

**ADDRESS AT THE OCCASION OF THE BILL OF RIGHTS SEMINAR
FOR THE NEW ZEALAND BAR ASSOCIATION**

**Held at the offices of Russell McVeagh, Wellington
Thursday 20 August 2015**

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Anniversaries are all around us this year. When Paul Mabey QC asked me to speak at this conference to mark the 25th anniversary of the New Zealand Bill of Rights Act, he noted that it was also the 40th anniversary of the Treaty of Waitangi Act and the 800th anniversary of Magna Carta. The other anniversary that we don't seem to be paying too much attention to in 2015 is the 175th anniversary of the signing of the Treaty of Waitangi.

All the documents I have mentioned are linked by the fact that they are properly regarded as foundations of the New Zealand constitution. I know that in our legal system, finding the constitution requires some commitment. But without effort we run the risk of losing our sense of the values that are fundamental. And that is very dangerous for the rule of law, which depends above all on a culture of constitutional observance and law-mindedness.

It is I think deeply worrying to see how little wider public engagement there is when legislation touching on constitutional values is being considered. That phenomenon isn't very recent. When the 1986 New Zealand Constitution Act was being considered to replace the British Act of 1852 which, unbelievably, until then had served as our principal constitutional statute, the Select Committee received only 8 submissions. Long before then, efforts by the Constitutional Society to promote a New Zealand Bill of Rights in the 1950s had foundered for lack of interest. That changed only in the 1980s with the galvanisation of the International Covenants following New Zealand's ratification of the International Covenant on Civil and Political Rights and adoption of the Optional Protocol in the mid-1970s. The tireless efforts of Sir Geoffrey Palmer brought about enactment of the New Zealand Bill of Rights Act in 1990. The same era of reform brought us the Official Information Act which, on a practical level, has transformed the operation of government and made it possible to ensure that government decisions can be measured against the standards set in the Bill of Rights Act. It also led to the adoption of the Cabinet Manual, which contains what is still one of the best explanations of the New Zealand constitution. These enactments and provisions have rationalised the processes of government. I am not sure to what extent the courts and the profession have appreciated this.

Indeed, one of the principal points I make is that the courts are not where much of the action has been. I question whether courts and the profession which shapes the cases that come to them have grasped how

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important it is to see the constitutional context behind issues that may seem to engage only a particular statute or a particular area of judge-made law. Carol Harlow says that behind every theory of public law, it is necessary to look to a theory of the state.² Indeed, I would say that behind every theory of law, it is necessary to look to a theory of the state. We cannot address human rights or the lawful use of public power without wider appreciation of the legal order. So an opportunity to think about the foundational elements of our legal order is timely as we observe these anniversaries.

Paul Mabey was entirely right to raise in that context the Treaty of Waitangi Act 1975. The fortieth anniversary of that enactment is something worth commemorating indeed. The Act was the brainchild of that visionary, Matiu Rata. It is true that it languished for some years. It hardly impinged on the consciousness of the legal profession. The first time I became aware of it was when the Tribunal's inconclusive first hearing (involving a power station) was held in the improbable surroundings of the ballroom of the Intercontinental Hotel in Auckland and attracted some press attention for that reason. All that changed when Eddie Durie and Graham Latimer and first Max Willis and then Paul Temm were appointed to the Tribunal. The Motunui Report was published in 1983.³ It was followed by the Manukau and Kaituna Reports.⁴ Those Reports brought the Treaty out of the legal dustbin to which it had been consigned by the colonial judges and eventually (and not without earlier misgivings) by the Privy Council.⁵

It is really hard to recapture now the impact those decisions had. After the Manukau Report was delivered in 1985, when I asked for a show of hands at the annual general meeting of the Legal Research Foundation, not one of the 100-odd lawyers present had ever read the text of the Treaty. I had not myself read it until I appeared in the Manukau claim and read the text in the schedule to the Treaty of Waitangi Act. It was never referred to in my time at Auckland Law School. Although I had practised in the area of public law and written a dissertation on human rights protection, I had never encountered it. What the Motunui Report and those that followed it did was reveal to us that the Treaty text and the ideas it expressed were part of our legal order. The Reports provided a bridge to understanding and prompted insights that have profoundly changed the New Zealand legal landscape in the last 30 years. If the constitutional status of the Treaty remains unsettled, well, it is still a work in progress. The constitution of any country is the work of centuries. It is never captured in a snapshot but continues to be a moving target.

