A BILL OF RIGHTS FOR NEW ZEALAND? JUDICIAL REVIEW VERSUS DEMOCRACY

Professor K.J. Keith
Faculty of Law, Victoria University of Wellington

A BILL OF RIGHTS FOR NEW ZEALAND?
JUDICIAL REVIEW VERSUS DEMOCRACY

K.J. Keith *

Introduction

The title to this paper is in the form of a question. My 1964 answer was No. [1] My 1985 answer is Yes. In response to any allegation of inconsistency, I was tempted to quote Emerson - A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines - but then I remembered another of his quotes - I hate quotations. [2] I was also tempted to recall a public lecture which I gave in 1976 indicating the beginning of a change of mind about the potential role of the judges in our constitutional system. [3] What I shall try to do instead is to set out a central part of my thinking - a part which has changed and developed over the past 20 or so years. That sounds and is much too egocentric. What I shall principally be doing is to draw on relevant North American material and to relate that to the draft Bill and its preparation.

The reasons for the 1964 negative answer were three - the Bill was not needed; if it had any effect (which was doubtful) it would create serious uncertainty; and the Bill would give unfamiliar tasks to the judiciary, tasks traditionally performed by the legislature and the executive. As my subtitle indicates, I want to give most attention to the last of those reasons, the reason which goes to a basic question about the distribution of public power. So far as the other reasons are concerned, I would, among other things, emphasise the great differences between the 1963 Bill and the 1985 draft. Some of those differences relate as well to my principal question - who should do what in our constitutional system - and I will consider them later. One important difference relevant to the second reason - the likely lack of effect of the 1963 measure - concerns

the status, or claimed status, of the two documents. The 1963 proposal was for a regular Act of Parliament which did not purport to control future Parliaments (and may well have had no impact or only very limited on existing law).[4] In that it followed (although not completely) the 1960 Canadian Bill of Rights. That Bill, according to a very experienced Canadian federal judge is not part of Canada's Constitution. It has had an unhappy, ineffective judicial history.[5] It was only a statute. The 1982 Canadian Charter of Rights and Freedoms by contrast is a document with the status of supreme law.[6] It has already in its very short history had a much greater impact than the earlier instrument. The new 1985 New Zealand draft claims the same status.[7] It draws heavily on that Canadian model, although with some important differences to some of which I will refer. I will also touch on two other important differences between the 1963 and 1985 measures which bear on the uncertainty argument: (1) the 1985 draft has a more limited scope in some important respects, and (2) some of its provisions are stated more precisely.

Is judicial review, as proposed in the draft Bill, at odds with democratic values? Is the court being given tasks which should properly belong to politicians who are elected and accountable? These are very big questions. They have been long debated in the United States. They were extensively debated here as well twenty years ago. The debate has resurged from time to time, for example Mr Palmer in 1968, Mr Laking in 1976, Sir Owen Woodhouse in 1979 and 1983, Mr McBride and Dr Hodge in 1979 and Sir Robin Cooke and Professor Quentin-Baxter last year. The debate has also been building in Canada, the United Kingdom and to some extent Australia. There is now also much relevant experience from elsewhere in the Commwealth, and the international human rights standards and processes are much more significant than they were 20 years ago. These developments provide further reasons why our present debate is to be carried on in a very different context from the early 1960s.

It is not my intention to draw on all of those developments. That would be far too large a task. Rather I shall select from the excellent United States material. The debate there has been particularly intense over the last thirty years: recall the school desegregation cases in the early 1950s, the police powers, school prayer and reapportionment cases in the early 1960s, and the abortion cases in 1973. Not only is the debate very intense; even among the academics it can be vitriolic. Thus a leading member of the Critical Legal Studies group entitled his review of a leading textbook by Professor Tribe of Harvard, "Diatribe", and his commentary on another very influential book is "Darkness at the Edge of Town".[8]

The United States Debates

That literature has identified three major functions for the courts, especially the Supreme Court, in reviewing legislation and administrative action by reference to the Bill of Rights.[9] It also has discussed at length the correct approach to these functions; for instance, are there neutral principles for decision, what does due process of law involve, what is the significance of the "original understanding" of the Constitution, should an "interpretive" or "non-interpretive" approach be adopted?

The first of the functions is to protect fundamental freedoms. Certain matters should be put beyond the regular political and legislative process. So, in the words of the First Amendment to the United States Constitution, Congress shall make no law respecting an establishment of a religion or abridging the freedom of speech and the press. In terms of the Civil Rights Amendments slavery is abolished. And the Eighth Amendment prohibits cruel and unusual punishment.

