PROFESSOR SMILLIE'S ALTERNATIVE BILL OF RIGHTS: A COMMENT

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Professor Guest began his inaugural lecture "Freedom and Status", delivered on American Independence Day twenty-five years ago, in his characteristic, direct manner: "The world is full of people who talk about freedom." But, he went on, there is more talk about freedom than analysis of it.[1] He would accordingly have been very pleased to see how carefully Professor Smillie examines the Government's proposal for a Bill of Rights. As a philosopher, Professor Guest would also have welcomed his successor's attention to the wider theoretical issues presented by the proposal. And no doubt the lecture is exactly the kind of contribution to the constructive, non-partisan debate that the Minister of Justice anticipated in his introduction to the White Paper on the Bill of Rights. The debate, if it is to be of that character, must go to both the philosophy and the detail of the proposal. It is even better if some of the participants in the debate suggest, as Professor Smillie does, alternative means of achieving the broad purposes of the proposal.

In this comment I consider

(1) the philosophy or philosophies underlying the proposal,
(2) the limitations on the rights and freedoms declared in a Bill of Rights, itself an aspect of the philosophy of the document and a principal difference between Professor Smillie's proposals and those in the White Paper, and
(3) the international context of the proposal, a matter which has perhaps had less prominence than it deserves.

I PHILOSOPHY

When, if at all, is it right for there to be a limit on the exercise of majority rule, majority rule moreover by the elected representatives of the people? When, if at all, is it appropriate for such limits to be policed by the courts, consisting as they do of non-elected, non-responsible (in the constitutional sense) judges? Can such limits and such policing be justified, even if the text is adopted in the first instance by a democratic process, that is by a broad endorsement of the proposal by the Parliament and possibly by the people through a referendum? These very large questions must be con-

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1 (1961) University of Otago Press. I am very pleased to have a small part in a tribute to Professor Guest. I was enriched, as a junior colleague in the teaching of law, by his broad wisdom, his experience, his wit and his friendship.

sidered, although briefly on this occasion.[2] Any answer should relate to philosophy, but it must also relate to the specific content of any proposal. Just as philosophy should influence the content of the document, so too does the content affect the particular philosophical approach to be found in it.

I begin with the content of the draft Bill. It can be divided into three:

1. Process writ small.
2. Process writ large.
3. Certain basic rights, including the rights of minorities.

The first of these groupings — process writ small[3] — consists essentially of the provisions of Part V of the draft Bill, particularly those provisions which regulate the procedures followed by the State in its dealings with individuals primarily but not exclusively in the area of police powers and criminal prosecution. These provisions are of central importance in the New Zealand Bill. Professor Smillie characterises them first of all as more specific and secondly as setting out existing safeguards. (There might be some question about that second characterisation in some detailed areas.) This greater specificity means that there will be less room for broad judgments of social policy — and for the application of differing philosophies of judicial review — than if the provisions were drafted in more open terms.

Compare the broad language of the United States Bill of Rights: the relevant provisions do little more than require "due process" from the State.[4] The area is of course also one in which the courts have long been involved. Indeed much of the law is their creation and they have heavy continuing involvement in its development and application. It is as well the part of the Bill which would be of the largest practical importance. Thus about eighty percent of the Canadian Charter cases decided in the Federal and Ontario Courts in the first three and a half years of the Charter's operation were criminal matters. Almost half of that group were about fair court procedures, about thirty percent concerned unreasonable search and seizure and about ten percent related to the right to be represented by a lawyer. The absolute practical importance of these provisions, their significance relative to the other guarantees, and their more precise character give the New Zealand draft a particular emphasis. Professor Smillie says that he

