Criminal Procedure and the Bill of Rights: A View from the Bench

*by the Hon Mr Justice E W Thomas**

The bitter change
Of fierce extremes, extremes by change more fierce.

– *Paradise Lost*; John Milton (1608-1674)

"A View from the Bench"

Apart from an important qualification, Professor David Paciocco and I have been given the same topic at this Seminar; "Criminal Procedure and the Bill of Rights". The qualification in my case has been expressed by the programme organisers in the form of a simple caveat – "A View from the Bench". So it shall be. I am content to leave the authoritative exposition of the provisions of the Bill of Rights to the good Professor[1] and other outstanding commentators such as Antony Shaw and Andrew Butler,[2] Paul Rishworth,[3] Jerome Elkind[4] and Tim McBride,[5] and present a purely personal view.

Because it is a personal view, what I have to say does not, or does not necessarily, represent the views of other Judges. So often have I sounded this caveat since becoming a Judge; in my article on the so-called right to silence; in my commentary relating to the liability of nominee directors and their appointors; in my paper purportedly outlining a coherent theory of constructive trusts, and in my upcoming monograph on legal reasoning,[6] that I am contemplating automatically adding this personal rider to my judgments!

In this paper I first review the basic purpose of the criminal process and reiterate that it is to secure the conviction of the guilty, although not at the expense of convicting those who are innocent. I then examine the law which was considered effective to secure the

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1 See also, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent Law Review 353; "Remedies for Violation of the New Zealand Bill of Rights Act 1990" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, 1992) 40.

2 "The New Zealand Bill of Rights Comes Alive" [1991] NZLJ 400.

3 "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZ Recent Law Review 337; "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, 1992) 7; "How does the Bill of Rights Work?" (A comment on *Ministry of Transport v Noort*) [1992] NZ Recent Law Review 189.

4 "Interpreting the Bill of Rights" [1991] NZLJ 15; "The Optional Protocol and Covenant on Civil and Political Rights" [1991] NZLJ 409.

5 "Evidence" [1991] NZ Recent Law Review 35, 51-53.

6 "The So-Called Right to Silence" (1991) 14 NZULR (No.4) 299; "He Who Pays the Piper Calls the Tune" (1991) Banking Law and Practice, 20; "A Coherent Theory of Constructive Trusts" (1992) (in the course of publication); and "A Return to Principle in Legal Reasoning and An Acclamation of Judicial Autonomy" (1992) VUWLR (in the course of publication).

fundamental rights of persons involved in the criminal process before the enactment of the Bill of Rights. The overriding precept of fairness which then prevailed is referred to with approval. Similarly lauded is the consequential approach, in which the Courts in their discretion provided a remedy, such as excluding the improperly obtained evidence, where the accused was prejudiced or a fair trial would be significantly impaired. It is suggested that this approach represented a mature regime in which the interests of the accused in obtaining a fair trial and preserving his rights was balanced against the public interest in securing the detection and conviction of the guilty.

The approach based on fairness is contrasted with the more rights-oriented approach which is the inevitable outcome of the enactment of the Bill of Rights. The implications of this approach are examined in relation to the provisions of the Bill of Rights relating to the criminal process, with special attention being given to s 23(1)(b). Such an examination also provides the prelude to the final section of the paper relating to remedies. It is there suggested that the previous approach based on fairness should be carried forward as far as is consistent with the protection and promotion of the fundamental rights affirmed in the Bill of Rights. The desirability of legislative clarification is discussed.

The aim of the criminal process restated

As this paper represents a personal perspective, I feel at liberty to reiterate my basic perception of the criminal process, of which the criminal trial is an integral part. To my mind, the central aim of the criminal process must be to secure the conviction of the guilty. I adhere to the Benthamite notion that its essential function, beginning with the police investigation and concluding with the trial itself, is to obtain an accurate determination of the accused's guilt or innocence. We should freely and unashamedly admit that this is so, but at the same time acknowledge and accept that such a goal cannot be achieved at the expense of convicting those who are innocent.[7] Criminal procedure can be then directed to that end, and those rules which do not serve that purpose can be modified or dispensed with.

I have referred elsewhere to the primary factor which intrudes upon this simple perception. It is the notion that the rules of procedure and evidence in a criminal trial must be dominated by the prescription that no innocent person is able to be convicted. No-one, of course, is prepared to brook that iniquity. Human frailty and the inevitable imperfection of procedures combine to make the conviction of an innocent person an ever-present risk. But the truly innocent can be protected without adopting procedural rules designed to ensure that nine guilty people go free before an innocent person is convicted. An accused can be assured of a fair trial without his "guilt" or "innocence" being determined in terms of rules which, when pressed to their hilt, convert the criminal trial to a game. As Lord Porter has said:

> [A] criminal inquiry should not be treated as a game hidebound by rules of fair play to give the criminal a sporting chance without considering whether it is for the benefit of the community or not.[8]

7 Above, note 6, "The So-Called Right to Silence", pp 302-303.
8 Quoted by Alfred Jeffery, "Right to Silence" (1988) 152 J of P 473.

To those imbued with this sentiment, a number of reforms to the criminal process have commended themselves for consideration. Two, in particular, impressed me as desirable changes which would promote the objective of securing the conviction of the guilty without increasing the risk of convicting the innocent. The first was the modification or abandonment of the so-called right to silence, and the second was the imposition of a duty upon accused persons to disclose in advance to the prosecution the nature of any affirmative defence and any documents and technical or scientific material proposed to be relied upon at the trial. This disclosure was originally recommended by the Criminal Law Reform Committee in 1986.[9]

I remain unshaken in my view that the so-called right to silence has long outlived its usefulness. It is properly to be perceived as a bogus right providing only illusory protection for those subject to an investigation by a law enforcement agency or involved in the courtroom confrontation of the criminal trial. It is recognised that, by its very nature, it helps the guilty and seldom assists the innocent. Small wonder that jurists, academics and commentators who have condemned this "right" comprise a formidable list.[10] I joined with them in concluding that it should be discarded and attention focused on identifying and securing those aspects of procedural fairness which would ensure a fair trial for guilty and innocent alike. Eventually, I anticipated, the moral and social duty to assist the police, which has been acknowledged by the Courts, would inform the law itself, and the right to silence could be displaced with concepts of cooperation, personal accountability and community responsibility.[11]

The case for the second major area of reform, the mandatory disclosure of certain features of the defence case, was cogently argued in the Report of the Criminal Law Reform Committee. Since that time the enactment of official information legislation[12] has resulted in the Crown making extensive pre-trial disclosure. This discovery has been prompted by the Courts.[13] But the advance has not been met by any corresponding development requiring pre-trial disclosure by the defence (other than when the defence of alibi is to be raised) in appropriate cases. If anything, as I suggested in *R v Harvey and Tamaki City Council*,[14] the subject of pre-trial disclosure by the defence requires legislative examination.

But neither of these reforms has eventuated. Instead, in 1990, the Legislature enacted the Bill of Rights Act seeking to protect and promote human rights and fundamental freedoms in New Zealand. Its provisions included an affirmation of the citizen's fundamental rights relating to search and seizure, the rights of persons arrested or detained and then charged, and it set the minimum standards of criminal procedure.[15]

9 "Report on Discovery in Criminal Cases", December 1986.
10 Eg, Professor Glanville Williams, Professor Z Cowen, Professor Rupert Cross, A A S Zuckerman, Criminal Law Revision Committee 11th Report, 1972, American National Commission on Law Observance (Report of 1931).
11 Above, note 7, pp 314-318.
12 Official Information Act 1982; Local Government Official Information and Meetings Act 1987.
13 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *Attorney-General v Hawkins (CA* 179/92, 15 July 1992).
14 (HC Auckland, M 1734/89, 18 October 1990).
15 Sections 21-25.

No-one can cavil with the objective of protecting and promoting the individual's fundamental rights. It is a self-evidently laudable goal. The key question is whether this goal can be achieved within the framework of a criminal process which retains the aim of securing the conviction of the guilty. The answer to that question depends on how these rights are construed and applied by the Courts. All too easily, I fear, the task entrusted to the Courts of protecting and promoting these basic constitutional rights may mean that the primary objective of the criminal process is further remitted.

The problem was inevitable, but apparently unforeseen. Handed a statute purporting to prescribe the citizen's fundamental rights, the Courts could not do other than seek to give effect to those rights. That objective, however, cannot be achieved without the imposition of sanctions for a breach of those rights, and this process gives rise to its own set of procedural and evidential rules. These rules have the inbuilt propensity to be directed towards the vindication of the rights as distinct from the assurance of a fair trial for the accused. Consequently, just as occurred with the so-called right to silence, their enforcement may impede the ascertainment of the actual guilt or innocence of the accused. The difference is that the rules with which we are now concerned have been given constitutional status. Notwithstanding that status, however, it is still important to ask whether these procedures, as shaped and formulated by the Courts, are for the benefit of the community.

