CONSTITUTIONALISING RIGHTS AND RESPONSIBILITIES IN AOTEAROA/NEW ZEALAND

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Introduction

In 1998 the Faculty of Law at the University of Otago celebrates 125 years of law teaching at the University. It is also the year in which the world community marks the 50th Anniversary of the signing of the Universal Declaration of Human Rights. This short paper is intended as a contribution to both those anniversaries and to the growing constitutional debate in Aotearoa / New Zealand. It argues for an enhancement of the domestic protection of human rights. It examines briefly the history of rights protection by New Zealand both internationally and in the domestic context; highlights three matters for improvement, namely, the "constitutionalising" of rights, increased recognition of economic, social and cultural rights; and in acknowledging the tension between the recognition of collective and individual rights, considers how that tension might be addressed by utilising the model provided by the Treaty of Waitangi. It identifies in the current situation in New Zealand a number of factors which impact on the protection and promotion of human rights into the 21st century. Finally, the paper makes some specific recommendations for change as New Zealand debates its constitutional future.

I Human Rights Protection in New Zealand : The Record to 1994

As a nation, New Zealand has an admirable history of promoting and supporting human rights initiatives and treaties at the international level. It has been a faithful member of the United Nations, taking its part in peace-keeping initiatives, for example, most recently, in Bougainville; in supporting and playing a role, often a leading role, in the mechanisms of the United Nations, for example, most recently, in its presence on the Security Council; and in the major UN and similar agencies, such as UNESCO and the World Health Organisation. It has, at least until recently, been a faithful member of the International Labour Organisation, the ILO. It has supported by regular attendance and vote and, where appropriate, ratification, the major UN human rights treaties, from the adoption of the Universal Declaration of Human Rights to the Vienna Declaration and Plan of Action. It has also taken reasonably seriously the requirements of UN treaty reporting. (See Appendix).

Domestically, again, New Zealand has a fair record in establishing a network of national rights protection mechanisms. The Ombudsman's office was

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established in 1962, the first such protection outside Scandinavia. The Race Relations Office was established in 1971, followed the ratification of the Convention on the Elimination of Racial Discrimination. The two major UN covenants, on Civil and Political Rights and on Economic Social and Cultural Rights (hereafter ICCPR and ICESCR), were ratified in 1976, and the Human Rights Commission Act which was introduced in 1977, was explicitly linked, in the Long Title, to those Covenants.[1] In 1990 the Bill of Rights Act came into force, deriving from the *White Paper* introduced in 1985.[2]

The Bill of Rights Act was followed in the early 1990s by an increase and improvement of national human rights protection mechanisms in the Human Rights Act 1993, the Privacy Act 1992, which established the office of the Privacy Commissioner, the appointment of a Children's Commissioner in 1991 under the auspices of the Social Welfare Department[3] and of a Health and Disability Commissioner in 1994. In the same period the Human Rights Unit of the Ministry of Foreign Affairs and Trade has increased in size and expertise.

It can also be argued that, in the Treaty of Waitangi, New Zealand's founding constitutional document, we have the first formulation of both individual (art 3) and collective rights (art 2) in Aotearoa/New Zealand, and a framework in which to consider and strengthen them.

II Some Neglected Issues

This record is not unimpressive either on the international or the national scene, at least until some five years ago. But in three aspects in particular rights protection has been deficient: in protection in the constitution; in the recognition of economic, social and cultural rights; and in effective ways of addressing the tension between collective and individual rights. It could also be argued that insufficient emphasis has been given, either in debate or in the documents themselves, to the necessary link between rights and responsibilities.

1 Constitutionalisation

One of the most effective ways in which rights are protected in the domestic context is by their inclusion in a constitution. New Zealand does not have a written constitution in the sense of a single code or entrenched law, although public discussion on the desirability of such a development has recently increased: see section IV below. It does, however, have a written constitution, in the Constitution Act 1986 and the Electoral Act 1993.[4] It could be argued that the

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1 The Long Title of the Human Rights Commission Act states that it is "An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights".

