NEW ZEALAND'S EXPERIENCE WITH A BILL OF RIGHTS

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I begin with a bit of history, then a summary of the New Zealand Act and how it has operated, and end with a few comments of general assessment.

History

The New Zealand Bill of Rights Act was enacted nearly two decades ago, in 1990. Two factors help to explain its origin. First was a general concern among those of a constitutionalist frame of mind that New Zealand lacked many of the standard legal guarantees of constitutional, limited government.

New Zealand was a unitary, non-federal state, with a unicameral sovereign parliament elected through a simple plurality, first-past-the-post electoral system. Arendt Lijphart, in his well-known contrast between majoritarian and consensual democracies, listed New Zealand as an extreme version of unchecked majoritarianism, more Westminster than Westminster itself. New Zealand was an elective dictatorship par excellence.

Most New Zealanders did not seem to mind, so long as the elected dictators consulted widely before acting and faced the voters at three-year intervals. But legal purists were always unhappy.

The second factor is the role of an individual activist, Geoffrey Palmer. Palmer, a legal academic, had studied in the United States. Like many other antipodean legal academics before and since, he had fallen in love with the US constitutional system, particularly the role of the Supreme Court. He joined the Labour Party, entering Parliament while the party was in opposition and drafting Labour's ambitious constitutional and justice policy. When the Labour government came to power in the 1984, he was deputy PM under David Lange and given a free hand to pursue his policy reforms.

Palmer commissioned a white paper which recommended a fully-fledged Bill of Rights, giving courts the power to override legislation found to be in breach of the stated rights. He also established a Royal Commission into the Electoral System which recommended the introduction of proportional representation on the German model.

The proposed Bill of Rights failed to garner much public support. The usual arguments were successfully mounted, including the superior legitimacy of elected governments over unelected judges. The issue was also complicated by the fact that the Treaty of Waitangi, the founding agreement between Maori tribes and the British Crown, was included in the Bill of Rights. This inclusion offended many Maori who did not wish to see the Treaty placed on a par with other rights. It also frightened non-Maori New Zealanders worried about special rights for Maori and unwilling to trust the courts with the final say on this contentious issue. In response, the indefatigable Palmer introduced his more modest alternative which became the 1990 Act – a non-entrenched Bill of Rights, shorn of the Treaty, and with no capacity to override legislation.

Electoral reform, incidentally, proved more successful. After first Labour and then National had torn up their electoral commitments in order to pursue unpopular economic reforms, New Zealanders voted for a radically new system of proportional representation. They thus proved keen to limit executive power and the elected dictatorship, but did so by strengthening Parliament rather than by empowering the courts.

Proportional representation has given New Zealand a rough equivalent of the Australian House of Representatives and Senate rolled into one chamber. Major-party governments alternate in power, but they need to negotiate with minor parties to secure majority support for their legislation.

The New Zealand Bill of Rights Act 1990

The Act sets out 19 civil and political rights, a generally unexceptionable list. These rights are said to be subject to *'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'* (s 5), a form of words taken from the Canadian Charter. This makes explicit the point that rights are typically not absolute and can be balanced against other public-interest considerations Even so, the courts have held that certain rights, including torture and the bar on retroactive penalties, should not be so compromised.

The courts are required where possible, to prefer interpretations which are consistent with the Bill of Rights (s 6). However, the courts are specifically barred from repealing or revoking any enactment on the ground that it is contrary to any of the rights (s 4).

The Bill of Rights also has a role is in relation to proposed legislation.

The Attorney-General is required to report to Parliament if proposed bills are inconsistent with the Bill of Rights (s 7).

The Act in Operation

How has the Act worked in practice, particularly in relation to Parliament? Vetting of government bills for consistency with the Bill of Rights takes place before each bill is introduced to Parliament, while non-government bills are reported on as soon as possible after introduction and before the first reading. The initial vetting of legislation is the responsibility of public servants in the Ministry of Justice and the Crown Law Office who advise the Attorney-General on whether or not a finding of inconsistency should be reported to Parliament. Their advice is cast in the form of a legal opinion, drawing on the relevant domestic law as well as international parallels, and is posted on a government website. The Act requires a formal report to Parliament only in the case of a finding of inconsistency.

The great bulk of legislation is found to be consistent with the Bill of Rights. Many *prima facie* inconsistencies are held to be consistent on the grounds of being *'demonstrably justify[able] in a free and democratic society'* (s 5).

Reports of inconsistency, however, are regularly made, on average just over two per year, divided equally between government and non-government bills.