Fairness v rights

To answer this broad question the dramatic shift in our criminal law following the enactment of the Bill of Rights needs to be fully appreciated. Prior to its enactment the admissibility of evidence obtained illegally,[16] or in breach of the Judges' Rules,[17] or contrary to a recognised common law right,[18] was determined by the application of the criteria of fairness. Fairness had been extended to encompass not only circumstances which rendered the use of the evidence unfair to the accused but also circumstances where the quality of the conduct of those who obtained the evidence gave rise to public policy grounds for exclusion.[19] But essentially the acceptance was "simply one of fairness".[20] Thus, in *R v Webster*[21] the common law right of access to a solicitor when sought by a person in police custody was recognised as a "fundamental right though not an absolute right".[22] Bisson J described the Court's function in these terms:

> ... while the courts have a supervisory function over law enforcement officers, it is not a disciplinary body. The ends of justice must be the paramount consideration. Fairness to the person being interviewed is not to be assessed in a vacuum but in the light of all the circumstances of the particular case and having regard, too, to the public interest in the proper investigation of crime, prosecution of offenders and the protection of the public.[23]

16 *R v Grace* [1989] 1 NZLR 197.
17 *R v Admore* [1989] 2 NZLR 210; *R v Fatu* [1989] 3 NZLR 419.
18 *R v Webster* [1989] 2 NZLR 129.
19 *R v Dally* [1990] 2 NZLR 184, 185. See also *R v Convery* [1968] NZLR 426.
20 *R v Walters* [1989] 2 NZLR 33, 36, Cooke P. See also *R v Webster*, above, note 18, and the cases referred to therein.
21 Above, note 18.
22 Ibid, p 140.
23 Ibid.

I believe that this observation is as sage today as it was at that time.

In *R v Admore*,[24] that felicitous judicial phrase, "it is all a question of fact and degree", was utilised by the Court of Appeal when considering the failure of the police to administer a caution. McMullin J said; "Questions of admissibility in such circumstances will generally depend on questions of fact and degree."[25]

Notwithstanding that the Courts adopted this flexible approach to the question of admissibility, the language of "rights" was customarily employed[26] and those rights were often described as "fundamental rights".[27] While the language of rights was used, however, the substantive law was framed in terms of *duties* which were imposed on the enforcement officers. Thus, police officers were under a duty to caution the suspect before taking a statement, an obligation incorporated in the Judges' Rules, not as a right, but as an injunction to the police.[28] The police were also under a duty not to cross-examine the accused in recognition of the "right not to be cross-examined".[29] Similarly, in order to protect the accused's right to a lawyer, once sought, the police were exhorted to comply with the requirement or run the risk that their conduct would be found an unfair and oppressive use of police power.[30] Finally, the accused's "right" to be prosecuted without delay was seen in terms of an obligation resting upon the authorities to avoid unreasonable delay. The "fundamental and important right" of the accused did not preclude reference to the public interest and the principle of fairness.[31]

It is not inapt to say that in all such cases the right was the rhetoric and the substantive law was the duties cast upon the enforcement officers. It followed that the notion of a prima facie rule excluding evidence where there was a breach of that duty was expressly rejected.[32] It also followed that the admissibility of improperly obtained evidence rested on the discretion of the Judge. "It is in our view", said the learned President in *R v Webster*, "preferable to leave the question of admissibility of evidence in this context, as it is in most other contexts, for the exercise of judicial discretion in all the circumstances of a particular case."[33]

In broad terms, with the enactment of the Bill of Rights, the rhetoric has become the substantive law. The requirements of the Bill are not phrased as duties on the enforcement officers – although they undoubtedly impose duties – but as rights attaching to the individual. This shift from rhetoric to substance provided the framework for the

24 Above, note 17.
25 Ibid, p 220.
26 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (right to refuse to answer questions, per Cooke J, p 398; right to remain silent, per McMullin J, p 406); R v *Fatu* [1989] 3 NZLR 419, 431 (right of persons arrested not to be cross-examined).
27 *R v Webster* [1989] 2 NZLR 129, 140; *Police v Travis* [1989] 2 NZLR 122, 125 (right of access to a solicitor if sought); *R v Alexander* [1989] 3 NZLR 395, 400-403 (right of arrested person to be brought before the Court as soon as reasonably possible); *R v Admore* [1989] 2 NZLR 210, 213-214 (right not to be questioned oppressively).
28 Rule (2).
29 See, eg, *R v Fatu* above note 17.
30 *R v Webster* above note 18.
31 Eg *R v Alexander*, above note 27.
32 *R v Webster*, above, note 18, p 139.
33 Ibid.

introduction of remedies which will prima facie apply wherever the rights of the citizen are denied and foreshadowed a corresponding reduction in the scope for judicial discretion.

I admit to being comfortable with the previous regime. It struck a sound balance between the essential aim of the criminal process to secure the conviction of the guilty, the objective of providing a fair trial to all persons charged with an offence, and the important goal of protecting the individual's recognised rights. Properly administered, neither the guilty nor the innocent could complain that they had not had a fair trial.

To my mind, therefore, the law or approach prior to the enactment of the Bill of Rights could be properly described as both mature and responsible. It can be called the approach based on the precept of fairness. Legalism was barely visible. The relevant interests and values could be balanced and weighed to achieve a result which was sensible and fair. It was this balancing process which instilled the system with its maturity. There is, I suggest, no better means for weighing the competing interests and values which distinguish the criminal process from start to finish.

The enactment of the Bill of Rights has meant that this approach has been supplanted by another. It is called the rights-oriented approach. Interests and values which were previously recognised at law have the status of constitutionally enjoyed rights and carry the expectation that they will be observed irrespective of the fact that any violation may not prejudice the accused nor affect his ability to obtain a fair trial. In the adjudication of the issues which arise these fundamental rights then obtain a weighting which they did not previously command, and the balance between the interests of the accused and the interests of the community are correspondingly amended.

It will be apparent from what I have said that I have little enthusiasm for the approach adopted to the Canadian Charter of Rights and Freedoms by the Supreme Court of Canada. While I customarily have the highest regard for the principled reasoning undertaken in the decisions of that Court, I am unable to accept the lack of flexibility and pragmatism in its extreme rights-driven approach. For example, I consider inexcusable the Court's virtual elimination of any discretion in determining whether or not to exclude evidence for a breach of the Charter, notwithstanding the specific requirement that such evidence be excluded only if its admission would be prejudicial to the administration of justice. I also consider equally untenable the Court's rejection of any causal link between the violation and the evidence in issue. Automatically excluding evidence which would have been ascertained, apart from and independently of the breach, seems to me to be quite disproportionate to the aim of vindicating fundamental rights.[34]

I confess to being dismayed when I recently read that the Supreme Court had struck down as unconstitutional the statutory provisions of Canada's Criminal Code which prevented the complainant's previous sexual conduct or experiences being put in issue in a rape trial.[35] To my mind, a jurisdiction which prefers the "rights" of the accused in this manner, and is apparently unable to balance and weigh the competing values and interests

34 See below, text accompanying notes 85-91.
35 *R v Seaboyer* (1992) 7 CR (4th) 117.

involved, is suffering from a bad dose of constitutional constipation.

One of the framers of the Charter, Eugene Ewaschuk, since elevated to the bench, has been scathing in his comments on the Court's interpretation of the Charter. His judicial colleagues, he observed, have fallen into "the trap" of "the often all-consuming zeal of some jurists to rewrite the Charter according to their personal perceptions as to what Canadian society requires."[36] Conceivably, a more extreme approach is acceptable where the constitutional rights have been entrenched with the legislature's concomitant delegation of extended authority to the third arm of government. But I doubt it. I particularly doubt that it is appropriate where Parliament, as in this country, has not seen fit to entrench those rights and has thus, by necessary implication, refrained from conferring such extended authority on the judiciary.

It may be observed that the enactment and implementation of the Bill of Rights will itself undoubtedly influence our traditional concept of fairness in criminal proceedings, whatever approach is adopted. It is one thing to ask whether the admission of evidence obtained in contravention of, say, the accused's right to silence would be unfair to the accused in the sense that it would prejudice a fair trial. It is another thing to ask whether it would be unfair because it is a violation of the accused's fundamental rights. In the latter case the unfairness lies in depriving the accused of the right, and the advantage of the right, which he or she enjoys in common with everyone. Without, therefore, resorting to the rights-oriented approach, the enactment of the Bill of Rights is likely to have the effect of reshaping the pre-Bill of Rights concept of fairness. Almost as a matter of course, relatively less weight will be placed on the question of whether there is any prejudice to the accused and greater weight on the denial of the right itself.

The adverse consequences of a rigid rights-oriented approach

Undue adherence to the rights-oriented approach will, I believe, have a number of adverse consequences. These will inure simply because the primary aim of ensuring the conviction of the guilty will not dissipate and disappear. It represents a legitimate interest of the community, and one which the Courts will inevitably seek, as they have in the past, to reflect in their decisions.

The first adverse consequence of a too rigid rights-oriented approach, therefore, will be the tendency in future cases to whittle down the full rigours of any seminal rule. Exceptions, some plainly illogical, will be carved out of the rule in an effort to balance the competing rights and interests. This has been the experience in the United States with *Miranda*. Post *Miranda* decisions have consistently resiled from the noble and lofty sentiments expressed in the original decision.[37] For example, the *Miranda* rule has not been applied to a situation where, although the suspect was questioned in the police station, he was not technically under arrest; questions asked of a suspect in the police car on the way to the police station have been held to be something less than interrogation and the evidence therefore ruled admissible; evidence obtained in violation of the *Miranda*

36 *R v Boron*(1984) 3 DLR (4th) 238, 242, referred to by Sir Robin Cooke, "Practicalities of the Bill of Rights" (1986) 2 Aust Bar Rev 189, 195 and quoted by Paciocco, "The New Zealand Bill of Rights Act ..." above, note 1.

37 Above, note 7, p 305.

rule will be admitted if the prosecution is able to show that it would have been discovered in any event; and while a confession obtained in breach of *Miranda* may not be given in evidence in chief, it may nevertheless be used in cross-examination for the purpose of impeaching the accused.