² Carlow Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at 1.

³ Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983).

⁴ Waitangi Tribunal *Kaituna River Claim Report* (Wai 4, 1984); and Waitangi Tribunal *Manukau Report* (Wai 8, 1985).

⁵ *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

That is demonstrated by the influence of Magna Carta, which was brought to New Zealand under the Treaty and which remains in force, in small but important part, under the provisions of the Imperial Laws Application Act. The Imperial Laws Application Act is a statute not sufficiently looked to by lawyers. Magna Carta (the version reissued by Edward I which was first entered on the parliamentary roll in 1297) appears second on the list, after the Statute of Westminster I. That statute builds on the rule of law indications in the Charter by declaring that the King willeth and commandeth that common right be done to all people, "as well poor as rich, without respect of persons". The Statute of Westminster I is an early expression of equality before the law, a concept not found in the Bill of Rights Act for the reason explained in the White Paper: because equality before the law is part of the rule of law.⁶ One of these days I hope that some well-read lawyer may remind the Supreme Court of the promise of Edward I and that it remains part of New Zealand enacted law today.

Although King John repudiated the Charter almost immediately, with the support of the Pope who thought it had been extracted by duress, the Charter was reissued by successive kings and confirmed some 30 times through the Middle Ages. Scholars have recently identified 60 legal cases in which the Charter was invoked in the century following its grant.⁷ The clauses of the Charter repay reading, especially in the more accessible translations produced for this anniversary. The Charter was widely disseminated and read aloud throughout the land. Even today scholars are still turning up copies, misfiled for centuries. The articles of the Charter were a seed bed from which further protections of freedom grew.

Detractors have pointed out that there is little in Magna Carta that was truly new. Its terms are often misunderstood. Inevitably, myths have grown up around it. Similar promises of good government had long been made by Anglo-Saxon and Norman kings. Contrary to folk-lore Magna Carta did not establish *habeas corpus* or trial by jury. Nor did it establish parliamentary control of taxation. Magna Carta does not point to the repositioning of the sovereign power to make law in the king-in-Parliament. Still less does it say anything about democratic government. Nor does it protect the independence of the judges, which was not secured until the Act of Settlement in 1701. All these things lay in the future in 1215 and their achievement was by no means made inevitable by the Charter.

The Charter has always had its detractors, especially among the powerful. Cromwell jeered coarsely at it. (But then he was levying taxes without Parliamentary authority). Legal philosophers in the nineteenth century thought its exaltation by its partisans, such as Lord Coke, was romantic antiquarianism or special pleading, which ignored the self-interest at work in its creation and invested it with modern values undreamed of by the magnates who obtained it. Even today in the outpouring of writing to mark

⁶ *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A6 at [10.81].

⁷ Anthony Arlidge and Igor Judge *Magna Carta Uncovered* (Hart Publishing, Oxford, 2014) at 103.

this anniversary some who should know better continue to buy into the view that Magna Carta is largely an invention of Lord Coke in the 17th century, even though recent scholarship makes clear its importance throughout the Middle Ages. When the despotism of the modern state established by the Tudors and abused by the Stuarts became too much, it was the Charter that was invoked in the Petition of Right and was the basis of the revolution by which it was established once and for all that the King was made by the law and was subject to it, as Bracton and Glanvill had insisted in the 13th century, and as Magna Carta demonstrated.