2 *A Bill of Rights for New Zealand, A White Paper* (1985). For an account of the *White Paper* see Rishworth, "The Birth and Rebirth of the Bill of Rights" in Huscroft and Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 1-35.

3 See Children, Young Persons, and Their Families Act 1989, s411.

4 Constitutional conventions, such as the convention that the Crown acts on the advice of Ministers, are also part of New Zealand's "unwritten constitution".

"rights" statutes, in particular the Bill of Rights Act and the Human Rights Act, are part of that "constitution". But the Bill of Rights Act is not entrenched procedurally, nor is it "supreme law" in relation to other statutes. The earlier Human Rights Commission Act was subordinate to other statutes and regulations (see section 92(2)) and the status of the Human Rights Act 1993 is currently ambiguous: see section III below. The recommendations of the Ombudsman and of other rights officers remain unenforceable and the *legal* status of the Treaty of Waitangi continues to depend on its ad hoc recognition in particular statutes (for example in Section 9 of the State Owned Enterprises Act 1986) and therefore on the whim of particular governments. The maintenance of fundamental rights and freedoms deserves better constitutional protection and models are not wanting for ways in which this can be done. These are discussed below in section IV.

2 *Increased Recognition of Economic, Social and Cultural Rights*

The Universal Declaration included both civil and political rights[5] and economic social and cultural rights.[6] But in the two Covenants which followed, the historical bias towards the protection of civil and political rights was perpetuated. In brief, the ICCPR, in contrast to the ICESCR, has enjoyed the advantages of a stronger monitoring committee (the Human Rights Committee) a complaints mechanism (the First Optional Protocol procedure) and no resource - restriction clause, such as is found in article 2 of the ICESCR.[7]

This "second class" status afforded to economic, social and cultural rights has been often reflected in the domestic context. Many bills of rights and charters contain predominantly civil and political rights, for example the Canadian Charter of Rights and Freedoms, or include social and economic rights only as non-enforceable principles, as for example in Part IV of the Indian Constitution.[8]

The New Zealand Bill of Rights Act 1990 protects only civil and political rights. The 1985 *White Paper* considered but rejected the inclusion of economic and social rights, in addition to the classic civil and political rights, which, as described, have been the usual content of a Bill of Rights.[9] Economic and social rights were rejected generally, including by the Minister of Justice who promoted the debate,[10] on two traditional grounds: that such rights are "non-justiciable" and

5 For instance; Article 9 prohibiting arbitrary arrest, detention or exile; Article 19 enunciating the right to freedom of opinion and expression, and Article 7 guaranteeing a fair and public hearing by an independent and impartial tribunal.

6 For example; Article 22 guaranteeing the right to social security; Article 23 guaranteeing various work related rights, and Article 25 setting out the right to an adequate standard of living.

7 Article 2(1) states "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation... *to the maximum of its available resources* [my emphasis], with a view to *realising progressively* [my emphasis] the full realization of the rights recognized in the present Covenant by all appropriate means..."

8 Constitution of India (1949).

9 *A Bill of Rights for New Zealand, A White Paper*, infra n 22 at 23, para 3.14.

10 See Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (1996) 49-50, and Rishworth, supra n 2 at 21.

that the judiciary are unsuited to considering such possibly political issues. The Select Committee originally followed this lead in the context of an entrenched Bill.[11] However in their *Final Report*, in the context of an unentrenched Bill, they did recommend the inclusion of some economic and social rights — the right to an adequate standard of living, to work, education, property and participation in the cultural life of the country.[12] These were to be included as something akin to the Principles in Part IV of the Indian Constitution where such rights are listed as constitutional principles for the State to take into account, but are judicially unenforceable. This recommendation was, however, rejected in the Parliamentary debate on the Bill.[13]

The inclusion of only one "set" of rights in the Bill of Rights Act *can* lead to the assumption that such rights are *more* important, despite the assurance of section 28.[14] This would arguably be even more the case if the Bill were to become entrenched. And the Indian solution, following Ireland and now adopted in Papua New Guinea,[15] may simply draw attention to and therefore compound the problem.