2 The writing on these matters, especially in the United States, is legion. See the bibliography in the White Paper, pp 119-123. It does not cease. For the United States, see also eg Dworkin, *The Law's Empire* (1986), and Tribe, *Constitutional Choices* (1985) reviewed by Tushnet (1986) 21 Harv CR-CLL Rev 285. For New Zealand see also the proceedings of the seminars held by the International Commission of Jurists, Wellington, May 1985, and the Legal Research Foundation, Auckland, August 1985, *A Bill of Rights for New Zealand* (1985); the submissions of the New Zealand Law Society to the Parliamentary Select Committee, *Law Talk* March 1986; Elkind and Shaw, *A Standard for Justice* (1986); the *Guide* and *Discussion Paper* published by the Human Rights Commission (1986); and contributions to the New Zealand Law Journal since July 1985 by Berryman, Chapman, Clapshaw, Dugdale, East, Elkind, Mathieson, Smillie (an earlier version of the paper published here) and me. I have examined some of the philosophical questions in "A Bill of Rights for New Zealand? Judicial Review versus Democracy" (1985) 11 NZULR 307. The White Paper also discusses them, of course, in Parts 4 and 6.

3 The expressions "process writ large" and "process writ small" are taken from John Hart Ely, *Democracy and Distrust* (1980).

4 See the fifth and fourteenth amendments. There is some greater specificity in the fourth, fifth, sixth and eighth amendments.

largely ignores these provisions in settling his philosophy. But they are central to any assessment of the proposal.

The word *process* should perhaps be further emphasised. The guarantees in Part V do not stand in the way of Parliament altering the substance of the criminal law. Within broad limits it is still for Parliament according to its own unlimited judgment to determine *what* conduct should be made criminal and what the range of penalties should be. The provisions of Part V of the Bill are concerned about *how* those laws are to be applied to particular individuals.

A second set of provisions in the Bill – essentially those in Part III – can be characterised as process writ large. Much of the argument against the Bill is to the effect that we should trust majority political decision-making. That criticism does not seem to take account of the fact that the very processes for majority decision-making and the related rights of participation in the processes that lead to majority decision-making might themselves be taken away or limited by the operation of the majority principle. The second set of provisions is very much designed to protect those rights to participate in the political and wider social process. The critics do not take account of the fact that for thirty years now our constitutional system has given protection like that being proposed here. Central provisions of the electoral system can be changed only if the major political parties or the people through a referendum agree.[5] The provisions that come into this category of process writ large are those concerned with the right to vote, the right to freedom of thought and expression, the right to freedom of assembly and the right to freedom of association. Those are freedoms which are used to influence the direction of policy and the development of social attitudes. Those provisions do not themselves determine the product of the political and social processes (although they very much affect, of course, the general political and social ethos). On my understanding, for instance, the Bill does not in any direct sense affect the law relating to abortion or the testing of nuclear weaponry or the main lines of economic and social policy. Provisions which allowed American and Canadian courts to move into those areas are not included in the draft.[6] What the Bill would do though is to protect the processes by which those concerned about such matters of policy can contribute to the development of policy, and can as well take their desired part in the life of the community.

The draft Bill does of course go beyond those two types of process. Indeed some would say that such freedoms as freedom of speech are not to be seen solely or even principally in process terms.

5 Electoral Act 1956, s 189. There is of course the difference that the protecting provision could itself be repealed by the ordinary process, but there has been no attempt to do that and the convention that Parliament looked to in 1956 now appears to be established.

6 Eg *Roe* v *Wade* (1973) 410 US 113 (a privacy right constructed out of the Fourteenth Amendment's concept of personal liberty and restrictions upon State action) and *Operation Dismantle,* cited by Smillie, n 43 (based on the broad guarantee of liberty and security of the person in section 7; although note that the challenge to the Government's action in allowing the testing of cruise missiles failed).