In this area, two basic questions arise. First, what freedoms or rights should be protected, and, second, who should decide whether a right or

freedom is to be protected? Much of the controversy in the United States has been about the second question, that is about important decisions of the court to protect certain rights which are not expressly mentioned in the Constitution. Consider particularly the enormous and divisive debate about the Supreme Court decision relating to abortion.[10] The judicial approaches are sometimes referred to as non-interpretive as opposed to interpretive. That choice of expression recognises of course that the statement in the Bill of Rights may not be complete - at least in its express terms. The court does have the power, on one view, to find somewhere or other new rights which have not been expressly articulated or recognised. Similar disputes arose from the school desegregation cases and those relating to the rights of persons charged with criminal offences. The school cases led to the call for "neutral principles" for decision.

The inclusion of such rights, whether by express amendment to the Constitution or by court decision, does of course put a substantive block in the way of democratic processes. It raises a basic question about just how far one generation should go in imposing those restraints on future generations. The answer to the question is to be found partly in history and comparative analysis, helped greatly now by the international instruments.[11]

A second basic function of the United States Bill of Rights, exercised by the Supreme Court, has been to protect minorities and those not likely to be protected through democratic and political processes. We face here a basic problem of government - the reconciliation of majority decision and minority interests.[12] Again there has been controversy in the United States often for the same reason: there has been no express text from which the court can work. There is for example no general prohibition on discrimination on the ground of race in the United States Constitution.

The only express prohibition relates to voting.[13] The New Zealand draft, by contrast, does contain several express provisions in the areas of safeguarding fundamental rights and of protecting minorities. It has greater specificity. A New Zealand court's task accordingly would not be as substantial as the American courts - while still being very important.

Judicial Review and Government Processes

The third role of the court in enforcing a Bill of Rights is that of protecting processes of government. This approach is associated with the work of John Hart Ely.[14] He has referred to processes of two kinds - first are processes written large and capaciously. Consider for example the rights to freedom of opinion, expression, assembly, association and voting. These are all rights to participate in the democratic and governmental processes. Far from challenging democratic values a court which protects speech, particularly in the political arena, and redistricts gerrymandered electorates is enhancing democracy. It is particularly in this context that I have difficulty with the opposition to a court enforced Bill of Rights expressed by Professor Griffith, of the London School of Economics.[15] He has strong objections to enhancing the role of the courts in the way proposed by a Bill of Rights. For example, he says that one of Professor Dworkin's writings is another attempt to hide in a mist of words the conflict which is characteristic of our society. "Community morality" is nonsense, says Griffith, at the very top of a very high ladder. (It sounds a little as though Professor Griffith is trying to go one up on Jeremy Bentham.)[16] The solution to conflicts, he says, should not lie with the imprecisions of a Bill of Rights and the illiberal instincts of judges. They are matters to be fought out through political processes. In a general sense I agree with that. Politicians do have a role in our political and constitutional system. They have the basic role. We should not be contemplating government by the judges. Of course we are not, but

how does his opinion apply in this area of process? Professor Griffith's principal prescription for England's constitutional maladies is greater openness - referring for example to the very restrictive Official Secrets Act and law of contempt of court in England. He must agree with the view of Justice Brandeis that sunlight is the best disinfectant.[17]

Why are the courts to have no part at all in opening up the processes of government? The fact is of course that they already have had that part. Consider, to introduce the second part of the process - process writ small - their amazing development in the last twenty years of the law of public interest immunity (helped more recently by the legislature through the Official Information Act 1982) and the law of natural justice.[18] Here we see the law going back to principle. It is insisting that those who take decisions affecting individuals give proper notice and follow fair processes prior to decision, and make relevant information available to those who wish to challenge the decisions or actions. In the United States a major contribution of the Supreme Court in this area of government process, related in part to the protection of minorities, has been the development of the rights of those subject to the criminal law. Once again there has been controversy about the development, in part because it was based on very slight material in the constitutional documents. In this area too the New Zealand draft is more specific in setting out the main rights. There would still remain major matters for court decision and judgment. Consider for example the prohibitions and unreasonable searches and seizures and on reversing the onus in criminal cases. But the basic scope of the text is much clearer, and much of the draft more precise.

In draft New Zealand Bill places major emphasis on the processes of government - writ large and small. There is consequently less emphasis on the first area of substantive rights than is to be seen in some

instruments. That is to say substantive rights are left rather more to the political processes, a political process which is protected and enhanced by some of the provisions. That is one reason why economic, social and cultural rights are not prominent in the text. There are other reasons for that including, just to mention one of them, the very great difficulty for the courts in fashioning appropriate remedies to protect some of the rights in question. For instance, does a court which considers that our health services are inadequate take over some of the treasury functions of government?