Further, *Miranda* does not apply to custodial statements which are initiated by the suspect as distinct from those made in response to questioning; incriminating answers given to questions from Probation Officers without a *Miranda* warning have been held admissible; the Court has declined to exclude the evidence of a suspect who, having initially declined to answer questions following a *Miranda* caution, was subsequently questioned by another officer who did not repeat the caution; and the incriminating comments of a suspect inspired by police officers deliberately discussing the case within earshot of him have been ruled admissible. The evidence of suspects questioned at the scene of the crime where public safety might be endangered are also admissible without a *Miranda* warning; the evidence of a suspect who has waived her right not to speak, incorrectly believing that her lawyer was not present because of the deliberate deception of the police officers, was not excluded; it has been held that the police may question a suspect about a more serious crime after he has waived his right to silence in respect of a lesser crime following a *Miranda* warning; and the police may use the verbal statement of a suspect who agrees to talk but declines to sign anything in writing until his lawyer is present.[38]

Perhaps the high-water mark in the Supreme Court's retreat from *Miranda* is its decision in 1985 which enables the police to ask a suspect to repeat a confession which is given without a *Miranda* warning, providing that the warning is then given before the suspect is invited to repeat the incriminating statement.[39] Most suspects, of course, would believe the damage had been done. Unlike the police, they would be unaware that their first statement could not be used in evidence.

These decisions have, I suggest, effectively reduced *Miranda* to a mockery. The absolute character of the judicially-formulated rule has been clearly undermined so that the impact of any violation is in fact assessed in the particular case. Indeed, as early as 1974, the Supreme Court ruled that *Miranda* warnings are not constitutional requirements in themselves, but only prophylactic measures designed to safeguard Fifth Amendment rights.[40] Decisions carving out further exceptions to the *Miranda* rule and holding that violations of a suspect's rights did not necessarily mean that his evidence would be held inadmissible were inevitable.

It is insufficient to dismiss these decisions as the "political" outcroppings of the American system of appointing Judges to its highest Court. The decisions are reasoned decisions falling well within the common law tradition. What they demonstrate, I suggest, is that an overly-dedicated or rigid approach to rights will not indefinitely suppress the primary aim of the criminal process to ensure the conviction of the guilty. Rooted in the

38 See Ogletree, "A Proposal to *Mirandize* Miranda", [1987] Harv LR 1826; and Zuckerman, "The Right Against Self-Incrimination: An Obstacle to the Supervision of Interrogation" (1986) 102 LQR 43, 50-52.

39 *Oregon v Elstad* 470 U S 298 (1985).

40 *Michigan v Tucker* 417 U S 433 (1974)

community, that aim creates a pressure which is eventually reflected in the decisions of the judiciary.

To my thinking, the pendulum has swung too far in one direction in the United States, just as it has more suddenly swung too far in Canada in the opposite direction. The extreme position in both jurisdictions is untenable. I do not doubt that the pendulum in both countries will return to a position of greater equilibrium in the fullness of time. The art for the New Zealand Courts, to my way of thinking, is to avoid the extremes of both jurisdictions and adopt an approach to the Bill of Rights which avoids the excesses of both and is more closely aligned with the precepts of justice.

The second detrimental feature of an approach which unduly restricts the trial judge's discretion to admit evidence in the circumstances of a particular case is the effect it will have on the judicial process. Few Judges can view with equanimity the prospect of a guilty person escaping the consequences of his crime because it is seen to be necessary to vindicate his rights or discipline the police. Decisions of the post *Miranda* kind seeking to rationalize departures or exceptions to the rule are the likely outcome. Findings of fact which are, perhaps, strained and lead to an inconsistent application of the rule are another.

The third negative consequence relates to the effect on the police. I have elsewhere commented on this aspect in respect of the so-called right to silence.[41] The police are placed in the position at the very outset of an interview of endeavouring to ensure that the suspect does not exercise his right to silence. They do so in the kindly shade of Court decisions which decline to crimp the police power of investigation.[42] It is perverse that, in promoting the community's demand to be protected from unlawful activity, the police should be constrained to try and frustrate the suspect's lawful right to respond to their questions.

The same reasoning cannot, of course, be automatically applied to the accused's right to consult a lawyer and to be informed of that right. Unlike the right to silence, this right assists the innocent as well as the guilty. Rather, in this instance, the adverse effect is the debilitating effect on the police force who, acting in good faith and with due competence, nevertheless fail to give the necessary advice or to give it at the appropriate time. The police officer who genuinely fails to apprehend that the suspect is being detained in a manner which the Courts will describe as a de facto arrest provides one example. On the rights-oriented view, the bona fide and due competence of the police officer is irrelevant because the citizen has been deprived of his constitutional right and in that regard, it is argued, he is in no different position from the suspect whose right is deliberately flouted.

Be that as it may, my point for present purposes is that it is reasonable to accept that the exclusion of an admission obtained, say, competently and in good faith, and in circumstances where the accused's right to a fair trial cannot be said to be prejudiced, is likely to have a detrimental effect on the morale and performance of the police force. The debilitating impact on law enforcement officers who seek to bring a "villain" to justice only to find themselves on trial, as it were, can readily be imagined. Devices and practices

41 Above, note 7, p 306.
42 See Zuckerman, above, note 38, p 13.

to evade the effective implementation of the right, as has occurred with the so-called right to silence, could be the unfortunate result.

There is a view, which is widely held, that there is no good reason why the police should not comply with the requirements of the Bill of Rights in all cases or, certainly, almost all cases. The problems encountered to date, it is said, result from initial uncertainty as to the law and represent the inevitable "settling in" period as the police adjust to the new requirements.

Without doubt, the immediate post Bill of Rights situation will improve. But I do not share the optimistic view that violations of the Bill of Rights will disappear or, at least, dwindle to a tolerable level as the police accept and apply the new discipline. First, this has not been the experience in the United States. Nor, as I apprehend it, is it the experience in Canada. Moreover, the position does not seem to be noticeably "settling down" in New Zealand. Certainly, there has been and will continue to be an improvement, but cases in which the police are alleged to have failed to comply with s 23(1)(b) still continue unabated, notwithstanding that it is now nearly a year since *R v Butcher* was decided.

Secondly, the often expressed expectation that, other than in rare cases, the police could comply with the requirements of s 23(1)(b) if they really wanted to is, to my mind, unrealistic. Such a view ignores the myriads of situations and pressures which arise and confront police officers in real life, and assumes a degree of competence and capability in those situations and under that pressure which is unattainable. Enforcement officers, no less than judges and lawyers, suffer human frailties and deficiencies, the consequences of which can fall to be judged harshly with the benefit of hindsight.

Thirdly, the obligations which are imposed upon the police under the provisions of the Bill of Rights in order to give effect to the rights contained in it will not remain static. Those obligations cannot be exhaustively defined at any given time. The obligations will change as the Courts work out in successive factual situations what is required of the police to give full effect to the recognised rights. Some of the problems are anticipated below.[43] Moreover, as the approach adopted towards the interpretation of s 23(1)(b) is applied to the other criminal law provisions, additional requirements will evolve and require compliance by the police.[44] In all these circumstances, the Courts will be called upon to define and impose new duties on the police.

The final adverse feature threatened by a strict rights-oriented approach is the very fate of the Bill of Rights itself. It contains many splendid rights and freedoms. Some are omitted; the right to privacy and the right to one's reputation are notable examples. Other rights could have been developed; the right of victims of crime could fall within this category. But overall, the civil rights and freedoms of the citizens of this country are resoundingly affirmed in a single constitutional document which will undoubtedly strengthen the community's resolve and capacity to withstand their erosion.

Not unexpectedly, however, for it is also the experience in Canada, the focus has been on

43 See text accompanying notes 66-84, below.
44 See text accompanying notes 71-84, below.

the provisions prescribing the rights, principles and procedures relating to the criminal law. If these provisions are applied in a manner which was not intended and the central aim of the criminal process to secure the conviction of the guilty is displaced, the Bill of Rights as a whole is put at risk. The cartoon in which a smirking masked burglar is pictured climbing through the householder's window with a torch in one hand and a burglar's kit in the other, and is seen to have a document in his hip pocket conspicuously marked "Bill of Rights", is a depressing prospect.

Public disenchantment with the operation of the criminal principles and procedures of the Bill will all too easily spread to the document as a whole and surreptitiously infect the other rights and freedoms contained in it. All rights and freedoms are therefore put at risk if the operation of the criminal safeguards are perceived to favour the "criminal" at the expense of the community. To the extent that the Bill of Rights is a rallying point for public opinion in the face of a threatened invasion of any fundamental right or freedom, it is also irreparably weakened. In the sphere of basic rights and freedoms it is imperative that the constitutional document recording those rights and freedoms command the respect of the community and reflect the deepest will of the people.

Section 23(1)(b)

A number of the criminal law provisions of the Bill of Rights have been in issue in various cases. None, however, have come remotely close to capturing the Court's time and attention to the extent of s 23(1)(b). This is to be expected, first, because the subsection enlarged the existing law and, secondly, because (apart from the question of detention for the purposes of breath and blood tests under the Transport Act 1962[45] and detention for the purpose of search under the Misuse of Drugs Act 1975[46]) no question of inconsistency with other statutes arises. What is in issue in each case is the meaning of the provision and its application in the circumstances in which the police officers have purported to exercise – or not exercise – the power of arrest or detention. In short, the Court of Appeal has held that the right to a lawyer and to be informed of that right applies to de facto arrest as well as formal arrest.[47] As at the time of writing, an authoritative ruling on the same issue is pending in the case of *R v Goodwin*.[48]

Obviously, it would be preferable if any further examination of s 23(1)(b) could be deferred until the decision in *R v Goodwin* is delivered. Certainly, it is not my intention to predict the outcome in that case, and my examination of the subsection must necessarily be limited in its purpose. I therefore propose to undertake one task only. It is to suggest that the best argument for adopting the more restricted interpretation to the subsection has not yet been advanced. The exercise may serve to emphasize the desirability, perhaps covertly, of adopting the approach recommended in this paper.