The ideas set loose at Runnymede still animate constitutional thought. It demonstrated that the king is made by the law and is bound by the law. In our time, where the sovereign power has passed from the king to the king-in-Parliament, it may be time to consider whether Parliament itself is made by the law? If so, is it subject to law, as James I had wit enough to see was the implication of being made by the law? Is arbitrary power acceptable today if exercised by a Parliament democratically elected? These are big questions with which it is unnecessary to engage further today. But they illustrate why the ideas of Magna Carta continue to resonate today. For present purposes, the importance of Magna Carta is that it demonstrates how deep the roots are for the rule of law, and how much our constitutional tradition is set against arbitrary power. The New Zealand Bill of Rights Act is in that tradition. It sets limits to power.

Sir Robin Cooke said soon after enactment of the legislation that the New Zealand Bill of Rights Act “does not merely repeat the old law” and that it is intended to be woven into the fabric of the whole of New Zealand law.⁸ But the more generally held view was that the Act was intended to reflect existing law and to be “evolutionary”.⁹ To date, it seems to me that the second view has dominated among lawyers and the courts. Indeed, the most profound impact of the Act has I think occurred not through the decisions of the courts, but in the processes of government. There is no doubt that, in New Zealand, the success of the New Zealand Bill of Rights Act is not principally to be gauged from reading court decisions. It has permeated the processes of power, as appears from the Cabinet Manual down.

There has been a revolution in what has been required of those exercising public power by way of reasons (prompted in part by other legislative measures concerning freedom of information and other checks such as are provided by Ombudsmen). It would be cynical to doubt that the observance of human rights by public agencies has not greatly improved as a result.

I also think, although this view is not easily substantiated, that the Act is well-embedded in popular thinking, perhaps because the rights and freedoms to which it refers resonate in much the same way that the Great Charter of Liberties entered into in 1215 resonates. 95 per cent of the submissions received by the Scrutiny of Acts and Regulations Committee into the first four

⁸ *R v Te Kira* [1993] 3 NZLR 257 (CA) at 262; *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 and 171.

⁹ *R v Jefferies* [1994] 1 NZLR 290 (CA) at 299 per Richardson J.

years of the operation of the Victorian Charter, tabled in September 2011, supported retention or strengthening of the legislation. I think similar support could be expected here.

But there is much more to be done before it can be said that the Act is woven into the whole of New Zealand law. The matter of rights is a more long-term project than may have been appreciated at the outset. Judges and the profession need, I think, to take this legislation more seriously.

In the time I have I want to mention 6 areas which I think may be key to future directions:

- a) The section 4,5, and 6 dance;
- b) The impact of developing international and comparative law relating to human rights;
- c) Remedies;
- d) The use of Bill of Rights values in administrative law;
- e) The neglect of s 27 of the Act; and
- f) Impact on the development of the common law.

The dance around sections 4, 5, and 6

Late changes to the Bill of Rights Act, from that proposed in the White Paper, left us with some challenges and may have contributed to a climate of timidity in application of the Act. In particular, section 5 of our Act is something of a relic left over from the fundamental law first proposed. Section 5 was originally intended to fulfil the same function as s 1 of the Canadian Charter, on which it was based. With the inclusion of s 4, the impact of s 5 has changed.

As French CJ noted in *Momcilovic*, the test mandated by s 1 of the Charter of Rights and Freedoms in Canada had no part to play in the interpretation of legislation to conform with the rights protected.¹⁰ Nevertheless, after considerable hesitation (and disagreement between two of the greatest New Zealand judges in Sir Robin Cooke and Sir Ivor Richardson), it is now established in New Zealand that the general provision balancing rights against the objectives of the legislation is key to the interpretation of legislation which impinges on rights.

This has implications I think for the effectiveness of s 6. It means that courts work off “reasonable rights” which have been balanced against limitations that may be justified in a free and democratic society. It is less necessary to have recourse to s 4 because in most cases the courts are likely to find limitations justifiable. That may blunt the political cost in overriding rights and parliamentary scrutiny if it interposes the courts.