The text recognises in another way the interaction between democracy and judicial review. Any interpretation given by the courts would be subject to change. It would not be the law of the Medes and Persians although the intention is that the text be durable in a general sense. First of all it could be amended in the way indicated in article 28 and, secondly, as experience in many countries shows, court interpretations of such documents can change over time.[19]

Equal protection of the laws

I want to spend a little time pursuing some of the general ideas that I have touched on by reference to one topic which has been the subject of comment - the equal protection of the laws. There is no guarantee of equal protection or equality before the law in the draft. In that the draft differs from other constitutional documents. Thus the Fourteenth Amendment to the United States Constitution provides that no State is to deny to any person the equal protection of the laws. The 1963 New Zealand Bill, faithfully tracking the Canadian Bill of 1960, spoke of the right of the individual to equality before the law and to the protection of the law. The Canadian Charter provision is fuller, suggesting doubts about the spare 1960 text:

Equality before and under law and equal protection and benefit of law.

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The provision then goes on expressly to save affirmative action programmes.

I wish to raise three questions about provisions such as these, primarily by reference to the relevant American experience:

1. Is the idea of equality a meaningful one in such constitutional provisions?
2. What effect have the provisions been given by the United States courts?
3. Should a Bill of Rights give the courts powers such as those exercised by the United States courts under the equality guarantee?

The first question - a rather more theoretical one than the others - I raise in part because of an outstanding article by Peter Westen in the Harvard Law Review. His thesis appears clearly from his title - The Empty Idea of Equality.[20]

He argues that statements of equality logically entail and necessarily collapse into simpler statements of rights, and that the additional step of

including elements of equality in these statements not only involves unnecessary work but also engenders profound conceptual confusion. This is a brave claim. It provoked vigorous replies and rejoinders. [21]

I do not have the time to take you through the detail of the argument. I want to take two points out of the exchange, but before I do that let me make you think about the substance of his argument by giving you the text of the recently proposed equal rights amendment - never adopted - to the United States Constitution. It would have read as follows:

Equality of rights under the law shall not be denied or abridged on account of sex.

His argument, which persuades me, is that the word "equality" in that provision adds absolutely nothing to the substance of the text. The text without it would just as effectively prohibit discrimination on grounds of sex.[22]

The first point I would make about this exchange of opinion is that the fact that the existence of the idea can be so fully and responsibly questioned more than one hundred years after the equal protection clause became part of the United States Constitution must make us hesitate to include it in a text. The second point about the article and the responses leads me into my next question about equal protection. Just what has it meant in practice? The United States courts have given it three different meanings.

They have used the equal protection clause in the first place to protect certain "preferred" or fundamental freedoms. Restrictions on those freedoms will be subject to "strict scrutiny", a scrutiny which in practice is fatal. What are those freedoms? So far the courts have identified

rights to inter-State travel, equal voting opportunities, and equal litigation opportunities.[23] Westen would of course argue that what is involved in those cases are the various substantive rights - the right to travel within the United States, the right to an equal vote, and the same right as other persons to appeal, or to sue the government. Such freedoms, he would argue, are better directly protected - and the draft Bill so provides in articles 5, 11, 17 and 21.

The United States approach leaves it open to the court to continue to add to the substantive rights which are to be protected under the clause. That Constitution with its amendments is a remarkable document. It has however been put together over a lengthy period in a slightly patchwork way. We, like the Canadians, can take advantage of the very rich American experience and look at the matter somewhat more comprehensively. It is possible for those preparing our Bill of Rights to make the major decisions about the rights which are to be protected. It will of course remain for the courts to determine just how the statements of the particular rights are to be interpreted, developed and applied - a very important role, but narrower than that exercised by the United States courts.

Secondly, the American courts have used the equal protection clause to strike down legislation which uses suspect classifications, especially classification by reference to race. This legislation, like that in the first category, is also subject to "strict scrutiny".[24] Again, for Westen, they are separate substantive rights - for instance the right not to be discriminated against on grounds of race. Once again those rights are directly stated in the New Zealand draft in Article 12 and it would not be for the courts to discover and recognise them and to add new ones - although it would be for them to interpret their scope and application. What for example would be the fate of affirmative action programmes? The draft also contains specific provisions on one critical issue for New Zealand - the Treaty of Waitangi. This is a very important matter, as the

public debates and the White Paper underline.[25]

These two meanings of the equal protection clause in American experience are therefore of value to us in determining what might be included in a draft Bill. The determination can be more specific than the American one, with the role of the courts being consequentially narrower. I do not think however that we get the same positive assistance from the vast, third meaning of the equal protection clause.