In suggesting that there is a far better case to be made for interpreting s 23(1)(b) in such

45 *Ministry of Transport v Noort; Police v Curran* (1992) 8 CRNZ 114.
46 R v Waddel (HC Auckland, T 119/91, 25 October 1991, Thomas J).
47 *R v Kirifi* [1992] 2 NZLR 8; *R v Edwards* (CA 83/91, 27 September 1991); *R v Accused (CA 250/91)* [1992] 2 NZLR 53; *R v Butcher* [1992] 2 NZLR 257; *R v Biddle* (CA 432/91, 18 February 1992); *R v Narayan* (CA 80/92, 15 April 1992); *R v Latta* (CA 151/92, 24 June 1992).
48 *R v Goodwin* (HC Hamilton, T 56/91, 29 November 1991, Jamieson J).

a way as to apply to formal arrest only, I am not to be taken to be necessarily endorsing that view. My opinion can await an appropriate case. It is important, however, that the less rights-oriented approach be fully stated and that the arguments, if not accepted, be raised and refuted. No doubt they will have been anticipated in *R v Goodwin*.

I have no quarrel with, and in fact wholly support, the broad purposive approach which has been adopted to the interpretation of the Bill of Rights.[49] When dealing with statutorily affirmed fundamental rights, I do not see how it could be otherwise. To be legalistic rather than generous, to cavil short of the full intendment necessary to secure the effective enjoyment of the rights, or to timidly shy away from the logical consequences of a given constitutional premise, would be to deny the Court's constitutional mandate when interpreting fundamental human rights. In the New Zealand context, however, I consider that the resulting interpretation must nevertheless be circumscribed by the intention of Parliament where that intention can be fairly ascertained.

Consequently, I would frame the critical question in these terms; accepting that a purposive and generous interpretation of s 23(1)(b) may necessitate the construction that the word "arrest" includes de facto arrest, does that construction nevertheless accord with the ascertainable intention of Parliament? If it does not, I would suggest that the intention of Parliament must prevail.

I am aware that some scholars subscribe to the view that legislative intent is of secondary importance in the interpretation of a constitutional document proclaiming fundamental rights. As I apprehend it, such a view stems from the notion that the legislature has, in effect, delegated a function to the courts; the function of protecting and promoting the fundamental rights and freedoms, and it therefore falls to the courts to give meaning and force to those rights and freedoms. Whatever the validity of this perception may be where the constitutional document is entrenched, I do not consider it appropriate where the statute is not entrenched – and the legislative history makes it plain that it was deliberately not entrenched. The Bill of Rights is an ordinary statute with the extraordinary function of promoting and protecting fundamental rights, but the function belongs to the statute, not the Courts. To my mind, it can be persuasively argued that Parliament intended, in enacting the Bill as an ordinary statute, to ensure that this function would be proscribed by its will.

Having accepted that a broad purposive approach is desirable, but desirable within the limits of Parliament's ascertained intention, I should clarify at the outset that the arguments to be advanced in favour of the narrower meaning of s 23(1)(b) do not embrace the principal reasons given by Gault J in reaching the same conclusion in *R v Butcher*.[50] With due respect to that learned Judge, I do not consider that the word "arrest" should be interpreted in accordance with its common law meaning. The Act is not declaratory of the common law, and to utilize a meaning arrived at in other contexts, such as claims for wrongful arrest and habeas corpus proceedings,[51] is to disregard the fact that in this instance the word "arrest" is used in an enactment guaranteeing fundamental rights. It also

49 See Shaw & Butler, above note 2, pp 401-402 for a discussion of the principles of interpretation.
50 R *v Butcher*, above, note 47, pp 269-271.
51 See *R v Waddel*, above, note 46, pp 11-12.

effectively restricts the interpretation of a vital document to a point in time and deprives it of its capacity to be interpreted in accordance with the "evolving standards of decency that mark the progress of a maturing society".[52]

Nor do I accept that the word "affirm" in the Long Title and in s 2 to the Act imports the existing law.[53] With again due respect to the learned Judge, the word "affirm" is used in a different sense. It is not the pre-existing law which is affirmed so much as the fundamental human rights and freedoms which are perceived to exist apart from the law. In other words, it is the rights, and not the law, which are declared. The Bill of Rights is therefore an acknowledgment by Parliament that the citizens of New Zealand possess these rights. In that sense they are affirmed. Richardson J put it this way in *R v Noort*:[54]

> ... the deliberate reference to "affirm" in the long title and in s 2 which provides:
>
> The rights and freedoms contained in this Bill of Rights are affirmed.
>
> makes the very important point that the Act is declaratory of existing rights. It does not create new human rights. As basic human rights, the rights and freedoms referred to do not derive from the 1990 Act. In that respect it parallels the Bill of Rights Act 1689 which was declaratory of "the true, ancient and indubitable rights and liberties of the people" (s 6).

The word "affirm" is also used in the Long Title to register New Zealand's commitment to the International Covenant on Civil and Political Rights. In this respect it is relevant to point out that the Covenant does not contain an express right to legal assistance as affirmed in s 23(1)(b), just as it omits any reference to a right to silence. Such rights form no part of the legal system of many of the signatories to the Covenant. This does not mean that Parliament cannot affirm that these rights are nevertheless fundamental to New Zealanders. It does suggest, however, that the Courts and commentators should be guarded in utilizing New Zealand's commitment to the Covenant to support an expansive interpretation of Parliament's intention when those rights are not themselves contained in that document.

Consequently, it can be properly asked which right has Parliament affirmed; the right to legal assistance and to be informed of that right when formally arrested or the right to such legal assistance and information when detained during the course of an investigation? The scope of the two "rights" are significantly different and it now remains to advance those arguments which support the former interpretation.

First, I refer to the legislative history. In this regard, specific reference is frequently made to the fact that the word "detained" is qualified by the words "under any enactment" in the New Zealand Bill of Rights, whereas the equivalent provision in the Canadian Charter on which the wording is clearly based does not include those words. In Canada it would not be necessary to expand the meaning of arrest to include de facto arrest as any such instances of detention would come within the word "detained". It has been suggested, therefore, that the insertion of the words "under any enactment" during the Committee

52 *Trop v Dilles*, 36 US 86 (1988), per Warren CJ, pp 100-101.
53 Above, note 50.
54 Above, note 47, p 5.

stages of the Bill indicates the Legislature's intention to restrict the meaning of the word "detained" so as to exclude cases of de facto arrest. But I doubt the utility of focusing on a specific phrase in this way. The words may have been added for any number of reasons ranging from the draftsman's whim to a desire to more adequately reflect the existing law relating to the police powers of arrest. For myself, such an approach generally represents a near-sighted approach to the question of legislative intent.

Rather, there is no reason why the Courts should not have regard to the known history of the Bill. Its grand beginning and humble ending then provides the background against which the question of interpretation can proceed. The knowledge that Parliament was reluctant to vest the judiciary with powers which would or might limit the concept of parliamentary supremacy is supported by provisions such as s 4. Parliament can be assumed to have wished its intent to be accorded equal supremacy. Reference to Hansard also reveals that no dissatisfaction of any kind was expressed about current criminal law procedures in this country. The so-called right to silence and right to consult and instruct a lawyer were not mentioned. On the contrary, a number of speakers were anxious to clarify that the Bill did not enlarge the rights of accused persons – somewhat loosely referred to as "criminals".

It is acknowledged that legislative history must be approached cautiously. It can be vague and equivocal, and it can be misused. In this instance, however, it might reasonably be felt that the legislative background does not suggest that Parliament contemplated any dramatic changes to the criminal law.

Secondly, while acknowledging the need to adopt a purposive approach which could make the affirmed rights effective, it is important to observe that Parliament has not itself made the right to a lawyer effective. The need for a suspect to have access to legal assistance at the earliest point practicable is based on a number of concepts; the need to provide a counterbalance to the coercive power of the State at the point where the suspect comes into contact with it; providing access to knowledge as to "the suspect's general legal position";[55] providing the suspect with an independent and reliable "channel of support, information and advice";[56] the importance of ensuring that the accused is treated fairly in the criminal process; and generally securing the suspect's effective enjoyment of his fundamental rights by ensuring that he has access to advice as to those rights and the means of exercising them. In *R v Noort*, Richardson J, in a comprehensive and compelling articulation of the right to a lawyer[57] as part of our "constitutional inheritance", summed up the basis and content of the right in these terms:[58]

> In short, advice and representation are the two central aspects of the right to counsel. If that right is to have more than token recognition it must be exercisable without delay – before the legitimate interests of the person who is arrested or detained are irretrievably jeopardised. And if the detainee is to have a reasonable opportunity to exercise the right he or she must know of it. Hence the requirement of s 23(1)(b)

55 Shaw & Butler, above, note 2, p 406.
56 Ibid, p 407.
57 Above, note 47, pp 8-11.

> that everyone who is arrested or detained under any enactment shall have the right to consult and instruct a lawyer without delay "and to be informed of that right".

One can agree with these sentiments but at the same time point out that, for the right to a lawyer to be effective in those terms, the advice should be given at the stage when the suspect is presently cautioned, that is, when the police officer has made up his or her mind to charge the suspect being questioned with a crime. Only then can all the advantages of the right be secured, particularly in respect of "advice" as distinct from "representation". For all practicable purposes the advantage of such advice cannot be limited to the time when the suspect's movement is restricted as is necessary to constitute an arrest, although in some situations the need for it may possibly be exacerbated at that point.

