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The recently adopted New Zealand Bill of Rights[1] presents to that nation's judiciary a variety of options whereby it can elect to either move a little closer to the Canadian and American practices of judicial review or continue to maintain its practice of upholding the principle of parliamentary supremacy. The focus of this article is to examine some of these options and then reflect upon them in light of the experiences of the Canadian and American judiciaries.

In 1985, New Zealand's Labour Government introduced a White Paper to Parliament supporting a Bill of Rights.[2] Within this document, the government outlined its intentions to adopt a Bill of Rights that would 1) be the supreme law of the land,[3] 2) recognize the rights of the Maori under the Treaty of Waitangi,[4] 3) insure the right to freedom from discrimination,[5] and 4) establish in the courts the power of judicial review.[6] During the subsequent five years, debates flourished over the Bill of Rights. Issues discussed in the debates included 1) whether the Bill of Rights would bestow too much power in an undemocratic institution, the judiciary (eventually making it the most powerful branch of government), and 2) conversely, whether legislative oppression can be prevented without a Bill of Rights?[7]

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1. New Zealand Bill of Rights Act, Pub. L. No. 109 (assented to Aug. 28, 1990) [hereinafter The Act].

2. HON. GEOFFREY PALMER, A BILL OF RIGHTS FOR NEW ZEALAND: A WHITE PAPER A6 (1985).

3. *Id.* at 68.

4. *Id.* at 74-75.

5. *Id.* at 85.

6. *Id.* at 109-16.

7. NADJA TOLLEMACHE, THE PROPOSED BILL OF RIGHTS: A DISCUSSION AND RESOURCE PAPER (Mar. 1986)(with assistance from Pam Ringwood).

These debates continued until August 1990 when, with the October elections closing in, Parliament passed a Bill of Rights Act, but one that is much more limited than the proposed White Paper. Rather than become the supreme law of the land, this Act is merely on the same level as any other legislative enactment of Parliament, and it specifically prohibits the judiciary from striking down laws of Parliament, whether passed before or after the commencement of this Act.[8]

Responses to the Act in the local newspapers were immediate and generally negative. Some claimed the Bill of Rights was "empty window-dressing,"[9] while others maintained that it was "disastrous."[10] Yet, these responses may have been a bit premature. For, although the courts are prohibited from striking down an enactment in violation of the Bill of Rights, there are possibilities for a judiciary interested in controlling the interpretation of an enactment. For instance, unlike the American Constitution, the New Zealand Act specifically mentions the power to implement good faith affirmative action measures,[11] the right to the observance of the principles of natural justice,[12] as well as the notion of judicial review.[13] When these sections are combined with Provision 6 of the Act, specifying that the preferred interpretation of any enactment is one consistent with this Bill of Rights,[14] it would appear that the New Zealand judiciary has now been provided with an opportunity to examine the interpretations of a variety of laws.

Perhaps no where will this opportunity be greater than within the parameters of Provision 27(2) of the Act, which provides that: "Every person whose rights, obligations, or interests protected or recognized by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination."[15] It is under this provision that a court, in examining the actions of a public authority, could decide that the public authority ignored the clearly expressed intentions of Parliament to interpret enactments as being as consistent as possible with the Bill of Rights. The court could maintain that, as Parliament has expressly stated a desire to have issues of natural justice, human rights, freedom from discrimination, and fundamental freedoms af-

8. The Act, *supra* note 1, at 2.
9. *Window Dressing*, THE DOMINION, Aug. 28, 1990, at 8.
10. *Disastrous, Says Aids Foundation*, THE EVENING POST, Aug. 24, 1990, at 6.
11. The Act, *supra* note 1, at 4.
12. *Id.* at 6-7.
13. *Id.* at 7.
14. *Id.* at 2.
15. *Id.* at 7.

firmed, protected, and promoted in New Zealand,[16] public authorities, as well as tribunals, must consider these rights and freedoms in interpreting enactments. Thus, although the court will have no power to strike down an enactment in violation of the Bill of Rights, it could have a great deal of influence upon how certain acts of Parliament are administered.

Therefore, the Bill of Rights has at least opened the door to such judicial action. Yet, as the Canadian and American experiences have shown, whether the New Zealand courts will choose to take advantage of this opportunity depends upon the judges themselves. An examination of these North American experiences will help to illuminate the situation.

The Canadian Bill of Rights Act came into effect in 1960, forcing the judiciary to consider whether to take a more activist role in disputes involving the government or to maintain their non-interventionist role within the legislative realm. With few exceptions, the Supreme Court of Canada chose to adhere to the principle of parliamentary supremacy. One of the earliest cases involving the Bill of Rights was *Robertson & Rosetanni v. The Queen.*[17] In that case, Justice Ritchie, speaking generally about the Bill of Rights, set the tone for the Court's eventual view of the enactment as a whole. He stated that: "The Canadian Bill of Rights is not concerned with 'human rights and fundamental freedoms' in the abstract sense but rather with such 'rights and freedoms' as they existed in Canada immediately before the Statute was enacted."[18] This view drastically limited any development in the area of human rights and civil liberties protections. Instead, the Court continued its role as an umpire of disputes, carefully avoiding what it considered to be the domain of the legislative body in government. As stated by the Canadian constitutional scholar, Professor Elman: "This, so-called 'frozen rights' theory of interpretation clearly limited the potential development of the Canadian Bill of Rights."[19] Thus, it wasn't until April of 1982, when the Canadian Constitution came into power,[20] that the judiciary changed its views towards judicial activism.