The third meaning is that other legislation - all other legislation which classifies - is subject to scrutiny by reference to a test of rationality. This is an easier test to satisfy than that of strict scrutiny. Classifications are valid so long as they are rationally related to furthering a legitimate state interest. This power, linked at times with the power to scrutinise legislation on the ground, set out in the Fifth and Fourteenth Amendments, that the legislation deprives people of their liberty without due process of law, is potentially of enormous scope and actually so at times. Thus the United States courts have held invalid laws fixing maximum working hours for bakers (but not for miners), fixing minimum wages (but not for women), regulating labour relations, regulating prices and wages, and regulating entry into a business.[26] They have done this either by holding that there was no legitimate state interest or that there was no real and substantial relationship between the statute and the purposes of the statute.

This power, I suggest, is much too broad and unconfined. It ranges across the whole area of economic and social regulation. It potentially gives the judges power to second guess the executive and the legislature on the "ends" of policy and the ways in which that policy is being pursued. I stress that I am not saying that the rationality test is one which is beyond the courts' competence. Obviously it is not. The courts are, of all public

bodies, committed to a process of reason. Indeed we shall see that a rationality test is operating - and operating most effectively - in Canadian Charter cases. But, so far, at least, it is operating within a confined context, a context determined by the particular statement in the Charter of substantive rights. It may well be, with the coming into effect of the equal protection provisions of the Canadian Charter in April of this year, that the role of the courts will change. It may well be too that section 7 of the Canadian Bill with its protection of liberty by reference to the principles of fundamental justice, will turn out to have a broader potential than the draftsmen intended. But for the moment the equal protection guarantee has a narrower area for operation than in the United States.

I should recapitulate to this point. I have been talking principally about the relationship about judicial review and democracy. Plainly, judicial review will sometimes stand in the way of democratic decision. In some circumstances that will be seen as justifiable. In other cases it will not be so seen. But my main emphasis is on the proposition that a Bill of Rights can in fact enhance democratic processes and other fair processes of Government. So far as the particular case of the equal protection of the laws is concerned, my view is that such a clause would give too much power to the courts. The matters that come within its broad sweep should either be the subject of more specific provision in a Bill of Rights or they should be completely omitted. Such specific provisions will either protect substantive rights or prohibit discrimination on particular offensive grounds. I should make it clear that I do not deny the great value and significance in a general sense of the idea of equality. It has been and is of critical importance in our history, politics, society and law. That will continue to be so. It does not follow that the courts should have a general free ranging power to enforce the broad idea under a Bill of Rights.

Now some commentators have said that the broad language of the Bill,and particularly of Article 3, will set up tests which are really not essentially different from those of an Equal Protection Clause. Does that provision confer tasks on the courts which should remain with Parliament or the executive? Article 3, modelled on section 1 of the Canadian Charter, recognises that the rights set out in the Bill are not absolute. They are subject to limits. It provides:

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

It is said that there can be little dispute that the tasks which the court will face under that provision are political. I am not sure what the word "political" means there. But I would like to give some consideration to the tasks which will arise under that provision. It is first to be noted that it comes into operation only when a right or freedom set out in one of the later provisions has presumptively been denied or abridged by some official action. That is to say the inquiry is confined by the particular substantive right in dispute. Article 3 would not set the courts off on a general free ranging inquiry over all legislation.

The next point to note about Article 3 is that there must be a "limit prescribed by law". That is an important phrase. It has already had an effect in an Ontario case in which film censorship legislation which did not supply standards to control the decisions of the censor failed.[27]

Because of the vagueness and breadth of the discretion of the board, its powers were not "prescribed by law". This position of the court does not of course deny that there might be censorship law. Rather what the court is saying is that the Parliament has not yet done its job. It has not yet passed a law or at least a law which prescribes limits. The matter is being sent back to the legislature so that it can do its job. That rejection of legislation on the basis that it is not really legislation relates back to another important value in our law, particularly law which deals with freedom of expression. It is that the law should be certain; the expression of opinion should not be "chilled" by vague laws. It relates very much to the first of Dicey's meaning of the rule of law: state authorities should not have wide, arbitrary or discretionary powers of constraint. [28]

This is a convenient point to mention one other related way in which the courts might avoid going to the substance of the issues thrown up by constitutional cases, including the issues presented by provisions such as Article 3. That way is to interpret the legislation which is impugned consistently with the Bill and thereby avoid the constitutional questions. In a recent decision of the Supreme Court of Canada dealing with the right to a fair hearing of persons who were claiming refugee status Madame Justice Wilson in an opinion joined by two of her colleagues stressed the practice of her court and the United States Supreme Court of not deciding constitutional issues where it was necessary to do so. If, as a matter of statutory interpretation, the procedural fairness sought by the appellants is not excluded by the scheme of the Act in question there is, she said, no basis for resort to the Charter of Rights and Freedoms. The issue may be resolved on those other grounds.[29] Article 23 of the draft Bill makes express provision to that effect.