What is the justification for the inclusion of those other restraints, enforced by court decision, on majority power? The freedoms in the first place are of the most fundamental kind – such as the right not to be arbitrarily deprived of life and the right not to be tortured. Secondly, included in this category are rights of minorities and the right not to be discriminated against on particular prohibited grounds. Minorities by definition cannot in the end depend on a majority decision-making process to protect them from "the tyranny of the majority".[7] Also within this set of provisions is the guarantee of the rights of the Maori people under the Treaty of Waitangi – a provision which raises complex issues which cannot be adequately treated here.[8] Thirdly, the emphasis of the provisions is on those rights which in our community are very broadly supported and agreed. As the Minister of Justice says in the introduction to the White Paper, the debate – and the Bill – should concentrate on what New Zealanders have in common with each other, not on what divides them. The emphasis appears in the attempts to leave to the regular legislative process controversial aspects of industrial relations law and the law of abortion, and in the exclusion of general guarantees of the equal protection of the laws or of due process of the law.[9]

As Justice Benjamin Cardozo put it in his famous lectures on the judicial process, a constitution ought to state not rules for the passing hour, but principles for an expanding future.[10]

How is this brief discussion of the content of the draft Bill to be related to the theories Professor Smillie reviews? The "process" categories appear to me to align very much with the theory of John Hart Ely. As the White Paper puts it,[11] the Bill would in large measure promote the accountability of Government and the quality of democracy; the courts would continue to be concerned, as they have been historically, with the processes of Government (in the capacious sense involved, say, in freedom of speech

7 Eg Scarman, *English Law – New Dimensions* (1974), and the famous footnote 4 in *United States* v *Carolene Products* (1938) 304 US 144, 152-153.

8 Perhaps three points can be made about the constitutional elements of Maori claims and the actions of the general population over the years to demonstrate the limits of majoritarian decision-making by national bodies. (1) Claims for *autonomy* have been accepted, even if in a very limited way, in legislation such as the Maori Councils Act 1900 and that which replaced it. (2) On some matters a *two party,* even contractual model has been considered appropriate, as with the current work of the Anglican Church on the Treaty of Waitangi. It emphasises the principle of partnership (as well as that of bicultural development) in the life and governance of the Church, eg the report of the bicultural commission adopted by the General Synod, Easter 1986. (3) General institutional decision-making might be required to protect or take account of the *rights of the Maori people;* consider the Treaty of Waitangi Act 1975.

9 White Paper, paras 10.66-10.71, 10.85, and 10.81-10.82 (see also Keith, loc cit, n 2 above, 312-316), and more generally eg paras 4.14 and 7.21. A comparative reading of the Canadian Charter and the International Covenant on Civil and Political Rights (both included in the White Paper) makes the point in a more comprehensive way. See ss 7, 15, and 16-23 of the former and Articles 1, 6(2)-(6), 8, 11, 16, 17, 20, 23, 24, and 26 of the latter, and also the International Covenant on Economic, Social and Cultural Rights.

10 *The Nature of the Judicial Process* (1921) 83. He of course called in aid Chief Justice Marshall's "mighty phrase": we must never forget that it is a *constitution* we are expounding, *McCulloch* v *Maryland* (1819) 4 Wheat 316, 407.

11 Para 4.14.

and the suffrage and the focused sense of criminal process). The Bill would do that, for instance, to mention one provision which has a fuller statement in the New Zealand draft than in comparable documents, through the guarantee of the right to justice – the right to a fair hearing before a public authority makes decisions in respect of a person's rights, the right to get Court review of decisions by public authorities affecting the person's rights, and the right to bring civil proceedings on the basis of equality against the Government. These process provisions do not stand in the way of any particular substantive majoritarian outcomes.

But the third set of provisions plainly does. Parliament will not be able, by simple majority decision, to provide for torture or for the arbitrary taking of life. What is the underlying theory for that set (and, as indicated, for those of the process writ large guarantees which some would rather see as a substantive limit on majority rule)? The answer partly runs into the next part of this comment. For the moment it is perhaps enough to say two things. The first is that the rights are of the most basic and established kind. This appears from our own political and constitutional history, from comparative material from elsewhere in the common law world, and from the international standards painstakingly worked out over the last forty years and widely accepted. This is no selection of rules for the passing hour. The second point is that our constitutional history has long opposed to the supreme law-making power of the majority in Parliament ideas of the protection of the minority and of the responsible exercise of power. Dicey's great book of 100 years ago indicates that opposition through its headings: against the supremacy of Parliament he sets the rule of law.[12]

That suggests a two part theory for this category of rights: restraints can properly be placed on majority decision-making to protect our most fundamental freedoms – freedoms, that is, that have long been accepted and still have very broad support.