But much progress has been made in the consideration of economic and social rights in the last few years. At international level the universality and non-divisibility of rights has been increasingly affirmed, particularly and definitively at the 1993 Vienna World Conference on Human Rights and in the Declaration and Plan of Action.[16] An optional protocol to the ICESCR has been proposed.[17] The pre-eminence of civil and political rights has been, it can be argued, largely due to historical factors in the West. Recent analyses and cases have demonstrated that the distinction between civil and political rights, as cost-free and requiring no policy input, and social and economic rights, as expensive for the state and casting the judiciary in the political, or worse, economic role, are over simplistic.[18]

Arguments are often made, and were in the debate on the Bill of Rights Act in New Zealand,[19] that judges are not suited to policy-making roles. It is argued that judges become "politicised", called on to make judgments on policy matters best left to politicians, that is, to elected representatives. The "sovereignty of parliament" is frequently invoked. It is also argued that the appointment of judges would need to be subject to scrutiny, as in the USA, and certainly more transparent; and that the legislative process would become paralysed by becoming thus entangled in the court process.

11 *Interim Report of the Justice and Law Reform Select Committee, Inquiry into the White Paper-A Bill of Rights for New Zealand* (1987) 79.

12 *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1988) 3- 4.

13 See Hunt, supra n 10, and Rishworth, supra n 2 at 21.

14 Section 28 states "An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part".

15 See Article 45 of the Constitution of Ireland (1937) and Article 63 of the Constitution of the Independent State of Papua New Guinea (1975)

16 *The Vienna Declaration and Programme of Action* UN Doc A/CONF157/DC/1/Add1 1993.

17 Ibid, at Part II C, para 75.

18 See generally, Hunt, supra n 10 at 53- 69.

19 Ibid, at 43- 53, and Rishworth, supra n 2 at 15- 18.

These are certainly matters for debate; and indeed the representation and selection of the judiciary is under scrutiny at present. It is an important subject for the standing of the law, regardless of the status of a Bill of Rights. As to the judiciary considering policy or even political matters, two aspects need to be considered: put bluntly — should they? and could they? The first raises questions about theories of the separation of powers and the non-elected nature of the judicial office; the second of training and suitability. But two points should be borne in mind also: there is a limit to how much "policy" is made in these circumstances, that is in striking down an Act for non-compliance with the Bill of Rights. The abortion debate in Canada provides an example of the limits to "policy-making" by the court in the context of the overall debate.[20] Secondly, these arguments often ignore just how much "policy" and "political" matters are decided in the courts, particularly the higher courts, already. One has only to consider as an example the *Maori Council* case.[21] Judges are wont, quite reasonably, in the rights area to point to the fact that our present rights have developed not only from international models but to a considerable degree within the common law.

There is a growing interest in New Zealand in the protection of economic and social rights and in the question of the "social contract", as those rights are seen to be increasingly under threat in the current political and international climate. The government itself has recently introduced for debate the question of legislating a "social code": see section III below.

3 Collective and Individual Rights and the Treaty of Waitangi

As mentioned earlier, the Treaty of Waitangi can be seen as New Zealand's first, and most fundamental, rights document. In articles 2 and 3 it encapsulates both collective and individual rights. Yet its legal status remains obscure, absent a direct reference in an empowering statute.

The 1985 *White Paper* recommended, in the context of an entrenched Bill of Rights, that reference be made to the Treaty in the Long Title and that its recognition be one of the two Objects of the Bill and, secondly, that the rights in the Treaty should be formally recognised in the Bill of Rights, so that other legislation would be read subject to it.[22] This proposal had the support of the Minister and of academic commentators.[23] There was considerable opposition, particularly from Maori, to the Treaty of Waitangi being incorporated in any way in the Bill, and, in the event, the Select Committee recommended that there should be no reference to the Treaty.[24] Certainly in an unentrenched Bill, arguments that the inclusion of the Treaty would demean its status and make it liable to alteration or repeal, seemed to have some validity.