But I cannot of course keep putting off the evil day. In some situations the courts will find that they cannot or should not avoid, for example by reference to ideas of mootness or standing, or the discretionary character of the remedies,[30] as well as the other methods I mentioned, the question whether the derogation from the right in question can be "demonstrably justified in a free and democratic society". There is now a growing number of Canadian cases which bear on that test. Two of them give an early impression of how the courts might go about that task.

The first concerns the presumption of innocence and the provisions in the Canadian Narcotic Control Act which reverse that presumption.[31] The Act provided that if the accused was proved to be in possession of a narcotic it was for him to establish that he was not in possession for the purpose of trafficking. If he failed to do that he would be convicted of the trafficking offence. This reversed the ones and was presumptively a breach of the Charter. But could it be justified in terms of section 1 of the Canadian Charter? The court said no. It laid down a number of important principles. A principal one is that great weight must be given to Parliament's determination of the necessity for a reverse onus clause in relation to some element of a particular offence. Further, Parliament's judgment of the magnitude of the evil and of the difficulty of the prosecution proving the presumed fact would be listened to. The court noted that reverse onus clauses existed in other free and democratic societies and mentioned United Kingdom statutes. But, it said, the reverse onus provision cannot be justified as a reasonable limitation in terms of section 1 in the absence of a rational connection between the proved fact and the presumed fact. If there is no such connection the presumption created is purely arbitrary. The court concluded that the

provision in issue was constitutionally invalid because mere possession of a small quanitty of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. The situation would be different, the court suggests, if the quantities in question were large or if there were other facts which suggested an intention of distribution. [32]

In such cases that kind of test (of "rational connection") can be seen as working precisely, and without reference to broader partisan political considerations. I do not see here "political" judgments in the operation of section 1 of the Canadian Charter. But what about broader areas of economic policy? The second case bears on that.[33] It concerns an inflation restraint statute passed by the Ontario Parliament in 1982. That statute extended the life of collective agreements covering public sector employees. One of its effects was to deprive workers, during the period of extension, of the right to be represented by a union of their choice, the right to bargain collectively, and the right to strike in regard to non-compensatory matters. An Ontario Court unanimously struck down the legislation in so far as it had those effects in the non-compensatory area. The judgments are long and difficult. Let me take three points out of them. The first is to remember that we get to the questions presented by Article 3, or in the Canadian case section 1, only when we have a finding of a breach of the right in question. Did the right to freedom of association in the Canadian Charter include the right to bargain collectively, to be represented by a union of their choice and to strike. The Privy Council had said no.[34] The Ontario judges said yes - at least in the sense of engaging in conduct which is reasonably consonant with the lawful objects of the association. Some of these first stage questions are going to be difficult and taxing ones. We should not assume that all the complexities will arise at the second level of Article 3. Consider the questions raised by the prohibition on unreasonable searches and seizures

or the protection of freedom of religion.

The second question presented by the case is whether the extension of the collective agreements to a wage freeze in the interests of controlling inflation could be justified in terms of section 1 of the Canadian Charter. The judges had no difficulty at all in holding that the extension could be so justified. Inflation, said one of the judges, is peculiarly in the political realm and calls for political action. In the normal course of things, he continued, the decision to bring in measures of a fiscal, monetary or economic nature to correct a perceived problem in the country, will be left to the political judgment of elected representatives. That there is in such cases a valid legislative objective will virtually become a given. The courts will not generally interfere, for then they would be placed in the awkward and unenviable position of having to choose among a number of alternatives or, worse still, not to choose at all. All judges recognised a wide power in the executive and the legislature in this area of ends and means.

There were, however, limits. This brings me to the third point about the case. There was no rational connection that had been presented to the judges or that they could see for including non-compensatory elements in the programme. The infringement of the workers' freedom to choose their union and to bargain on non-monetary issues cannot reasonably be justified, the court concluded, by the purpose of imposing a wage freeze.