Consequently, in providing that the right is to be triggered upon "arrest", the Legislature has clearly restricted the right (as it has with the right to silence) to a point which may, and commonly is, later in time than that which is required to secure this advantage. Many suspects are questioned, and make incriminating statements, long before they are arrested or before any question of them being detained or under de facto arrest could arise. The fact that the Legislature has itself plainly not sought to make the right to a lawyer effective in the sense in which it is invoked to extend the meaning of the word "arrest" to include de facto arrest must, it could be suggested, weaken the force of that argument.

In the third place, it also emerges that an extended definition of the word "arrest" requires the Court's to attribute to Parliament the intention to enact in a constitutional charter of rights an improbable and unfair anomaly. Two hypothetical cases may be compared to illustrate the point. First, the "cooperative" model. The suspect is interviewed in circumstances in which no question of arrest arises. He is cautioned but voluntarily accompanies the police officer to the police station and is aware at all times that he may leave prior to his formal arrest. The occasion to advise the suspect of his right to a lawyer does not arise until then. The second case is that of the "uncooperative" model. The suspect is truculent and may even threaten to escape. He is arrested. At that point the police officer must advise him of his right to a lawyer. Comparing the two cases it can be seen that the first suspect is deprived of the right at the very time it is required to be effective. The second suspect, however, by virtue of the erratic or arbitrary point in time when he is arrested, enjoys the right and all its accrued advantages much earlier.

To broadly state this point in terms of saying that an intention to legislate a glaring and unfair anomaly must be attributed to Parliament if the right arises at the time a suspect is detained under circumstances which amount to de facto arrest is to understate its force. In the first place, the more critical the right to a lawyer is perceived to be, the worse the anomaly gets. For example, if the extension of the right is necessary to give effect to the "equality of arms" principle,[59] then that equality is secured for some and not for others. Nor, in the second place, should the Bill of Rights be approached on the basis that it is about fundamental rights without reference to equally fundamental concepts of justice. Yet, if rights, with the advantages they confer, are secured to some but not others

58 Ibid, p 10.
59 Shaw & Butler, above, note 2, p 406.

depending, not on when the suspect's need for a lawyer arises, but if and when the suspect is arrested, then citizens have been treated unequally. A constitutional document should be construed in such a way as to recognise the fundamental principle of distributive justice; equality before the law.

In the fourth place, reference may be made to the immediate previous paragraph, para (a), of s 23(1). It provides that a person who is arrested or detained under any enactment is to be informed at the time of the arrest or detention of the reason for it. The wording of this paragraph might be taken to provide an internal indication of Parliament's meaning to s 23(1) as a whole. In short, the police officer often will not be in a position to inform the suspect of the reason for his arrest until he is formally charged. As long as the officer merely contemplates the possibility of a charge, he cannot in fact give a valid reason. To say to the suspect that he is under arrest simply so that he can be questioned as to whether or not he *should* be charged with a crime would run foul of the Court of Appeal's clear injunction that the police have no power to detain persons for questioning in this country.[60]

It is therefore difficult to see how para (a) could sensibly apply at the time of a de facto arrest. Indeed, the officer may not be intending to arrest the suspect at all. The problem is manifest if de facto arrest is construed so as to include suspects who have a reasonable apprehension based on the conduct of the police officer that they are under arrest. In such circumstances the officer may not only be unaware that he is obliged at that time to inform the suspect of the reason for his arrest, but also he may not know or be able to formulate the reason which he is nevertheless required to give. Moreover, for s 23(1)(a) to be effective, one would expect that the reason given would need to be accurate. This is the position in Canada where misleading advice as to the reason for an arrest "can vitiate or infringe the Charter right to counsel"[61]. Parliament's clear intention that para (a) should operate at the point of formal arrest can therefore be accepted. But once that conclusion is accepted it is difficult to see why the same controlling words in subs (1) can permit a different construction for para (b).

In the fifth place, it may be suggested that the question of interpreting s 23(1)(b) should be approached with reference to the collateral right contained in s 21(4). That subsection provides that everyone who is "arrested or detained under any enactment" for "any offence or suspected offence has the right to refrain from making any statement and to be informed of that right". A quick glance at the subsection is sufficient to confirm that the right is narrower than the so-called right to silence recognised by the Judges' Rules. Rule (2) states that:

> Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.

In the discretion of the Judge, statements made before or without a caution may be held

60 *Blundell v Attorney-General* [1968] NZLR 341; *Waaka v Police* (1987) 2 CRNZ 370; *R v Butcher* [1992] 2 NZLR 257, 265.

61 *R v Greffe* (1990) 55 CCC (3d) 161, 177; R v *Smith* (1991) 63 CCC (3d) 313, 321-322.

inadmissible.[62] Section 23(4) does not therefore "enshrine" or supplant the common law regarding the need for a caution to be administered when the officer has determined to charge the suspect with a crime. Having regard to the fact that this requirement is founded on the precept of fairness, it would be surprising if it did.

Consequently, fairness dictates that cautions continue to be given (subject to a possible modification in wording)[63] in terms of the Judges' Rules. No question of arrest or detention need arise. Later, at the time the suspect is arrested or detained under any enactment, the suspect will need to be advised of the right contained in subs (4). This must be so whether the term "arrest" includes de facto arrest or not.

Once, however, it is accepted that the existing procedure must continue to apply prior to an arrest under the Act, it should also be accepted that Parliament must have contemplated that situation. Prior to an arrest or detention under any enactment, ample scope for the operation of the common law still remains. The suspect will still be entitled to a caution or to a solicitor should he seek one in terms of the existing law before s 23(1) comes into operation, whatever its meaning. It would seem, therefore, that there is no compelling reason to interpret s 23(1)(b) as being applicable to de facto arrests any more than s 23(4) can be interpreted to apply at the stage a caution is required. Parliament can be assumed to have intended that the pre-arrest situation will continue to be governed by the existing common law, perhaps as modified by the Courts in the light of the Bill of Rights.

The foregoing reasons support the sixth point. It can be suggested that para (b) is part of a legislative pattern or scheme, and that the provision is to be construed accordingly. In dealing with the criminal procedure, the draftsman has begun with the individual's right to be secure against unreasonable search or seizure. (s 21) Although not invariably the case, a search with any consequent seizure, is often part of the investigative process. This section is followed by s 22 with its affirmation that everyone has the right not to be arbitrarily arrested or detained. This right is available at any time but will no doubt have its greatest application in cases of unlawful arrest or detention. The word "detained" in this section is not limited to being "detained under any enactment". Together with habeas corpus, it provides a safeguard against the arbitrary exercise of police power resulting in the individual's wrongful loss of liberty.

The draftsman has then moved to the point in time when the suspect is arrested or detained. Leaving to one side habeas corpus and such remedies as may be secured by ss 21 and 22, there are no specific provisions in the Bill of Rights following s 22 which secure the rights of the individual during the course of an investigation. As already mentioned, the need for a caution to be administered prior to arrest or detention is left to the Judges' Rules and the right to a lawyer, if sought, is left to the common law and the dictates of fairness. Admittedly, the police investigation can extend beyond the point of an arrest or detention,

62 *R v Coombs* (1983) 1 CRNZ 116, 119; Tay*lor v New Zealand Poultry Board* [1984] 1 NZLR 394, 406. An example of a statement being excluded because a caution had not been given and where no question of arrest arose is R v *Murphy* (1988) 3 CRNZ 342, where the incriminating statements were made to the constable over the telephone.

63 See below, text accompanying notes 75-76.

but this does not obscure the fact that the Legislature has left a vital area where the rights of citizens could be jeopardized to be covered by the common law.

If this overall pattern is accepted, the rights of the individual during the investigatory phase of a criminal prosecution up to the time of arrest continue to be controlled by the common law (and ss 21 and 22); the rights of the person formally arrested are then dealt with under s 23; the rights of the person formally charged are dealt with in s 24; and the minimum standards which are to be observed at the resulting trial are then specified in s 25. One might be forgiven for speculating whether the draftsman is wondering what has happened to his neat progression of rights.

Finally, the argument would be incomplete without providing a rationalisation as to why Parliament might intend the more limited construction. The explanation lies in the nature of the matters which require attention following a formal arrest. An arrest and charge requires the accused to consider such matters as bail; it provides him with the first effective opportunity to challenge the lawfulness of the arrest in relation to the charge; and it sets the point at which the preparation of any defence can properly begin.

Such a basis departs from the perception that the right to a lawyer is necessarily founded on the need for legal advice and assistance to secure the suspect's rights and focuses on the need for a lawyer to effectively secure a fair trial for the accused. In doing so it moves more closely to the United States Supreme Court's perception of the basis of the rule in *Miranda*; the need to ensure fairness in the adjudicative process. A fair trial for the accused, it has been held, can be achieved by restricting the rule in *Miranda* to "custodial interrogation"[64] In the result, it is the State's commitment to a criminal prosecution evidenced by the formal arrest which triggers the necessity to advise a suspect of his right to a lawyer in that jurisdiction. Parliament may have intended the same here.

And so how telling is the argument? Without doubt, it is a strong case which cannot be lightly dismissed. One suspects that, if it were possible to approach the statute as if it were an ordinary run-of-the-mill piece of legislation instead of an ordinary statute with an extraordinary constitutional function, the narrower interpretation would be readily accepted. But it is not an ordinary run-of-the-mill piece of legislation. The Bill of Rights is a constitutional document affirming the citizen's fundamental rights, and it seems somehow niggardly not to extend the right as far as a reasonable interpretation, rationally argued, will permit. Notwithstanding that the suspect's rights during investigation would continue to be governed by the pre-existing common law, both in respect of the need for a caution and the right to obtain a lawyer, it sticks in the judicial craw that any apparent limitation of fundamental rights should fall to be decreed by the judiciary rather than explicitly directed by the Legislature.