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[20] See *R v Morgentaler* (1985) 12 DLR (4th) 502 (Ont HC); (1985) 22 DLR (4th) 641 (Ont CA); (1988) 44 DLR (4th) 385 (Can SC).

[21] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

[22] *A Bill of Rights for New Zealand, A White Paper* (1985) 37, para 5.15.

[23] Elkind and Shaw, *A Standard For Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (1986) 36- 46.

[24] *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1988) 3- 4.

Moves to give constitutional recognition to the Treaty of Waitangi introduce another linked issue, the recognition of collective or group rights. The emphasis in human rights documents hitherto, both nationally and internationally, has indeed been on the rights of individuals. But the right of individuals to full identity may require the recognition of a collective of which they are part. The pre-eminence of individual rights may again be one of historical western emphasis. There is no inherent reason why collective rights cannot also be included in a bill of rights, if appropriate. Internationally and in other jurisdictions significant developments have occurred in the last decade in the recognition of "collective" or group rights. Both the African Charter[25] and the Draft Declaration on the Rights of Indigenous Peoples 1992[26] include them. Collective rights may be particularly significant in relation to the preservation of language or culture and to the protection of minorities and would be particularly appropriate in New Zealand now.

Aside from the undeveloped potential represented by article 2 of the Treaty, New Zealanders as a society and New Zealand law demonstrate significant examples of the recognition of collective rights and responsibilities, an aspect which has been largely lost sight of in the period since 1984. These examples are to be found in mainstream Pakeha law and institutions — that is without any consideration of the value and importance of group recognition in Maori society and structures. Recognition of collective rights was a feature of New Zealand's industrial relations system for almost a century. State health care, education and social security presupposed a policy network of group rights and responsibilities, or at least individual rights arising from membership of a group and collective responsibilities, even where the group was not a minority group but might extend to all citizens. A significant example is provided by the original Accident Compensation Scheme, as outlined in the *Woodhouse Report*, one of the five pillars of which was "community responsibility".[27]

4 Duties and Responsibilities

Raising the profile of the "rights debate" and entrenching rights more strongly is often said to have the adverse societal effect of increasing the tendency to consider rights in isolation from corresponding duties and obligations. That necessary link was made when the Universal Declaration of Human Rights was being drafted — in a letter in reply to a request for his input into the content of the Universal Declaration, Mahatma Gandhi wrote:[28]

> I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.

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25 See Articles 19- 24 of the African Charter on Human and Peoples Rights (1981).

26 See, inter alia, operative paragraph 5.

27 *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (1967) 39- 40.

28 Mahatma Gandhi, *A letter addressed to the Director-General of Unesco* May 25th, 1947.

As is clear from the previous paragraph, all rights can only be effectively protected within a web of reciprocal rights and duties: that is rights are effectively protected only within a community; there are corresponding duties imposed on the state; and individual duties on all members of the community in the respecting of others' rights.

It is not impossible to include reference to duties or obligations in rights documents. Article 29(1) of the Universal Declaration of Human Rights and Chapter II of the African Charter provide examples.[29] Such articles refer not to the duties of the state in relation to individual rights, which are present, as it were, by implication as the corollary of citizens' rights, but to duties of individuals. There is no inherent reason why this could not be done in New Zealand.

III Current Social and Political Factors which affect the Protection of Human Rights in Aotearoa/New Zealand.

There have been a number of changes in the last fifteen years in New Zealand, and a number of factors in the current political and social context, which suggest a need for increased protection of human rights in the domestic context. The change to a different political system — the MMP system of proportional representation — was itself partly brought about by a perceived lack of checks and balances in the constitutional system, revealed in the speed with which "reforms" had been carried out and in the general unremedied disenchantment with aspects of them. That very change in the political system has brought a different legislative environment where legislative change or development may be more difficult to bring about, particularly as both as voters and as parliamentarians, we become more practised at the politics of an MMP election and Parliament.

The period since 1984 has also been marked by an increasing withdrawal of the government from areas where New Zealanders have traditionally looked to the state for policy initiation and protection. Many of these are areas where the economic and social rights and responsibilities of individuals and groups are affected : health care, education, social security and employment and industrial relations.