Use of s 5 also provides some challenges for judicial method. To date there is little evidence of much appetite to look to legislative facts in support of

¹⁰ *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 at [26]–[29].

limitations. Instead, justification is often found by application of a crude utilitarian calculus potentially destructive of rights, and deference to policy makers in the choices made. This may be shallow reasoning, destructive of rights.

The centrality of s 5 post *Hansen*¹¹ may also be undermining of parliamentary scrutiny of measures which limit rights by permitting Attorney-General reports to be restricted to those where there is an opinion that the restriction is unjustifiable. On a conclusion that the restriction is justifiable, in application of *Hansen*, there is no infringement of the Act.

Some commentators have questioned whether the declaratory form of judicial review for human rights values introduced with the New Zealand Bill of Rights Act (by which the courts under s 4 must apply legislation which is inconsistent with the Act) has left us with the worst of all worlds: a view that human rights are the responsibility of courts when the courts cannot insist on their observance. That is said to have led to two further consequences: erosion of the former conventions of Parliamentary observance of human rights and perhaps respect for the decisions of the courts; and timidity on the part of the courts in protecting human rights. Janet McLean has suggested that, whereas before the Bill of Rights Act, "Parliament limited itself", we are now in danger of adopting what she calls "a s 4 [Bill of Rights] anti-constitutionalism" by which Parliament is liberated to do whatever it wants in relation to human rights. "That", she says, "was never our constitutional tradition".¹²

Although I think it is a mistake to see courts as centre stage in assessing the success of the New Zealand Bill of Rights Act, it would be wrong to think that closer judicial scrutiny of rights is not very important. The role of courts is critical not only to the scheme of ensuring that legislation is construed in conformity with the Bill of Rights Act. It is also critical in ensuring the legality of executive action which affects rights. If the purpose of a Parliamentary Bill of Rights is in part to raise understanding of and respect for rights, the explanations provided through the judgments of the courts in deliberative public processes are an essential bridge to understanding. What is most important in the judicial contribution to human rights may be the processes of engagement. So I question whether we should be complacent about approaches and methods which have the effect of shutting down full exposition of rights by moving too quickly to any limits that may be justified on them.

That is why I think we should be concerned if s 6 is not seen as centre stage in the work the court is required to do under the Bill of Rights Act. The terms of s 6 set up a general rule of statutory interpretation, equivalent to s 5 of the Interpretation Act. Anyone running a statutory interpretation argument should be using s 6 if there is any suggestion that one interpretation is more

¹¹ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

¹² Janet McLean "Bills of Rights and Constitutional Conventions" (speech at Victoria University of Wellington, Wellington, 30 August 2011).

rights compliant, whether or not the case directly concerns invocation of rights. I do not think the importance of s 6 has been properly grasped.

The enactment of s 6 also has implications for interpretation of legislation pre-New Zealand Bill of Rights Act. Interpretation of legislation in authorities which predate the Bill of Rights Act should always be looked at critically. Apart from the criminal bar, I think the profession has been very slow to appreciate the potential of the Act.

It is true, that the courts may be reluctant to depart from established authority. In cases like *Morgan* I think we have not responded to the changed circumstances of rights.¹³ But practitioners should keep trying.

International and comparative developments in human rights

At the time of its enactment, the New Zealand Bill of Rights Act, as a statutory bill of rights, had no equivalent elsewhere. We are now plugged into an international community in which the New Zealand statutory bill of rights model is no longer unique. Some of the solutions we adopted when we thought we were unique are being rejected in other jurisdictions. We have been stretched by the developing case law in the United Kingdom. The early New Zealand diet of drunken drivers and petty criminals, in retrospect, may have made the courts a little casual at times. By contrast, the courts of the United Kingdom were pitch-forked into applying human rights in the most contentious cases of the day, those concerned with the threat of terrorism.