In these circumstances, and assuming the Court of Appeal in *R v Goodwin* confirm that the word "arrest" includes de facto arrest, I am not certain that it would not be prudent to invite the Legislature to clarify its intention. There would be nothing judicially remiss in doing this. As I have indicated elsewhere, I am an adherent of the Louis Jaffe school of

64 Optican, "The Right to Counsel in Breath/Blood Alcohol Investigations: *Noort* from a United States Perspective" [1992] NZ Recent Law Review 189, 200-209.

thought which recognizes the potential for a "fruitful partnership" between the legislature and the courts as the two bodies in the law-making business together continuously at work on the legal fabric of society.[65] But Parliament is the dominant partner, and there must be occasions when it can and should reverse the decisions, or the trend of the decisions, of the Courts. In this instance, Parliament's handicraft is poorly worded and it could properly be invited to make its meaning clear. In doing so it might well consider whether advice to a suspect of his or her right to a lawyer should be given at the time a caution is required under the Judges' Rules. At the same time Parliament might reflect that the previous law represented a balanced and mature approach to the task or reconciling the due administration of the individual's rights and the community's interest in "the proper investigation of crime, prosecution of offenders and the protection of the public".

A plentiful feast

Whatever the Court of Appeal decides in *R v Goodwin*, the full implications of s 23(1)(b) have yet to be explored. Some of the issues which will arise for resolution may be indicated. Then, it is inevitable that a number of the decisions reached will give rise to further issues which will in turn require determination. There is no reason, at present, to suspect that the experience of this country will be dissimilar to that of Canada where the courts have been deluged with proceedings challenging the validity of the procedures followed and the principles applied in the criminal process. A short reference to some of the issues will provide the background to my final submission seeking an approach to the question of remedies which is unreservedly flexible, and which admits scope for the Courts, in the exercise of their discretion, to adjust the remedy in accordance with the overall dictates of justice. The approach adopted to s 23(1)(b) can also usefully be extrapolated and applied to other principles and procedures laid down in this part of the Bill of Rights to provide some idea of the nature of the issues which will be required to be resolved and which confirms, I believe, the need for the more flexible approach to remedies which I will later endorse.

Having regard to the length of the treatment already accorded s 23(1)(b) in this paper, it will be sufficient to shortly list some of the questions which remain to be resolved. In approaching such an exercise, one must bear in mind the admonition of Hardie Boys J in *R v Salmond*:[66]

> The Bill of Rights Act holds an important place in the statute book and has a significant role to play in the formulation and the administration of the law. It is not well served when treated as a straw to be clutched when no other aid is at hand. It is demeaned and trivialized when resorted to indiscriminately or on tenuous grounds.

A number of decisions have since been given in which the observation has been made that the arguments advanced "trivialize" the Bill of Rights. Whether or not the following points will do so will largely depend on the factual situation in which they are raised and the sophistication with which they are advanced. The points may be listed as follows:

65 Jaffe, *English and American Judges as Lawmakers* (1969) esp pp 20 and 48.
66 (CA 1/92, 23 March 1992) 3.

* The police must provide the suspect with a reasonable opportunity to exercise the right to a lawyer. While what is reasonable will be no doubt worked out over a number of cases, problems can be expected to arise whenever a lawyer, or the selected lawyer, is not available.

* Will it be enough to inform the suspect of his right and provide him with a telephone, or will the police be expected to further facilitate the suspect's efforts to exercise his right?

* Will the police be required to provide an interpreter where the suspect does not understand, or does not appear to understand, the advice as to his right to a lawyer? To what extent will the police be required to otherwise ascertain that a suspect understands, not only what is said, but the significance of the information conveyed? He may be suffering from drunkenness or shock and his ability to understand impaired. Will the police ne required to wait for him to become sober or recover?

* Will it suffice to hand the suspect a card containing a statement of his rights? Canadian cases suggest that it may not.

* Will it be enough to tell the suspect that he can ring a lawyer or must the police convey the information in terms of a "right"? Smellie J has suggested that the language of a "right" should be used.[67]

* What is the position if the suspect cannot, or believes he cannot, afford a lawyer? Must the police advise him of the position relating to legal aid? Must they assist him apply for legal aid? If groups of lawyers or legal services are organised to be available in the event that the chosen lawyer is not, must the police advise the suspect of these groups?

* To what extent will the suspect be allowed the lawyer of his choice? What are the consequences if that lawyer is not available but other lawyers are?

* Must the police inform the suspect of his right to a lawyer "without delay"? Judicial opinion varies. In *R v Grant*, McKay J[68] held that the importance of the words "without delay" is to ensure that the person in custody is not delayed once he has requested access to a lawyer. On the basis that the subsection must be construed so as to make the right effective, Smellie and Anderson JJ have both suggested that advice of the right must be given without delay.[69]

* Once the suspect has been informed of his right to a lawyer, the police will no doubt be required to cease asking questions of the suspect until he has had the opportunity to exercise the right. But must the police also refrain from asking questions or otherwise eliciting evidence from the suspect until after the lawyer has arrived and had the opportunity to discuss the matter with his client? Although in practice the questioning has at times proceeded pending the arrival of the lawyer, the purposive approach would require that it cease.

67 R *v Dobler* (HC Auckland, T 21/92, 8 July 1992) at p 15.
68 (CA 443/91, 19 March 1992) 5.
69 R *v Dobler* (HC Auckland, T 21/92, 8 July 1992, Smellie J); R v Tunui (HC Auckland, T 223/91, 10 March 1992, Anderson J).

* Will the police be required to reinform the suspect of his right to a lawyer where the charge, or the jeopardy in which the suspect is placed, changes?

* Will the right to be informed be regarded as effective if it is not proceeded by or made contemporaneously with the advice that the suspect may refrain from making a statement? Delaying the advice that the suspect may remain silent could in certain circumstances undermine the value of the suspect's right to a lawyer.

* Where the police fail to give the necessary information and the suspect makes incriminating statements, will the police then be able to give the advice and ask the suspect to repeat what he has said? As has been seen, in certain circumstances the police can do this in the United States.[70]

* Hard or tangible evidence which would have been discovered and adduced irrespective of the accused's confession may be admitted; but should evidence acquired as a consequence of the accused's confession invariably be excluded?[71]

* Will incriminating statements obtained without the information being given be able to be used by the prosecution to impeach the accused in cross-examination as in the United States?

Many of the above questions, as with issues of causation and waiver, will turn on the facts. What becomes clear, I suggest, is that most of the questions should not be resolved without full regard being given to the question of whether the accused is prejudiced in obtaining a fair trial. There are and will be shades of violations; some will be significant, others peripheral. At times, perhaps, consideration of whether the accused has been prejudiced or his right to a fair trial significantly impaired, may be overwhelmed by the need to vindicate the Bill of Rights; yet at other times these considerations will and should predominate.

Much the same conclusions can be drawn from a brief survey of the issues which will arise for determination in respect of other criminal procedures and rights provided in the Bill of Rights. Not every provision, however, can be examined in this paper. I have already indicated the difficulties which will arise for the police in complying with the requirement of s 23(1)(a). Nor need I speculate upon the effect which s 24(a), which requires that everyone who is charged be informed promptly and in detail of the nature and cause of the charge, will have on existing procedures. The scope for argument centred on the words "promptly and in detail" are self-evident. The requirement in s 24(b) that the accused be released on reasonable terms and conditions unless there is "just cause for his continued detention", has already been discussed in the context of granting bail.[72] The influence of the paragraph is undoubtedly not spent.

The right to have adequate time and facilities to prepare a defence, affirmed in s 24(d), will be relevant to the question of whether in certain circumstances adjournments should be granted. It has already been pressed in that context.[73] But further attention may be

70 See note 39 above.
71 See below, text accompanying notes 86-87.
72 *O'Connor v R* (CA 305/90, 16 November 1990); *I v Police* 7 FRNZ 674; *Horopapera v R* (HC Tauranga, 16 December 1991, Penlington J).
73 *R v Shaw* [1992] 1 NZLR 652; *Hines v MOT* (HC Auckland, AP 168/91, 3 September 1991, Henry J).

expected to be given to the adequacy of the "facilities" required by the accused to prepare a defence. Will the phrase encompass, for example, scientific evidence for a legally-aided accused at rates which the Court might not presently approve? Furthermore, what is the position if an accused who is not on legal aid but who nevertheless is not able to afford the facilities which his counsel claims are essential to the preparation of his defence? Section 24(f), conferring on an accused the right to receive legal assistance without cost "if the interests of justice so require and the person does not have sufficient means to provide for that assistance", raises the question of whether the Courts are obliged to accept the Executive's determination of a person's means. In other words, notwithstanding that an accused does not qualify for legal aid, is it open to the Courts to hold that he does not have "sufficient means" to exercise his right to legal assistance?

The right to a "public" hearing, as well as a fair hearing, in s 25(a) may bear on the exercise of the Court's power to prohibit the publications of proceedings, as discussed in *Police v O'Connor*,[74] as well as the issue of name suppression. The principle that everyone is presumed innocent until guilty (s 25(c)) has always been a basic tenet of our criminal justice system. Yet, its description as a right in the Bill of Rights will mean that it will be invoked with greater force whenever it is remotely arguable that a statutory provision shifting the onus of proof to the accused cannot mean what it says.[75] Finally, s 25(f), which gives the defence the right to "obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution" may give rise to the plea that an accused is being denied this right where he does not have the same resources as the Crown to obtain the attendance of costly experts as witnesses for the defence.

Certain key provisions may now be addressed in more detail.