On the more positive side, some changes and developments suggest ways in which rights protection may be increased. The last two decades have seen a resurgence of Maori on the political and constitutional scene and attempts at government and judicial level to give constitutional meaning to the Treaty of Waitangi. Both government and Maori are currently further exploring models, often constitutional models, for such recognition.

Another significant feature has been the operation of the Bill of Rights Act itself. Briefly, from small beginnings in the area of criminal procedure, where lawyers were on familiar ground, the effect of the Bill of Rights has become

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[29] Article 29(1) of the Universal Declaration of Human Rights states that "Everyone has duties to the community in which alone the free and full development of his personality is possible" and Articles 27- 29 of the African Charter on Human and Peoples' Rights (1981) are concerned with the duties of individuals.

increasingly evident in, for example, cases concerned with mental health, education, employment, discrimination and religion. More importantly, the very existence of the Bill of Rights, and increasing judicial and legal familiarity with it, have had a considerable impact on the building of a "rights" climate within the New Zealand legal system. This is evidenced by the very passage of the Human Rights Act 1993; by the developments in the jurisprudence of the Bill of Rights itself, as represented by the extension of the availability of remedies in the *Baigent* decision;[30] and by developments in the wider law towards greater recognition of the importance of international human rights treaties in the domestic context, as evidenced by the *Tavita* case.[31]

The United Nations human rights treaty monitoring system, though still underfunded and short of its full potential, is slowly gaining acceptance and a higher profile in New Zealand, especially with the accession to the First Optional Protocol, the 1993 CTU complaint to the ILO,[32] publicity over the first report to the Children's Committee[33] and recent Ministry initiatives towards consultation.

Another significant development which has the potential to affect rights protection by the state, or to make more urgent the strengthening of those protections, is the lessening of the power of the state within the global context. On the one hand, the laws and institutions of New Zealand are increasingly affected by international legal obligations in all fields.[34] This makes it increasingly important that human rights obligations be recognised in the negotiation of, for example, trade and investment arrangements. In New Zealand initial measures have already been agreed to for keener parliamentary scrutiny before the ratification of international treaties,[35] acknowledging the significance for domestic law and institutions of such negotiations.

Within New Zealand another significant factor is the increasing debate around a number of constitutional issues, including not only proposals for a written constitution but questions about the desirability of a republican system and the removal of the appeal to the Privy Council and various suggestions for an alternative, all encapsulated in the Bill introduced earlier this year by the Hon Mike Moore.[36] It is important that human right protection remains on this agenda.

30 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 647.

31 *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

32 *Complaint Against the Government of New Zealand by the New Zealand Council of Trade Unions* (8 February 1993); International Labour Office Governing Body, *292nd Report of the Committee on Freedom of Association; Case No. 1698* (Geneva, March 1994); International Labour Office Governing Body, *295th Report of the Committee on Freedom of Association; Case No. 1698* (Geneva, November 1994) 40.

33 Ministry of Youth Affairs, *United Nations Convention on the Rights of the Child: Responses to Questions from Geneva on Initial Country Report* (1997).

34 See Sir Kenneth Keith, "A Bill of Rights; Does It Matter? A Comment" [1997] 32 Texas International Law Journal 393, 394 and "The Application of International Human Rights Law in New Zealand" [1997] 32 Texas International Law Journal 401, 418- 420. See also Cabinet Office, *Cabinet Office Manual* (1996) 7.

35 See Law Commission, *Report 45, The Treaty Making Process: Reform and the Role of Parliament* (December 1997), and Sir Geoffrey Palmer, "Human Rights and the New Zealand Government's Treaty Obligations" Paper presented to the International Law Association (April 30 1998) 7- 8.