Professor Smillie's discussion of the theories is in the end not so much about *what* is to be included in the list of rights.[13] It is rather more about the *way* in which the limit on the rights is to be written and applied. It is that which leads him to the Dworkin "rights as trumps" thesis. He does not think that the proposed Bill sufficiently protects the rights included (when reduced slightly as he proposes). The theory and the text are too majoritarian and too weakly utilitarian, he argues. That takes me to the second heading.

II Limitations on Rights and Freedoms

Those who prepare documents setting out and guaranteeing fundamental rights and freedoms can approach their definition in at least four different broad ways. In the first place a particular right or freedom might be left,

12 Dicey, *An Introduction to the Law of the Constitution* (1st ed 1885).

13 He proposes a narrowing of the expression and association freedoms (both discussed below), and of the freedom of movement, the exclusion of the provisions relating to the Treaty of Waitangi (see n 8 above), the exclusion of the guarantee of minority rights as redundant, the widening of the guarantee against the arbitrary taking of life, some detailed changes to the Part V rights, and the exclusion of two of the provisions in Part VI concerning application and enforcement.

at least as a matter of subsequent interpretation, outside the scope of the guarantees. Thus can it really be said, as Professor Smillie does, that freedom of information legislation is affected by the proposed guarantee of freedom of expression? A positive answer would require a ruling that the right to freedom of expression, including the freedom to seek, receive and impart information, includes a right of access to information from somebody who does not wish to release it. That does not appear to be within the ordinary meaning of the words "seek" and "receive". Moreover, no such general interpretation has been given to similarly worded provisions in Commonwealth constitutional documents or in international human rights instruments. Access to information is seen as a separate matter, as appears for instance from the independent moves towards greater openness of government in Commonwealth countries subsequent to their ratification of the International Covenant on Civil and Political Rights.[14] Similarly, some of the rights claimed under the heading of freedom of association might be held not to be encompassed by that freedom. Canadian courts have sometimes taken that line and so too has the International Labour Organisation Committee on freedom of association in relation to the recent amendments to New Zealand's industrial relations legislation.[15]

A second approach to the limits on freedom is to say nothing at all in the text. This is the approach, in general, of those who prepared the United States Bill of Rights. Thus the first amendment provides that Congress is to make no law abridging freedom of speech or of the press. The courts over the last 200 years have held either that particular forms of expression do not fall within the scope of "speech" (reverting to the first approach), or that other important social interests can be balanced against the guaranteed freedom. This is to be seen in the cases which Professor Smillie cites in his annotation to his proposed Article 7.

The third approach is to include limitations which are specific to a particular freedom. The European countries, the International Covenants and many Commonwealth Bills of Rights are examples.

The final approach, the one adopted in the draft and in Professor Smillie's alternative, is to state a general limit which will apply to the various freedoms listed.[16]

14 The New Zealand phrasing "seek, receive and impart" adopts that of Article 19(2) of the Covenant. The European Convention (which has had great influence on the wording of Commonwealth Bills of Rights) includes in the right to freedom of expression the freedom to receive and impart information.

15 See the *Dolphin Delivery, PSA* and Alberta cases which Professor Smillie cites in n 54. Compare now also *Re Department Store Union and Government of Saskatchewan* (1985) 19 DLR (4th) 609 (Sask CA). The Governing Body of the ILO at its 233rd Session (Geneva, May-June 1986) approved the report of the Freedom of Association Committee which reported that the law as it is to operate following the eighteen month interim period is not in conflict with the principles of freedom of association: *244th Report of the Committee on Freedom of Association,* paras 78-123. On the view so far adopted in Canada, issues about abortion would not fall within the scope of draft Article 14.