There are challenges as well as comfort in this comparative perspective. First, the challenge. We do have to be careful about legislative differences and the different contexts (constitutional and cultural) in which the statements of rights in other societies come to be considered. Without insight into these differences, translation of approaches to human rights assessments from one jurisdiction to another is risky. I am not sure that we are good enough as comparative lawyers to be sufficiently discerning in such matters.

But if these differences are understood, comparative law treatment of rights is extremely helpful and indeed is necessary given the acknowledgement in the New Zealand Bill of Rights Act that the Act affirms New Zealand's commitment to the International Covenant on Civil and Political Rights.¹⁴ Such acknowledgement inevitably brings in international and comparative material bearing on the same rights. The challenge is that unlike much domestic legislation, you cannot start and largely stop with the statute itself (although reading the statute is a pretty good start not always observed). You have to know a lot of law to work with rights. As the scope of the New Zealand Bill of Rights indicates, the rights also criss-cross across all areas of

¹³ *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1.

¹⁴ New Zealand Bill of Rights Act 1990, preamble.

law. Natural justice, discrimination, and other values provided for in the Act are not confined to criminal law.

The courts too need to follow the guidelines and insights provided by international tribunals. Not only the decisions of the European Court of Human Rights and similar tribunals, but also the explanations provided by the United Nations Human Rights Committee, and similar bodies. In *Taunoa*, for example, international standards for treatment of prisoners were looked to by the Supreme Court and in other cases we have looked closely to how rights are structured in different international texts.¹⁵ So judges and lawyers need to know these materials if they are to shape the arguments that will convince.

Remedy

I want to mention briefly later questions of remedy and in particular the development of existing tort law. In New Zealand we have tended to think of Bill of Rights remedies as distinct from other remedies available in law, and in particular have treated them as “top-up” vindication where no other remedy is available.¹⁶ It may be, however, that using the statement of rights to galvanise the common law, in the manner in which the Great Charters in the past did so, may yet be a better route. That it may be recalled was the position taken by Gault J in *Baigent’s case* and it is supported in Wade and Forsyth.¹⁷ It is interesting to see that the Victorian Charter of Rights explicitly looks to private law remedies, which are of course available as of right, not discretion. That would mean a fresh look at torts such as false imprisonment, trespass, and breach of statutory duty.

The case law on remedies is surprisingly little developed yet in New Zealand. *Baigent* damages is treated in some cases as a residual remedy. Damages ordered have generally been described as “modest”,¹⁸ in borrowing from English authorities influenced by the approach of the European Court of Human Rights. But these matters need much more considered responses.

Administrative law and human rights

The debate over the weight to be given to the assessment of the primary decision-maker has not yet produced a substantial body of case law in New Zealand. In the United Kingdom, the Courts have acknowledged frankly that

¹⁵ *Taunoa v Attorney-General* [2006] NZSC 95, [2008] 1 NZLR 429.

¹⁶ See *Taunoa v Attorney-General* [2006] NZSC 95, [2008] 1 NZLR 429.

¹⁷ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent’s case*]; and HWR Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 639.

¹⁸ See, for instance, *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) at [164]–[168] (CA) per O’Regan J for the Court; *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [210] per Hammond J, dissenting.

they are feeling their way.¹⁹ Certainly they have moved around. In Canada, the decisions in the Supreme Court have moved around too.

Where human rights are affected, it may not be adequate for a court to be satisfied the decision-maker took human rights into account and came to a decision which was rational. Where human rights are affected, the court must be concerned with the substantive question of compliance. Some sort of proportionality analysis seems inescapable. It is difficult to see that the court can avoid considering whether the decision reached by the primary decision-maker that human rights were not breached is correct.