36 Constitutional Convention Bill 1998 launched in January 1998.

But there have been a number of recent developments which suggest that the hard-won rights represented by the Bill of Rights Act, the Human Rights Act and these other encouraging factors are at risk. Last year the idea was mooted in cabinet that the Human Rights Act be amended to exempt the government ("the Crown") altogether from the ambit of the Act. Other suggestions included a proposal for a "hierarchy of rights", privileging the grounds of discrimination as found in the earlier 1977 Human Rights Commission Act and the Race Relations Act 1971 over those added in the 1993 Act.[37] Although neither of these courses has been followed as yet, the very fact that they were raised at all is disquieting. The government is intending to proceed with another initiative, namely the downgrading of the Human Rights Commission's "Consistency 2000" project. Pursuant to sections 5(1)(i),(j) and (k) of the Act which enjoined on the Commission the task of reporting to government by the end of 1998 on "whether any of the Acts, regulations, policies, and practices examined... conflict with the provisions of Part II of this Act or infringe the spirit or intention of this Act",[38] the Human Rights Commission had set up a programme entitled "Consistency 2000" which had the potential to deliver, for the first time not only in New Zealand but as a model for other human rights agencies, a comprehensive database for measuring New Zealand statutes, regulations, policies and practices for compliance with its human rights statute. This would have enabled informed choices to be made on policy decisions where a proper consideration of conflicting rights could be assessed and balanced.

Arguments have been advanced that the project is expensive and can be better achieved by individual departments' voluntary compliance. Even if this move is defeated in Parliament (it will require amendment to the Human Rights Act) it does not augur well for government commitment to human rights.

New Zealand's policies have not in the past escaped criticism from the Human Rights treaty monitoring agencies of the United Nations.[39] Matters to which the Human Rights Committee has previously drawn attention include the status of the Bill of Rights and the time delay for the implementation of sections of the Human Rights Act.[40] It is unlikely that these recent developments will go unnoticed, or unchallenged, in that forum, with consequent risk to New Zealand's reputation as a supporter of human rights. From being a leader in the field of domestic human rights protection, New Zealand is now in danger of falling behind other states — the United Kingdom, Fiji, South Africa for example — all of which are giving greater attention to improving their domestic human rights protections.[41]

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37 Prohibited grounds for discrimination in the 1977 Act were sex, marital status or religious or ethical belief as outlined in, inter alia, s15(2), s23(1) and s24(1) and in the 1971 Act race, colour, ethnic or national origin. The Human Rights Act 1993, however, not only sets out the prohibited grounds of discrimination much more comprehensively, it also includes additional grounds, such as, disability.

38 Human Rights Act 1993, s5(1)(j).

39 Ministry of Foreign Affairs and Trade, *Human Rights in New Zealand; New Zealand's Third Report to the United Nations Human Rights Committee on Implementation of the International Covenant on Civil and Political Rights* Information Bulletin no. 54 (June 1995) 69.

40 See Palmer, supra n 35 at 13.

41 The English position has received attention by way of the introduction of the Human

The protection of rights of certain groups also seems increasingly at risk: the mentally ill, prisoners, refugees, minority ethnic groups, beneficiaries, workers. Policies such as, in the employment field, extending the approach evidenced in the Employment Contracts Act to such issues as holiday entitlement and personal grievances,[42] at least require monitoring to see that rights are protected. The same applies to the proposed "Code of Social and Family Responsibility",[43] particularly with regard to the position of beneficiaries, including superannuitants. Recent developments in the delivery of health care, particularly the implementation of "targeting", similarly require monitoring.[44]

While concerns for these groups may not be directly addressed by, for example, entrenchment of the Bill of Rights or the Human Rights Act, they would be assisted by the resulting higher profile given to rights issues, both politically and legally, particularly at a time when a debate seems to be beginning in New Zealand on social values and responsibilities. Similarly, while, as mentioned above, considerable advances have been made in the last two decades in increasing the political and legal effect of the Treaty of Waitangi, and in settlement of Treaty claims, this is also an area where recent developments suggest that general constitutional protection would be an advantage.

IV Recommendations

In the present New Zealand constitutional arrangement, the Bill of Rights Act could be both procedurally entrenched and made overriding of other legislation as is, for example, the Canadian Charter.

If New Zealand were to adopt a formal written Constitution, the Bill of Rights could constitute a chapter in that Constitution, on the model of the recent Constitutions of Fiji and South Africa.