(i) *Sections 23(4) and 25(d)*

The point has already been made that the right to refrain from making a statement after being arrested or detained does not encapsulate the so-called right to silence. But I would not quibble with the terms of the subsection. The use of the phrase "right to refrain from" is more morally neutral than many of the formulations of the right to silence advanced by its endangered adherents. Be that as it may, the wording of the present caution may be inadequate. The police officer usually says; "You are not obliged to say anything, but anything you say may be given in evidence". Presumably, however, if the right to refrain from saying anything is a right at the stage a suspect is arrested, it is a right at the time the police officer has decided to charge him with a crime. The underlying principle against self-incrimination would not permit a valid distinction to be drawn between the two situations. If this is so, it is certainly arguable that the suspect should be cautioned in terms that reflect the nature of his "right" to remain silent when he or she is being questioned as a suspect.

Another aspect of the law as it is developing in relation to the so-called right to silence which may require rethinking is the effect the Bill of Rights may have on the Judge's

74 Police *v O'Connor* [1992] 1 NZLR 87.

75 This has already occurred; see R *v Phillips* [1991] 3 NZLR 175; *R v Rangi* (CA 43/91, 19 July 1991); *R v Elvines* (CA 269/91, 13 December 1991).

ability to comment where the accused has refrained from giving evidence. In appropriate circumstances, it is open to a Judge to instruct the jury that, if there is evidence pointing to the guilt of the accused, they may draw an adverse inference from his silence.[76] A number of reports into criminal procedure in the United Kingdom have recommended that trial judges should direct the jury that it may draw an adverse inference in such circumstances in much more robust and vigorous terms than is customary.[77]

Cooke P referred to this topic in his addendum to *R v Butcher*.[78] The learned President said:

> The present law certainly allows an inference adverse to an accused to be drawn if he remains silent at trial in the face of evidence pointing to his guilt. Moreover, by virtue of s 366 of the Crimes Act, the trial Judge may comment to that effect in his summing up to the jury .... The accused is not bound to give evidence, but he refrains at the foregoing risk, so the expression "right to silence" can be somewhat misleading.

This agreeable observation was followed by further dicta in *R v McCarthy*:[79]

> In the ordinary run of cases trial Judges are not to be discouraged from exercising their right of comment ... and we think that criticism of the one-sided effect of the so-called "right to silence" will be less justified if Judges bear this in mind. Silence certainly does not give rise to an inference of guilt; but, depending always on the particular facts, the prosecution evidence and natural inferences from it may more easily be accepted if not contradicted from the accused or other evidence called for the accused. In general, and subject again to the particular facts, the Judge is well-entitled to explain this to the jury. It may well be desirable to do so to prevent "the right to silence" from being over-exploited.

Implicit in the above observations is the notion that the risk of comment and an adverse inference being drawn if an accused does not give evidence is required to off-set the danger that the "right to silence" will be abused. In other words, if it is known that the Judge may comment on the accused not giving evidence and instruct the jury that they may draw an adverse inference from that omission, suspects who are arrested are less likely to shelter in silence, either under questioning by the police or in Court. Before examining the implications of this development having regard to the Bill of Rights, I will briefly proffer two reasons why this stratagem, if it be such, may not work.

The first reason is the unwillingness of some Judges to comment at all, notwithstanding the express authorisation to do so in s 366(1). With many lawyers, the notion invades an article of faith, their inviolate conception of the right to silence. A combination of a frozen Hell and flying pigs will intervene before there is any change of heart on their part. In such circumstances, apart from the fact that the suggestion of the Court of Appeal will not be universally implemented, justice ceases to be even-handed and the outcome of a trial may arbitrarily depend on the identity of the presiding Judge.

The second point I demonstrated in practice. Stirred by the exhortation in the various

76 (CA 1/92, 11 February 1992) 3.
77 Eg, Home Office, *Report of the Working Group on the Right to Silence* (13 July 1989) para 114.
78 Above, note 47, p 268.
79 (CA 263/91, 27 February 1992) ??, per Cooke P.

United Kingdom reports, and choosing a case in which it was clearly "safe" to do so, I commented on the fact that the accused had refrained from giving evidence in "robust and vigorous" terms. Perhaps I overdid it, but it left me feeling considerable disquiet. It seemed to me to impair the judicial detachment which should mark a Judge's direction to the jury. This impression was no doubt exacerbated by the fact that Crown counsel, because he could not do so by virtue of the statute, had not first advanced the point. Possibly, it would be preferable to change the legislation so as to allow the prosecution to comment with the leave of the Court, reserving for the Judge the responsibility of correcting any excessive zeal in the comment which is made.

Even if the Judge's ability to comment is practicable and becomes more prevalent, the Bill of Rights may inhibit its utilization. Of itself, the right to refrain from making a statement following arrest would not have this effect.[80] Combined with s 23(d), which provides the accused with the right not to be compelled to be a witness, however, the basis of an argument which would restrict the Judge's ability to comment undoubtedly exists. Drawing attention to the fact that the Supreme Court in the United States has held that judicial comment on an accused not giving evidence was a breach of the Fifth Amendment, Jeffries J raised the point in *R v Andrews*.[81] But just as Jeffries J did, I will also leave the issue "for full argument on another occasion".

(ii) *Section 25(b)*

Another provision which illustrates the consequences of converting principles into constitutionally recognized rights, is s 25(b). This paragraph guarantees an accused the right to be tried without undue delay. The need to avoid excessive delay in the prosecution of an accused has in the past been recognized under the "abuse of process" rubric. Generally, the accused must demonstrate that the delay in the prosecution of the offence has prejudiced his ability to obtain a fair trial.[82] The shift in the focus to the rights of the accused may require this approach to be modified. Other aspects of an over-long delay, such as the stress to the accused, loss of esteem in the community, loss of employment, disruption to the family, exposure to increased legal fees, and the like, will not necessarily impede the accused's ability to obtain a fair trial but may now need to be taken into greater account.[83] In Canada, these kind of features have been described as "the overlong subjection to the vexations and vicissitudes of criminal accusations".[84]

(iii) *Section 25(h)*

Finally, I propose to focus on s 25(h) because it will serve to demonstrate that no aspect of criminal procedure or principles are immune from the searching touch of the Bill of Rights. Section 25(h) provides that an offender has the right if convicted of an offence to appeal against the conviction or *against the sentence* to a higher court. It is to be noted

80 "The So-Called Right to Silence", above, note 6, pp312-314.

81 (CA.336/91, 15 April 1992) 6-7.

82 See *R v Williams* [1985] 1 NZLR 294; *Watson v Clarke* [1990] 1 NZLR 715; *Department of Social Welfare v Stewart* [1990] 1 NZLR 697; and *R v Ete* (HC Christchurch, T 37/90, 4 July 1990, Holland J).

83 See R*ahey v R* (1987) 33 CLC (3d) 289; and *R v Askov* (1990) 79 CR (3d) 273.

84 Ibid. See also Paciocco, "Remedies for Violation of the New Zealand Bill of Rights Act 1990", above, note 1, pp 56-57.

that, in respect of sentence, the right to appeal to a higher court is a right to appeal *against* the sentence. What impact, then, will the provision have on an appellate court which effectively imposes the sentence on the offender against which he might wish to appeal? An offender cannot complain if his sentence is reduced because he has then had the opportunity to appeal *against* his sentence. But clearly my rarely invoked practice, but practice nonetheless, of increasing a sentence upon an appeal against sentence from the District Court where the sentence which has been imposed is manifestly inadequate will have to be rethought unless the right of the appellant to appeal to a higher court is otherwise secured.

Sentences which the Crown appeals against pursuant to s 383(2) of the Crimes Act 1961 may be under the same question-mark. Let us suppose an offender is sentenced to a term of supervision in the High Court. He does not want to appeal *against* that sentence. But the Crown does so and, in response to its submission, the Court of Appeal vacate the sentence of supervision and substitute a sentence of three years' imprisonment. Effectively, this is the first opportunity the offender has had to appeal *against* his sentence. As best I can ascertain, leave to appeal to the Privy Council against sentence has been rarely, if ever, granted, but could leave properly be refused to an offender who was in substance and effect seeking to exercise his first opportunity to appeal *against* his sentence? Adopting a purposive approach and accepting that the provision is designed to ensure that no-one is required to suffer a grievance, at least without one right of appeal, it is doubtful if leave could be refused.

To secure this right it is probably desirable that the Legislature examine the procedure available for appeals by the Crown under s 383(2) with a view to interposing an appeal to, say, two or three High Court Judges so that a further right of appeal to the Court of Appeal could be provided in the event that the sentence is increased.

The vexed question of remedies

In its wisdom Parliament saw fit not to include any provision in the Bill of Rights stipulating the remedies which would be available to the Courts to secure the rights, or the criteria to be applied in determining the appropriate remedy in any particular case. It is most unlikely that this was an oversight. The Canadian Charter, which served the draftsman as a model, contains a provision which requires evidence obtained in breach of the fundamental rights in the Charter to be excluded if "having regard to all the circumstances, the admission of it [the evidence] in the proceeding would bring the administration of justice into disrepute".[85]

The omission of a specific provision in the New Zealand statute could mean a number of things; it could mean that Parliament was satisfied with the existing law; it could mean that the Legislature thought that the criteria provided in Canada of bringing the administration of justice into disrepute was too severe or, perhaps, equivocal; or it could mean that Parliament apprehended that the question of remedies was a complex one requiring a flexible response which could be best worked out by the Courts on a case by case basis. For myself, I suspect that the question was not properly thought through, but

85 Section 24(2).

I doubt that Parliament anticipated any drastic change in the law. If it had wanted to change the direction of the remedial law for a breach of fundamental rights when the Courts had already described such principles as "rights" and, at times, "fundamental rights", it could have been expected to say so. But it did not.