The Canadian Constitution became the supreme law of the land and authorized the judiciary to invalidate any laws inconsistent with

16. *Id.* at 1.

17. [1963] S.C.R. 651.

18. *Id.* at 654.

19. Bruce P. Elman, *Altering the Judicial Mind and the Process of Constitution Making in Canada*, 28 ALTA. L. REV. 521, 524 (1990).

20. Canada Act 1982, ch. 11 (U.K.).

this enactment. In addition, Part 1 of the Constitution, the Canadian Charter of Rights and Freedoms, guaranteed the nation's citizens legal, political, linguistic, and equality rights. As a result, the Constitution overtook Parliament in superiority and the Supreme Court became the guardian of the Constitution, zealously protecting and developing individual rights and freedoms[21] against legislative intrusion.

Yet, it is the zeal with which the Supreme Court has chosen to protect and define individual rights that has been pointed to as at least partially resulting from the composition of personalities upon the Court. It has been argued that, had a number of the retiring conservative justices in the 1980s been replaced by other conservatives, rather than by the liberals who did replace them, the Court could have proceeded at a slower pace and, thus, avoided such a monumental break from Canada's constitutional past.[22]

This same notion of judicial independence is also found in the American experience. The framers of the United States Constitution vigorously debated over the issue of judicial review. Some, such as Alexander Hamilton, maintained that judicial review was essential to prevent legislative oppression. In *The Federalist No. 78*, Hamilton argued:

> The interpretation of the laws is the proper and peculiar province of the courts . . . . Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.[23]

Others argued that the judiciary would become uncontrollable with judicial review powers, that it could eventually mold the government into any shape it pleases by declaring void all laws it feels are inconsistent with its interpretation of the Constitution.[24] As a result of these debates, the framers chose not to mention judicial review in the Constitution whatsoever. Thus, the judiciary was neither provided with such powers nor prohibited from assuming them.

This argument remained unsettled until Chief Justice John Marshall's decision in *Marbury v. Madison*,[25] which stated that the Su-

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21. Southam, Inc. v. Combines Investigation Branch, [1984] 2 S.C.R. 145, 155-56.

22. Elman, *supra* note 19, at 526-30.

23. ALPHEUS MASON & GORDON E. BAKER, FREE GOVERNMENT IN THE MAKING: READINGS IN AMERICAN POLITICAL THOUGHT 251-52 (Oxford Univ. Press 1985).

24. *Id.* at 246-50.

25. 5 U.S. (1 Cranch) 137 (1803).

preme Court is competent to declare Congressional legislation unconstitutional. What is interesting about this case is that Marshall arrived at this decision even though: 1) the Constitution does not provide for such powers in the judiciary; 2) President Thomas Jefferson and the majority of the executive and legislative branches were clearly opposed to judicial review; and 3) Marshall did not know if the decision would be respected or totally ignored. Thus, it is possible that without *Marbury v. Madison* judicial review would not exist in the United States today. As stated by the eminent American constitutional scholar and former Chairman of the University of Chicago Political Science Department, C. Herman Pritchett:

> The extent to which the framers and ratifiers of the American Constitution meant to confer on the judiciary authority to assess the validity of congressional and presidential interpretations of the Constitution is something about which we can never be fully certain . . . . But whatever scope and authority the framers meant to give judges, the plain fact is that since (Marbury), the United States has managed to live with a broad measure of judicial authority to invalidate acts of coordinate branches of government.[26]

Since the times of Justice Marshall, the debates have generally shifted from whether the court has judicial review powers to how much of an activist the court can become. These debates become especially intense whenever there is a vacancy upon the Supreme Court. Both activist and restraint proponents claim that by filling the Court with a jurist supported by the other group, the country will fall into ruin. Cases such as *Griswold v. Connecticut*,[27] where the Supreme Court declared the Constitution provides for a right of privacy even though it is not specifically mentioned in the document, have been at the center of the activist/restraint argument. Proponents of judicial activism generally argue that the Court cannot prevent legislative oppression of fundamental values unless it has the ability to make significant changes in public policy; while judicial restraint supporters maintain that, as the court is an undemocratic institution, lacking the resources to effectively ascertain public policy choices, it should avoid judicial law-making.[28] Therefore, like the Canadian system, it would appear what is important in the American system is the personality/ju-

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26. WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 480 (Random House 1986).

27. 381 U.S. 479 (1965).

28. Lawrence Baum, *The Supreme Court*, CONG. Q., 1985, at 5.

dicial theory of the Supreme Court Justice, and not simply the position of Supreme Court Justice in and of itself.

In conclusion, when examining the opportunities now available to the New Zealand judiciary by way of the recently adopted New Zealand Bill of Rights, it is worth considering the experiences of the Canadian and American judiciaries. Although, unlike the American Constitution, the New Zealand courts are expressly prohibited from invalidating laws inconsistent with the Bill of Rights Act, the Act does specify that the preferred interpretation of any enactment is one consistent with this Bill of Rights. In addition, the Act expressly specifies the concepts of judicial review, natural justice, human rights, and fundamental freedoms, concepts not expressly included in the American Constitution. Thus, controlling the interpretation of an enactment would seem to be a logical avenue for the courts.

Hopefully, unlike the Canadian judiciary with its Bill of Rights, the New Zealand judiciary will not pass up this opportunity to help protect human rights and civil liberties by examining the actions of public authorities and tribunals in connection with their interpretations of New Zealand laws. Of course, as with the Canadian and American examples, the make-up of the New Zealand judiciary will be vital to any change in jurisprudential focus away from an absolute application of the principle of parliamentary/legislative supremacy.