An over-ride clause could be included in the Human Rights Act, following the completion of the revived Consistency 2000 programme and thus proper consideration of what legislation required exemption.

The Bill of Rights, thus entrenched, could be enlarged to include social, economic and cultural rights. An example of inclusion, with full status, of such rights, is provided by Chapter 2, articles 26 and 27 of the new South African Constitution where social and economic rights are made "subject to available resources", following the model of article 2 of the ICESCR. A similar model can be found in the constitution of Papua New Guinea.[45]

Rights Bill in October 1997, whose long title states that it is "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights...". In Fiji, the Constitution Amendment Act 1997 has increased human rights protections and finally in South Africa protection has been boosted by way of the Constitution of the Republic of South Africa (1996).

42 See "Govt faces payout of $10m over court plan" *NZ Herald* (April 30, 1998) A3.

43 *Towards a Code of Social & Family Responsibility: Public Discussion Document* (1998).

44 See M Revington, "Blood Money" *Listener* (October 25, 1997) 24, for coverage of the Rau Williams case.

45 See Article 63 of the Constitution of the Independent State of Papua New Guinea (1975).

The status of human rights officers could be reconsidered, with a view to extending the model of the Ombudsman, an officer of Parliament, to others.[46]

The question of the constitutional status of the Treaty of Waitangi should be revisited. The suggestion that the Treaty would "disappear" or become less important if thus constitutionally recognised can be dispelled. This is not to diminish the status of the Treaty as a "covenant". But there are advantages in its being *also* legally recognised in some way. It would prevent for example, such action as the removal of any reference to the Treaty in the patient code of rights on the ground that it could create "legal uncertainty."

Constitutional recognition of the Treaty would give rise to proper consideration of how group rights can be legally recognised, an issue of particular importance for Maori.

Finally, consideration could be given to ways in which correlative responsibilities and duties are to be included.

These issues are all part of the wider constitutional debate taking place in New Zealand at this time, but within that debate they are issues of considerable, indeed fundamental, importance.

Appendix

New Zealand's Human Rights Record

Treaty of Waitangi		1840
United Nations Declaration of Human Rights	Adopted by UN General Assembly	1948
United Nations 1951 Convention relating to the Status of Refugees (reservation to 24(2))	Acceded	1960
1967 Protocol	Acceded	1973
Office of Ombudsman established		1962
Waitangi Tribunal Established		1975
Race Relations Act (established office of the Race Relations Conciliator)		1971
International Convention on the Elimination of All Forms of Racial Discrimination (reported on biennially)	Ratified	1975
Human Rights Commission Act (established Human Rights Commission)		1977

[46] As per s3 of the Ombudsmen Act 1975.

International Covenant on Civil and Political Rights (reserved articles 10(2)(b); 10(3); 14(6); 20(22); 1st report 1983; 2nd report 1989; 3rd report 1993)	Ratified	1978
International Covenant on Economic Social and Cultural Rights (reserved articles 8; 10(2); 1st report 1994)	Ratified	1978
Official Information Act (jurisdiction to Ombudsman)		1982
Convention on the Elimination of All Forms of Discrimination Against Women (reserved 11(2)(b); recruitment into armed services; underground work in mines (withdrawn subsequently after denunciation of ILO Convention 45); 1st report 1987, 2nd report 1994 3rd and 4th reports 1998.	Ratified	1984
Convention Against Torture (1st report 1992; 2nd report 1997)	Ratified	1989
Optional Protocol to International Covenant on Civil and Political Rights	Acceded	1989
Bill of Rights Act		1990
Second Optional Protocol to International Covenant on Civil and Political Rights	Acceded	1990
Convention on the Rights of the Child (1st report 1995)	Ratified	1993
Vienna Declaration & Plan of Action		1993
Privacy Act		1993
Human Rights Act		1993
Health and Disability Commissioner Act		1994

ILO Conventions
New Zealand has ratified a large number of ILO Conventions and has been until recently a strong supporter of the ILO. However it has not ratified Conventions 76 and 98.