The reasoned views of the primary rule-maker may be given weight in coming to that conclusion and some choice may remain if the assessment is one of judgement and the rule-maker has addressed the question, offered adequate justification for the conclusion reached, and its decision observes human rights. The judgment of the primary decision-maker is “always relevant and may be decisive”.²⁰

Claudia Geiringer takes the view that, contrary to the weight of academic authority, New Zealand case law does not yet support a conclusion that the Bill of Rights Act mandates proportionality review of administrative action.²¹

I am not convinced that the methodology of administrative law and review for rights-compliance should diverge. But that is on the basis of the variable standard of reasonableness which takes its colour from the context that rights are affected. In effect, that may well require application of proportionality analysis to ensure that rights are not unnecessarily eroded. Proportionality is part of what reasonableness requires in that context.

Section 27

The right to the observance of the principles of natural justice conferred by the New Zealand Bill of Rights Act is expected of “any tribunal or other public authority which has the power to make a determination in respect of ... rights, obligations, or interests protected or recognised by law”.²² To date, the New Zealand courts have interpreted this right narrowly, confining it to bodies with “adjudicative” responsibilities.²³ The case law is however slight on the topic to date and it may be that there is room for some movement in a case where the point directly arises.

¹⁹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [27] per Lord Nicholls.

²⁰ *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 (HL) at [12].

²¹ Claudia Geiringer “Sources of Resistance to Proportionality Review of Administrative Power under the New Zealand Bill of Rights Act” (2013) 11 NZJPI 123.

²² Section 27(1).

²³ *Chisholm v Auckland City Council* CA32/02, 29 November 2002 at [32] per Tipping J. See also *Taunua v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [221] per Blanchard J and at [377] and [379] per McGrath J. But see the different approach adopted in *Combined Beneficiaries Union Inc v Auckland City COGS Committee and Ors* [2008] NZCA 423, [2009] 2 NZLR 56.

It is surprising that more attention has not been paid to s 27. As Hammond J has pointed out, writing extra-judicially, s 27(2) on its face would seem to be relevant when interpreting and applying privative clauses.

Development of the common law to conform with human rights

Rights are limited in their reach by the identification in the New Zealand Bill of Rights Act of those obliged to observe them. The New Zealand legislation, unlike the South African Constitution,²⁴ does not explicitly bind those not exercising public functions. Nor does it explicitly require the judiciary to develop the common law to conform with the rights and freedoms in the Act, thus ensuring “horizontal” application.

But the New Zealand Bill of Rights Act explicitly applies to the judicial branch of government. It also applies to acts done:²⁵

by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

We have treated this as requiring the courts to observe human rights in exercising their functions.

The stated rights may also be important as principles of interpretation or standards against which to measure reasonableness of behaviour or for the purpose in other areas of law. These are democratically conferred values declared to be “fundamental”, they are an obvious source to use when standards like “reasonableness” are invoked by the general law.

Conclusion

I end, where I began, with the constitution. The old view of the constitution was that it comprised the whole legal order. The sources I have mentioned tonight, Magna Carta, the other ancient statutes, and the recent statutes which underlie our modern state, especially the New Zealand Bill of Rights Act, bear out Sir Neil McCormick’s view that a constitution is made up of principles and values which cross-refer and intersect.²⁶ Or, as Maitland said, you have to know a great deal of law before you can talk about what is constitutional.²⁷ The New Zealand Bill of Rights Act, which is 25 years old, is a brave attempt to identify values which are foundational. If we are to make it work, we need to understand how it fits within the heritage we trace in our

²⁴ Constitution of the Republic of South Africa 1996, s 8(2).

²⁵ New Zealand Bill of Rights Act 1990, s 3(b).

²⁶ Neil MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999) at 79–95.

²⁷ FW Maitland *The Constitutional History of England: A Course of Lectures* (Cambridge University Press, Cambridge, 1908) at 527.

twin tradition to Magna Carta and to the Treaty of Waitangi and we need to see how it is positioned within the wider international framework which is also a source of our law. Perhaps we need to bring a little more passion to the task if our law is to remain fit to serve the needs of our society.
