "Concerning Change : The Adoption and Implementation of the New Zealand Bill of Rights Act 1990" (2000) 31 VUWLR 721, I tested Schwartz's "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights" [1998] NZ Law Rev 295 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] 1 NZLR 58 (s27 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 (Wellington)* [2000] 3 NZLR 570 (balancing of public's right to receive information under s14 with the state's interest in protecting individuals from harm caused by speech under censorship legislation), *Neilsen v Attorney-General* [2001] 3 NZLR p 433 (damages awarded for unlawful arrest and detention due to irrational exercise of discretion to arrest in breach of arbitrary arrest and detention provision of s22), *Everitt v Attorney-General* [2002] 1 NZLR p 82 (award of damages for strip search in breach of unreasonable search provision of s21), *R v T* (10 December 2001 unreported Court of Appeal CA301/01) (unlawful stop of car inextricably linked to subsequent search in breach of s21; evidence held inadmissible), *R v Griffin* [2001] 3 NZLR 577 (breach of right to adequate facilities to prepare a defence to criminal charges under s24(d) results in quashing of conviction and new trial).

[51] *Lange v Atkinson* [2000] 3 NZLR p 385; *Lange v Atkinson* [1998] 3 NZLR 424.