Approaches to interpretation

This case is also helpful, as are a number of others, in indicating the various approaches which courts in Canada are adopting to the interpretation and application of the Charter. Early on there was a disposition to quote the by now famous lines of Lord Wilberforce in a Privy Council appeal. Lord Wilberforce called for an interpretation of

Bills of Rights which recognised that they were sui generis calling for principles of interpretation of their own suitable to their character. The Bill "should be given a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms" referred to.[35] The Supreme Court of Canada has elaborated on this. A Constitution, when joined by a Bill or Charter of Rights, has the function of providing a continuing framework for

> the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one."[36]

Just what does this fair, large and liberal approach mean? How should the courts go about their task? The American material is very rich. The Canadian is perhaps more familiar, and now gives some useful indications. Thus, the courts will draw on a wide range of material which they see as relevant to their constitutional and interpretative task. Any inhibition about looking at Hansard has been swept away, particularly in the context of discovering the purpose of legislation. The courts too will expect counsel to undertake relevant historical research. They will look to the wider international context drawing on relevant treaty material and decisions of international tribunals. They will consider relevant legislation from other countries. And they are insisting that the

government, in "demonstrating" that the limits on a protected right are reasonable in a free and democratic society, produce relevant evidence.[37]

The New Zealand context : a brief reference

I have hardly referred so far to the relevant experience of New Zealand judges. I shall now do that very briefly and mainly by assertion. In the past 20 years there has been a major change in the understanding of the role of courts and even more in their practice. Judges, especially in appellate courts, do make law. The question, as Lord Reid has said, is how do they approach that task and how should they.[38] How do they strike the balance between continuity and change, heritage and heresy, precedent, principle and policy? How do they weigh one set of values against another? How do they determine those values? And in what circumstances can they properly consider and resolve such questions? Courts are increasingly answering those questions.[39] And they are doing that particularly in resolving disputes about public power. The great reassertion of principle and the development of the law of judicial control of administrative action almost exactly coincides with the period of constitutional debate that I am considering. The beginning in many ways was Lord Reid's judgment - the one he was proudest of - in Ridge v. Baldwin decided in March 1963.[40] This has to be kept in perspective. To repeat, we are not moving to government by the judges. Again, they do not have unfettered power to determine policy or the merits of matters assigned to the government for decision. In general, they are concerned with ensuring that public bodies follow the correct process and act within the law.

These developments in judicial review are also to be placed in a wider context of political, constitutional and legal change over the last twenty or more years. This wider context includes countries outside New Zealand

as well as New Zealand itself. Consider in New Zealand the National Party Manifesto of 1960 with its call for a citizens' grievance procedure (later the Ombudsman), for a Bill of Rights, and for greater controls over regulations. Then in the 1960s and 1970s we had the great burst of judicial law making, the introduction of the Ombudsman, the attempt at strengthening scrutiny over regulations, the establishment of the Administrative Division of the High Court, the creation of the new remedy for judicial review, the creation of the Human Rights Commission, the extension of the jurisdiction of the Ombudsman, the development of greater activity by Parliamentary Committees in relation to public expenditure as well as legislation, the inquiry into the Security Intelligence Service, a consequence of which was the enactment in 1982 of the Official Information Act. It would take a long time to document and pursue all of them but I think that they recognise a need for a greater range of scrutiny over, and remedial devices in respect of, the exercise of public power. Are we not now at a stage where many of these developments should be put into a firmer and broader constitutional arrangement?

To conclude, I should recapitulate some of the main lines of my argument. I have focused principally on an aspect of the question of who should do what in our constitutional system. That led me to consider the relationship, including the tension, between judicial review and democratic processes and values. It is undoubtedly the case that a Bill of Rights like that proposed will restrain democratic processes in some cases. It should restrain some of the excesses of democracy. It should do that in the interests of important values, including the protection of minorities. It will undertake those tasks by a reasoned, public process. Whether the draft Bill goes too far or not far enough in protecting those important values and vulnerable minorities against majority and government decision is a matter for further debate and decision. What I

would stress again is that judicial enforcement of a Bill of Rights can enhance democratic process and values and strengthen proper governmental process. Moreover, the various tasks are not so distant from those which our judges currently undertake. It is possible in the preparation of a Bill of Rights to aim at a principled and justifiable definition of those tasks which is true to our traditions of democracy and of government under law.

It is too general a proposition to say that judges should not be involved in political issues, and that such issues should be resolved only by political processes. We have to define the issues which are subject to those processes and others with great care. And as well we have to be vitally concerned, as lawyers, with those processes. Remember Justice Felix Frankfurter:

> The history of liberty has largely been the history of the observance of procedural safeguards.[41]

Notes

* I was an adviser to the Minister of Justice in the preparation of A Bill of Rights for New Zealand A White Paper 1985 App. J.H.R. A 6. Except where otherwise indicated, the opinions I express are not to be attributed to anyone else. I can and gladly say however that I am very grateful to the others who were involved in that process, including my research assistants, Christine Jurgeleit and Janet McLean. I also benefited from the discussion of an earlier version of this paper at a meeting of the New Zealand Society for Legal Philosophy.