16 Paras 10.24-10.26 of the White Paper give brief reasons for the choice. See also the proposal of Elkind and Shaw, op cit n 2, that the limitation also expressly incorporate the International Covenant.

How do the two proposals compare? Is the draft only weakly utilitarian, not likely to have such impact, and unlikely to provide meaningful protection?

How accurate is it, as a first point, to say that the rights specifically guaranteed by the draft Bill are not intended to take automatic priority over other conflicting interests? In the first place it is not accurate to say that Article 22, a savings provision, "recognises" unspecified rights and freedoms. It merely provides that they are not to be held to be abrogated because they are not included. Secondly, the denial of some priority seems to take insufficient account of the wording of Articles 1 and 2 of the draft (reproduced without change in Professor Smillie's draft). The Bill is the supreme law, and law inconsistent with it is of no effect; and the rights are guaranteed against public authority. And, thirdly, the argument seems to take insufficient account of the words "as can be demonstrably justified" in Article 3. Those words have been read by Canadian courts as placing an onus on those (generally the Government) who are attempting to uphold a limitation on a freedom.[17] As the shoulder note to the text indicates, the State must "justify" the limitations.

Identical or similar language is to be found in the Canadian and European texts. Courts in those jurisdictions do not appear to have found it weak. It has certainly had an impact, for instance, on the United Kingdom Government and its law. So the European Human Rights Court has turned back attempted justifications by the British Government, for instance, of laws limiting the rights of prisoners to communicate with their lawyers, of restrictions on the freedom of the press to discuss matters subject to pending litigation, and of closed shop legislation.[18] And Canadian appellate courts have struck down, notwithstanding arguments made by reference to the limitation provision, legislation which reverses the onus of proof in drug cases, Sunday trading legislation, and film censorship laws.[19]

It is perhaps worth indicating in the context of the speech area (that being one to which Professor Smillie properly gives major attention) the way in which the courts have gone about this task. Again the discussion is a summary one. In the first place they have given important significance to the phrase "reasonable limits prescribed by law". They have held that open-ended legislation relating to censorship and customs that does not "prescribe" standards or rules according to which banning orders are to be made fails at that first step.[20] In this case, to repeat, the courts are both insisting that the law be made more certain and that the law be made by the legislature. They reverse, by that ruling, the force of the arguments that a Bill of Rights transfers authority from the legislature to the courts and

17 Eg *Hunter* v *Southam Inc* (1984) 11 DLR (4th) 641, 660.

18 *Golder* case (1975) 57 Int L Reps 200, *Sunday Times* case (1979) 58 Int L Reps 490, and *Young, James and Webster* case (1981) 62 Int L Reps 359.

19 *R* v *Oakes* [1986] 1 SCR 103, affirming the Ontario Court of Appeal, 145 DLR (3d) 123, *R* v *Big M Drug Mart* [1985] 2 SCR 295 and *Re Ontario Film and Video Appreciation Society* (1983) 41 Ont Reps (2d) 583, affirmed (1984) 45 Ont Reps (2d) 80.

20 Eg *The Sunday Times* case (n 18) at 523-527 (cf 551-555), the *Ontario Film* case, n 19 at 592, and *Re Luscher and Deputy Minister* (1985) 17 DLR (4th) 503, 506-508 (FCA).

makes the law less certain. Rather in these cases the courts are insisting that the legislature properly carry out its function of laying down the law and they thereby insist on greater precision in the law. As United States courts have indicated, this insistence is the more important in the area of speech. Vagueness of the law can have "chilling" effects.