Around three quarters of such bills are either dropped or amended to avoid the alleged inconsistency. However, in a significant number of instances, about one in four (always government bills), the legislation has been passed in spite of its alleged inconsistency.

One weakness of the process is that it does not deal with major changes made to bills after the first reading This is a significant lacuna in a proportional Parliament where much legislation is the subject of inter-party bargaining, particularly at the committee stages.

In one notorious instance, Parliament was legislating to increase the non-parole period for those committing murder as part of a home invasion. At the last minute, during a Committee of the Whole, the phrase *'whenever the offence occurred'* was added. This appeared to be a breach of the right against retroactive penalties. However, Parliamentary Standing Orders did not provide for rights implications to be examined at that stage of the legislative process.

Given the public emotion on the issue, it is unlikely that a report of inconsistency would have made any difference to the final outcome. (As often happens in such cases, a deficiency in one part of the system provoked a remedy elsewhere. The Court of Appeal subsequently upheld two appeals against the retrospective application of the Act, though without relying directly on the Bill of Rights to do so.)

The original sponsors of the Bill of Rights Act had recommended the establishment of a special parliamentary committee dedicated to the scrutiny of all legislation for Bill of Rights consistency. Such a committee, it was hoped, would provide a parliamentary focus for Bill of Rights issues beyond the Attorney-General's reports. However, governments have never adopted the proposal, leaving rights issues to be raised *ad hoc* by individual MPs or in submissions through the normal committee process.

General effects of the Bill of Rights process

What lessons can be learned from the New Zealand experience with a Bill of Rights? One effect is to make government departments more conscious, not just of general rights issues but also of the rights jurisprudence that informs the Bill of Rights and its legal interpretation.

For instance, all Cabinet submissions on proposed legislation must include a statement on possible consistency with the Bill of Rights Act. This procedure encourages prior, informal consultation between departmental officials and the relevant legal experts in the Ministry of Justice and the Crown Law Office. In addition, the Legislative Advisory Committee, a government-appointed committee of legal experts, has issued guidelines to increase official awareness of Bill of Rights issues.

In the legislative process itself, reports of inconsistency from the attorney-general, as well as the published legal advice from officials, have helped to insert Bill of Rights issues and concepts into public debate. New Zealand's well-developed system of parliamentary select committees forces almost every bill through a process of public consultation. Interested parties, as part of their political advocacy, draw on relevant reports and legal advice when it suits them. Committee members, too, can raise these legal rights issues in questioning ministers and government officials.

While legal rights jurisprudence has gained somewhat greater prominence in political discourse as a result of the Attorney-General's reporting process, the overall impact on Parliament has been minimal. The Act's requirements have been assimilated into ongoing parliamentary practice without raising any observable ripples, particularly in the absence of a specially designated Bill of Rights committee.

Also hard to discern is any major impact on the substance of legislation itself. Certainly, issues of civil and political rights have regularly been raised during the discussion of proposed legislation. But so have they always been. Civil and political rights in New Zealand have had powerful legal protection through the common law and other legal institutions such as the Human Rights Commission and the Privacy Commissioner.

Lawyers have also influenced public debate through bodies such as the Law Society and the Council for Civil Liberties. Rights abuses such as retrospective penalties and illegal detention have always given rise to strong public objections. Admittedly, the new procedure of reporting legislative proposals that are inconsistent with Bill of Rights has seen most such proposals dropped or amended. But, without a Bill of Rights Act, how many of them might have met the same fate, simply as the result of public and parliamentary criticism? It is hard to tell.

Most significant, perhaps, is the fact that, from the beginning, New Zealand governments and parliaments have shown themselves quite prepared to disagree with findings of Bill of Rights inconsistency and to enact their own view of the public interest.

Assessments of Bill of Rights Act inconsistency, it should be remembered, already contain an opinion about whether the right in question could be subject to *'reasonable limits… as can be demonstrably justified in a free and democratic society'*. For Parliament to override a finding of inconsistency it must therefore override an authoritative legal opinion which says that the proposed legislation is unjustifiable in a free and democratic society. But Parliament has proved quite willing to do so.

Such lack of respect for legal opinion may distress Bill of Rights enthusiasts. But it can also comfort the alarmists.

Many Australian opponents of a Bill of Rights fear that even a weak Charter, without the power to override legislation, will exert irresistible moral pressure on politicians and force them into submission in the face of legal disapproval. The New Zealand experience shows that antipodean politicians, at least, are not afraid to thumb their noses at legal correctness. A weak Bill of Rights may give more public space for rights jurisprudence in political debate. But it need not be a Trojan horse for judicial activism.

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