This is not to say, however, that the Courts could simply have applied the existing law once the rights were spelt out in a constitutional document. While I reject the notion that it is open to the Courts to forge a fresh start, I accept that some modification to the existing law is inevitable. The question is; how far should it be modified?

In responding to that question I begin with the objective articulated by Bisson J in *R v Webster*,[86] which I have already quoted. I make no apology for quoting it again:

> While the courts have a supervisory function over law enforcement officers, it is not a disciplinary body. The ends of justice must be the paramount consideration. Fairness to the person being interviewed is not to be assessed in a vacuum but in the light of all the circumstances of the particular case and having regard, too, to the public interest in the proper investigation of crime, prosecution of offenders and the protection of the public.

To my mind, the critical task for the Courts in revising and evolving the remedies for a violation of the fundamental rights in the Bill of Rights is to seek to perpetuate this objective as far as is consistent with the objective of promoting and protecting those rights. Whenever possible this would mean preserving for the Courts the ability to weigh the competing interests, one against the other, in order to reach a decision which is both fair to the suspect and consonant with the overall justice of the case. It would also mean mitigating the more extreme application of the Canadian rights-oriented approach with a measured dose of judicial discretion. The endeavour must be made, to my mind, to strike a sensible balance between valid competing interests which remain extant notwithstanding – and despite – the enactment of the Bill of Rights.

Contrary to the Canadian experience, I do not doubt that the Courts in this country will retain the need to establish a causal link between the challenged evidence and the violation. To exclude real evidence which would have been discovered and adduced in any event, and which is in that sense unrelated to the violation, would seem to represent a friendly bonus to the accused and to be out of all proportion to the breach. I consider, however, that there may be an argument to reconsider the admission of evidence excluded because it was discovered "as a consequence" of the accused's confession where that evidence possesses independent probative value. For example, if in the course of a confession given without a caution or advice of the accused's right to a lawyer, the accused mentions the name of a witness to his aggravated robbery who would not otherwise have been identified by the police, the independent and probative evidence of that witness should, I believe, be admitted.

Essentially, I consider that what is required is a flexible approach to the question of remedies. At times this flexibility will relate to the choice of remedy; at other times it will relate to the basis or rationale for applying or rejecting a given remedy. Depending on the particular infringement a Court may select one of a number of remedies; it may stay the

86 Above, note 18, p 140.

prosecution; it may quash a conviction; it may exclude evidence; it may issue a writ of habeas corpus; it may, possibly, grant compensation; it may leave it to the accused to pursue a complaint with the Police Complaints Authority; or it may leave the infraction to be dealt with as a matter of internal police discipline, perhaps following a recommendation that the matter warrants an inquiry. Flexibility is also obviously required to enable the remedy to bear some proportion to the seriousness of the breach. It would, I suggest, be an over-zealous application of the rights-oriented approach to suggest that the same violation should be met with the same remedy in both a case of murder and a case of driving without a warrant of fitness. Flexibility permits pragmatic considerations to enter into what may otherwise appear to be a rather sterile legalistic exercise.

The difference in approach, and the problem of rectifying it with words, can be illustrated by contrasting the different judicial reactions to the notion that unconstitutionally obtained evidence should be excluded if it would "bring the administration of justice into disrepute" or, more generally, would otherwise be contrary to the interests of justice or the public interest. To one school of thought the exclusion rule should be applied aggressively because it is in the public interest to enforce police compliance with the Bill of Rights. Failure to exclude the evidence would in fact discredit or undermine the administration of justice. The way to inculcate the values underlying the rights affirmed in the Bill of Rights, it is said, is to therefore apply an aggressive or severe remedy for any non-compliance. Admitting non-complying evidence tends to be perceived as a condonation of the breach and to involve the Court in the complicity of allowing a "tainted prosecution" to continue.[87] Such an approach allows for few or limited exceptions.

The other school of thought tends to the view that to exclude relevant and probative evidence solely to vindicate the right which has been breached, when the accused has not been prejudiced or the trial will not be rendered unfair by the admission of the evidence, is itself to bring the administration of justice into disrepute. To this school, the application of an aggressive or severe remedy, far from inculcating the values underlying the fundamental rights affirmed in the Bill of Rights, is likely to have the opposite effect and bring those values into disrepute and disapproval.

How, then, can the conundrum be resolved? It is not easy simply because the Bill of Rights cannot, as Cooke P has said in *R v Butcher*, be reduced to just another relevant factor.[88] In *R v Waddel*[89] I said as much the day before *R v Butcher* was released. But I overstepped the mark in foreshadowing the prima facie rule of exclusion.[90] I now doubt that such a rule is necessary. It sets a standard which is too high to enable competing considerations relating to the interests of justice in the particular case and the public interest generally to exert the influence which such factors should rightfully wield.

If, however, the Bill of Rights is not to be reduced to just another relevant factor, it is difficult to see what other formula might be adopted. Possibly, the primacy of the Bill of Rights could be recognised by making the imposition of a remedy, such as the exclusion of the offending evidence, a presumptive remedy which could be rebutted by other

87 Paciocco, above, note 1, p 42.
88 Above note 33, pp 266-267.
89 (HC Auckland, T 119/91, 25 October 1991) 17-19
90 Ibid.

considerations. But I am not certain whether in practice the difference between a prima facie rule and a presumption would be all that significant. What is required, to my mind, is a readiness on the part of the Courts to accept that any prima facie rule or presumption can be properly resisted wherever there is good reason for doing so. Any requirement that special reasons, such as the need to prevent the threatened destruction of evidence, the interests of public safety, or emergency situations, must exist to displace the primary rule is far too restrictive. Section 5, while not directly applicable, provides a measure of the Legislature's expectation that the fundamental rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society. The formula must therefore provide the Courts with access to the interests of the community and the central aim of ensuring the successful detection, prosecution, and conviction of those guilty of crime.

If, as I have suggested above, it is incumbent upon Parliament to clarify its intention, the addition of a remedies clause would be appropriate. Whether the application of a remedy is specified as a prima facie rule or as a presumption would not necessarily matter, providing it is clear that it can be refuted by grounds relevant to the community interest and the overall administration of criminal justice. But a broad reference to these factors would not, I suspect, be sufficient. Express provision would need to be made requiring the Courts to have regard to the question of whether the accused was prejudiced or his right to a fair trial significantly impaired by the infringement.

I appreciate that this formula will not satisfy those who adhere to the rights-oriented approach and perceive the vindication of the Bill of Rights as the dominant, if not the overriding, factor. There is, however, nothing inherently wrong with the notion that fundamental rights may be held by the citizen subject to the interest of the community in the way in which those rights are enforced. While improperly obtained evidence would not necessarily be admitted every time an accused fails to show that he is prejudiced or that his right to a fair trial would be significantly impaired, his complaint in such circumstances is at once directed to an objection that his fundamental rights have been violated. At this point the accused himself invokes the public interest in vindicating those rights. With the public interest put in issue, the Courts must be entitled to look to the wider community interests.

It also will be said that such a formula does not provide an "effective remedy" for a breach of the Bill of Rights. Reference will be made to Article 2, 3(a) of the International Covenant on Civil and Political Rights which requires that "any persons whose rights or freedoms herein recognized are violated shall have an effective remedy". Articles 8 and 2(3) of the Universal Declaration of Human Rights are substantially to the same effect. But they apply to rights "herein recognized", and a number of rights affirmed in New Zealand, such as the right to a lawyer and to be informed of that right and the right to refrain from making a statement, are not rights which are identified in those Covenants. It has been observed by one commentator that the exclusion of evidence would be regarded as a very eccentric way of enforcing standards in nearly all the signatory countries to the Covenant.[91] Indeed, what is "effective" is an open argument. For my part

91 Robertson, "Confessions and the Bill of Rights" [1991] NZLJ 398, 399.

I find it difficult to accept that, if it was thought that the existing law was effective to safeguard the rights of the accused prior to the enactment of the Bill of Rights, it is difficult to see why those safeguards should be regarded as any less effective now.

Conclusion

It fell to the lot of a Canadian Judge at first instance to point out that the Canadian Charter, paramount though it might be, should not be regarded "as the renaissance after the dark ages of the law". In more colourful and forceful language than I am capable of penning, Scollin J said:

> The Constitution is the safeguard of the citizen against the fist of the State: not his nanny. The task of protecting a person from State oppression and abuse does not require fevered solicitude for the private interest of the individual at the expense of the public interest he shares with his neighbours. To arm the individual is not to disarm the community ....[92]

I too have sought to point out that it would be wrong to regard the Bill of Rights as a renaissance. The legal system which preceded it was a mature and responsible regime in which the Courts were both solicitous for the welfare of the individual as well as the interests of the community. The rights of one were balanced and weighed against the interests of the other. The key aim of the criminal process of securing the conviction of the guilty without increasing the risk of convicting the innocent was not engulfed by a passion to vindicate the accused's rights for their own sake. The overriding importance of the principles of fairness to ensure for the accused a fair trial were desirable features of that regime. It is my belief that it is possible to reconcile this approach with the objective of providing an effective remedy to safeguard the individual's fundamental rights as affirmed in the Bill of Rights. In doing so it is, perhaps, possible that the Courts will come closer to achieving the intention of Parliament and meeting the legitimate expectations which people have in their criminal justice system.

92 R v LAR (1983) 4 DLR (4th) 720, quoted by the Right Hon Sir Robin Cooke, "Practicalities of a Bill of Rights" (1985-1986) 2 Aust Bar Rev 189, 196.