But, second, if a well known standard or concept in the law does have an established meaning the courts will hold that the law does have a sufficient precision. That precision can be provided, in such cases, not just by the legislature but also by court interpretation of the law.[21]

The third point relates to a phrase of which Professor Smillie is critical: "a free and democratic society." If there is established practice of enacting legislation, within Canada or elsewhere such as that in issue, then that is good evidence supporting the Government's justification.[22] And the reports which led to the enactment of the legislation in the first place may help make the Government's case.[23]

That justification must, however, to make a final point about draft Article 3, have regard to the very considerable importance that our system attaches to freedom of expression. It is not a freedom lightly to be put aside. That is to say, there is indication in the cases, in Europe as well as in Canada and the United States, that different freedoms will be given different weightings.[24] It may also be that within a single freedom different weight can be given. Thus an Ontario Court has distinguished between commercial and political speech, following in that respect lines long established in the United States.[25]

Professor Smillie's draft attempts to protect a somewhat narrower range of rights, but to protect them more substantially by having a more narrowly drafted limitation provision. In terms of the second paragraph of his draft Article 3 anyone attempting to justify a limit will have to argue that the limit safeguards other persons in their equal enjoyment of the rights and freedoms guaranteed in the Bill. The emphasis is very much on protecting the rights of individuals. My first question is whether that is wide enough, even given the narrower scope of the rights protected. The question can again be pursued in the context of freedom of speech. Consider the prohibitions in the Crimes Act 1961 and the Summary Offences Act 1981 on the release of certain State secrets. Is it possible to say of those provisions that they are designed to "safeguard other persons in their equal enjoyment of the rights and freedoms guaranteed" in the Bill? Is it not the case

21 *R* v *Red Hot Video Ltd* (1985) 18 CCC (3d) 1 (BCCA).

22 Eg the White Paper, para 10.34, and the cases cited in Smillie, n 36.

23 Eg *R* v *Keegstra* (1984) 19 CCC (3d) 254 referring to the Report of the (Cohen) Special Committee on *Hate Propaganda in Canada* (1966), and also to the writings of members of that committee. That judgment is also interesting for the point made earlier about arguments based on the extent of the right protected as opposed to those based on the limit imposed.

24 So the European Court has emphasised the importance of freedom of speech: the Court is obliged "to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man." *Handyside* case (1976) 58 Int L Reps 150, 174; see also the *Sunday Times* case (1979) 58 Int L Reps 490, 534.

25 See eg the division of opinion in the *Klein* case cited by Smillie, n 54.

increasingly be seen in an international context. The position commonly adopted as recently as fifty years ago that relations between a State and its own people were simply a matter for the State and for nobody else has now been substantially altered.[28] The process of change had indeed begun much earlier, for instance with the International Labour Organisation established after the First World War and earlier with the law relating to slavery and war crimes. Very wide parts of our statute law now give effect, often without any express indication of doing so, to international legal standards. This is to be seen, for example, in much of our labour law, in shipping and seamen legislation, in extensive parts of our criminal law, as well as in the law relating to international trade and financing.[29]

That body of international law increasingly provides both a standard for legislative and executive action, and particular material relevant to the application and interpretation of New Zealand law. While Parliament may be free under our constitutional system not to implement or depart from the international standards, that action is a breach of our international obligations. The view that Parliament can make any law it likes — a view which in any event could have been valid in domestic constitutional terms only from 1947 to 1956 — has for a long time been "more theoretical than real". It is not in any real sense possible for Parliament to wipe that slate clean. Many in the New Zealand legal profession have yet, it seems, to see the great significance of the international context in which our law is to be found.[30] And yet — to return to the philosophical questions — international law is a major element in the proposed Bill.

The particular value of the international material has been partly hinted at already. The meaning of, say, a freedom of association provision in a domestic bill of rights can be resolved not just by the meaning of the words and by the relevant domestic historical and legislative experience, but also by the meaning that has been given to such concepts and words by the committees of the International Labour Organisation, the European Court of Human Rights, United Nations bodies, those who prepared the texts,

28 Consider, for example, the narrow jurisdiction, both under the London agreement and the interpretation given to it, of the Nuremberg Tribunal over the actions of Germany against Jews in Germany before the outbreak of the Second World War. That is to be contrasted with the law stated in the Genocide Convention adopted in 1948.