1. 1965 App. J.H.R. I 14, reprinted in Cleveland and Robinson (eds), Readings in New Zealand Government (1972) 207 (submission with Mr D.L. Mathieson on the 1963 Bill of Rights also reprinted there, 189).

2. Ralph Waldo Emerson, Essays, Self Reliance (1841) and Journals, May 1849 (in context): "I notice that as soon as writers broach this question [of immortality] they begin to quote. I hate quotations. Tell me what you know." He also said: "By necessity, by proclivity and by delight, we all quote", Letters and Social Aims, Quotation and Originality (1883).

3. "A lawyer looks at Parliament" in Marshall (ed.), The Reform of Parliament (1978) 26, 40.

4. The 1963 Bill with a few small changes has been incorporated in the Cook Islands Constitution. The Cook Islands Court of Appeal has expressed the opinion that the relevant provisions had only an interpretive and not a constitutional effect in respect of legislation in force at the time of its incorporation. Clarke v. Karika, judgment of 25 February 1983 (unreported) (appeal to the Privy Council pending). The 1985 draft expressly applies to existing legislation.

5. MacBain v. Canadian Human Rights Commission (1984) 7 Adm. L.R. 233, 246. At the time we wrote that judgment Collier J. no doubt had in mind the fact that the Supreme Court had held inoperative just one provision by reference to the Bill of Rights, The Queen v. Drybones [1970] S.C.R. 282.

   More recently three of the six Supreme Court judges sitting in the case held inoperative provisions of immigration legislation enacted after 1960, Harbhajan Singh v. Minister of Employment and

Immigration, judgments of 4 April 1985. The other three judges used the 1982 Charter to reach the same result. The different approaches result in part from the lack of a general natural justice provision in the 1982 Charter; the 1960 provision has a wider scope. See article 21(1) of the New Zealand draft.

6. Constitution Act 1982, s.52 (1).

7. Draft Bill, article 1.

8. The bibliography in the White Paper, 119-123, refers to all the writing mentioned in this paragraph except for Laking, "A former permanent head looks at Parliament" in Marshall (ed.) op. cit., 59, 62-63; and the Tushnet review of Tribe's book (n.20 below), (1980) 78 Mich. L.R. 694. See also (1984) 18 (No. 1) University of Michigan J1 of L Ref. for an interesting transatlantic symposium (with the article on the Canadian Charter by Paul Weiler providing most interesting background on its drafting).

9. E.g. Chemerinsky, "The Price of Asking the Wrong Question : An Essay on Constitutional Scholarship and Judicial Review" (1984) 62 Tex. L. Rev. 1207, and see as well the selected bibliography in the White Paper 121-122.

10. Roe v. Wade (1973) 410 U.S. 113.

11. The most significant of the treaties are the 1966 International Covenants on Human Rights, especially that on Civil and Political Rights, (set out, along with its Optional Protocol, in the White Paper,134). The Government ratified the Covenants in 1978 having judged that New Zealand law with certain exceptions (which were the subject of reservations) complied with the Covenants. For its report to the United Nations Human Rights Committee on the relevant law see Ministry of Foreign Affairs, Human Rights in New Zealand, Information Bulletin No 6, January 1984.

12. See e.g. the third paragraph of the famous footnote 4 to the opinion of the court in U.S. v. Carolene Products (1938) 304 U.S. 144, 152-153 (suggesting a correspondingly more searching judicial inquiry of legislation affecting "discrete and insular minorities" if prejudice against them tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities).

13. The Fifteenth Amendment (1870) ("race, color, or previous condition

of servitude").

14. Democracy and Distrust: A Theory of Judicial Review (1980).

15. E.g. Politics of the Judiciary (1977), "The Political Constitution" (1979) 42 Mod. L.R.1, and Administrative Law and the Judges (1979). For a fuller comment see (1979) 10 V.U.W.L.R. 188. Two of his former students, Jack Hodder, The Capital Letter, 9 April 1985, Vol 8, No 12 (331), and Judith Reid at the International Commission of Jurists Seminar, 10 May 1985, have referred to the Modern Law Review paper.

16. For Bentham declarations of rights were nonsense upon stilts, quoted in the White Paper, para. 3.8.

17. Professor Paul Freund, one of Justice Brandeis' law clerks, is one source.

18. E.g. Brightwell v. A.C.C. (1985) 5 N.Z.A.R. 65, and Daganayasi v. Minister of Immigration [1980] 2 N.Z.L.R. 130.

19. Canadian Courts have recalled the "living tree" metaphor sown by the Privy Council in Edwards v. Attorney-General of Canada [1930] A.C. 124, 136; see for instance the Supreme Court of Canada in the Southam case, note 36 below.