29 On a rough count around a hundred statutes give effect in one way or another to treaty obligations. There are also many relevant regulations and orders.

30 This is a large claim. Two pieces of evidence are the submission of the New Zealand Law Society on the Bill of Rights, n 2 above, and the questionnaire it issued to its members. Neither refers in any way to the treaty context.

Professor Guest made a related point or a broader version of the same point in his inaugural lecture when he remarked on the modern tendency to expand public law at the expense of private law, n 1 above, 8.

Professor Quentin-Baxter argued the same proposition in the international context in public lectures which he gave at the beginning and end of his illustrious time at Victoria University. See "International Protection of Human Rights" in Keith (ed), *Essays on Human rights* (1968), 132-145; "Themes of Constitutional Development: The Need for a Favourable Climate of Opinion" (1985) 15 VUWLR 12-28.

and courts throughout the Commonwealth and in the United States which have interpreted guarantees of freedom of association.[31]

Not only might the international and comparative material help a court to determine the meaning of a disputed provision. It might also help ensure that New Zealand law is interpreted in accordance with our international obligations. The courts have established that if they can interpret legislation consistently with those obligations they will do so.[32]

This is a comment on, rather than a response to, Professor Smillie's paper – in part because of the extensive common ground between the draft Bill and Professor Smillie's alternative. They both proceed on the basis that certain basic values are too important to be left vulnerable to possible abrogation or modification by ordinary legislation. They largely agree on the matters to be included in the Bill. The protection, they also agree, should not extend to a broader range of rights in the way that it has in the United States and is likely to in Canada (because of the broader wording of the Canadian Charter). And theoretical discussions of rights and judicial review are, I agree, of value in suggesting and assessing the content and balance of a bill of rights.[33]

The differences relate primarily to the limitation provision.[34] As indicated, I think that Professor Smillie underestimates the strength of the draft Bill and proposes an alternative limitation provision which would

31 See for example the learned and widely researched decisions of the Union Membership Exemption Tribunal, especially UMET 1/85 of 30 September 1985. In determining the scope of the power conferred by the 1985 Amendments to the Industrial Relations Act to grant an exemption from union membership, the Tribunal drew on the Human Rights Commission Act, the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, the Constitution of the ILO, the ILO Freedom of Association and Right to Organise Conventions, the European Convention on Human Rights and Social Charter, the drafting history of the Declaration, the Covenant and the ILO and European Conventions, the interpretations given to the Covenant and Conventions, and United Kingdom legislation (including that enacted in response to a European Court decision on closed shops) and its interpretation.

32 "It has been increasingly recognised in recent years that, even although treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation will do their best conformably with the subject matter and the policy of the legislation to see that their decisions are consistent with our international obligations." Richardson J in *Ashby* v *Minister of Immigration* [1981] 1 NZLR 222, 229 (CA).

33 The theorists though are not easy to keep up with. Thus Ronald Dworkin, whose *Taking Rights Seriously* (1977), Professor Smillie emphasises, introduces his latest book with the comment that he has made no effort to discover how far it alters or replaces positions he defended in earlier work: *Law's Empire* (1986) viii. The "law as integrity" emphasis used in that book does appear to be different, at least in some situations, from the "rights as trumps" theory; consider for instance his discussion of the remedy in school desegregation cases, 389-392. And there are some who in any event deny theory any validity or value. So the Tushnet review of the latest Tribe book, n 2 above, includes a part headed The Futile Effort to Abandon the Futile Search for a Theory of Judicial Review.

34 See also the differences in the rights listed in n 13.

not allow the protection of some important public interests which should continue to be protected.

Professor Guest should have the final word. His essential principles, including the rule of law, have as their fundamental object preventing the arbitrary administration of justice. The rule of law provides a procedural framework within which substantive rules of law must work if the law is to be justly administered. If we look after justice, he concluded, freedom and order, and freedom and planning, will look after themselves.