20. (1982) 95 Harv. L. Rev. 537. See also Tribe, American Constitutional Law (1978) 991; "Equality makes non-circular demands and imposes non-empty restraints only to the degree that we are willing to posit substantive ideals to guide collective choice."

21. Burton, "Comment on 'Empty Ideas': Logical Positivist Analyses of Equality and Rules" (1982) 91 Yale L.J. 1136, Westen, "On Confusing Ideas: A Reply" ibid. 1153, Greenawalt, "How Empty is the Idea of Equality" (1983) 83 Columb. L.R. 1167, and Westen, "To Lure the Tarantula From its Hole: A Response" ibid. 1186.

22. Westen, loc. cit., n. 20 above, 594.

23. E.g. Tribe, op.cit, n.20 above, 1002-1011. Westen's argument is nicely made by Carey v. Brown (1980) 447 U.S. 455 (a case he dismisses). The legislation that was struck down there forbad the picketing of residences or dwellings "except the peaceful picketing of a place of employment involved in a labor dispute". The Court held that the law violated the equal protection clause by impermissibly distinguishing

36. Hunter v. Southam Inc (1984) 11 D.L.R. (4th) 641, 649. Supreme Court of Canada, judgment. The Freund statement is quoted from "The Supreme Court of the United States" (1951) 29 Can. Bar. Rev. 1080, 1086 (reprinted in Freund, The Supreme Court of the United States (1961) 9, 19). Professor Freund went on:

> Instead the justices have been guided by the basic canon of Marshall, calculated to turn the mind away from canons:
>
> > This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. (McCulloch v. Maryland (1819) 4 Wheaton 316, 415.)

37. See e.g. Supreme Court of Canada in Law Society of Upper Canada v. Skapinker (1984) 9 D.L.R. (31) 161, 181-182 and Wilson J. in the Singh case, n.5 above; see also paras 10.30-10.34 of the White Paper and section 42 of the Evidence Act 1908.

38. "The Judge as Law maker" (1972) 12 J.S.P.T.L. 22.

39. See the very interesting contributions of two members of the Court of Appeal, Cooke, "Divergences - England, Australia and New Zealand" [1983] N.Z.L.J. 297, and Richardson, "The Role of Judges as Policy Makers" (1985) 15 V.U.W.L.R. 46.

40. [1964] A.C. 40. For related commentary see the lectures in n.3 above and in (1983) 13 V.U.W.L.R. 239, and the papers in (1978) 9 V.U.W.L.R. 427 and in (1985) 15 V.U.W.L.R. 29.

41. McNabb v. United States (1942) 318 U.S. 322, 347.

between labour picketing and all other peaceful picketing. Ensuring the privacy of the home could not justify a statute that discriminated among pickets based on the subject matter of their expression. But is not Stewart J. (concurring) right when he says that what is actually at stake "is the basic meaning of the constitutional protection of free speech"? Reasonable time, place and manner regulation on the use of streets are allowed; discrimination on the basis of content is not, 447 U.S. at 471-472.

24. E.g. ibid., 1012-1042.

25. See articles 4 and 26 of the draft Bill of Rights and paras 5.1-5.26, 10.36-10.47 and 10.191-10.192 of the White Paper. This vitally important matter is the subject of separate discussion in the seminar.

26. E.g. Tribe, op.cit., 994-1000. The Supreme Court has recently introduced an "intermediate" scrutiny of classifications based on sex, Craig v. Boren (1976) 429 U.S. 190.

27. Re Ontario Film and Video Appreciation Society (1983) 41 Ont. Reps (2d) 583, 592, affirmed (1984) 45 Ont. Reps (2d) 80.

28. Dicey, Introduction to the Study of the Law of the Constitution (10th ed. 1959) 188.

29. Harbhajan Singh v. Minister of Employment and Immigration, Supreme Court of Canada, judgments of 4 April 1985.

30. See e.g. paras 6.27-632 of the White Paper.

31. R v. Oakes (1983) 145 D.L.R. (3d) 123, discussed in paras 10.117-10.119 of the White Paper. The case is before the Supreme Court of Canada.

32. Compare the detail of section 6(6) of the Misuse of Drugs Act 1975.

33. Re Service Employees International Union and Broadway Manor (1983) 44 Ont. Reps (2d) 392.

34. Collymore v. Attorney -General [1970] A.C. 538. See similarly the Federal Court of Appeal of Canada, Public Service Alliance v. The Queen (1984) 11 D.L.R. (4th) 387 (appeal to S.C.C. pending).

35. Minister of Home Affairs v. Fisher [1980] A.C. 319, 329.