
THE BILL OF RIGHTS FIFTEEN YEARS ON

Keynote Speech
Ministry of Justice Symposium:
The Zealand Bill of Rights Act 1990

10 February 2006

Rt Hon Sir Geoffrey Palmer
President, Law Commission

Introduction¹

- 1 In this address I intend to say something about how the Bill of Rights came about, the experience that New Zealand has had with it over fifteen years and how the idea may be developed in the future.
- 2 When I was last in Washington DC I went to see Congressman Jim Leach from Iowa's second District. I met him first years ago in the 1980s when New Zealand was having difficulties with the United States Republican administration over the nuclear free policy. He was a member of the House International Relations Committee of the House of Representatives in the United States Congress and still is. He has always been helpful to New Zealand. When I got to his office he had some other guests visiting with him. He introduced me to them as "the man who gave his country a Bill of Rights." I must say I felt rather good about that accolade, as if I were some sort of New Zealand James Madison or even Thomas Jefferson. I would never be introduced in New Zealand in that way. Our political culture is different. Bills of Rights do not rate here. Indeed constitutional issues of any sort are little understood.
- 3 The Parliamentary Select Committee that examined New Zealand's constitutional arrangements last year concluded that it was necessary to "foster more widespread understanding of the practical implications of New Zealand's current constitutional arrangements and the implications of any change."² The New Zealand Bill of Rights Act 1990 is a constitutional statute and is of great practical importance. Yet I doubt that many New Zealanders have much idea of the content of the rights it protects or how that protection is accomplished.
- 4 It is worthwhile in this regard to recall that the Bill of Rights debate in the 1980s was itself bedevilled by ignorance on all sides concerning New Zealand's civics.

¹ I am grateful to Dr Andrew Butler for reading and commenting on an earlier version of this paper. I have also derived advantage from my student Laura Carter's unpublished paper *Giving the Courts Power to Uphold the New Zealand Bill of Rights* (LLB (Hons) Research Paper, Laws 505, Public Law, Victoria University of Wellington, 2005).

² Constitutional Arrangements Committee "Inquiry to Review New Zealand's Existing Constitutional Arrangements" [2005] AJHR I 24A 5.

This is what the submission to the Select Committee from the National Council of Women in 1986 said about the difficulty they had in dealing with their branches:

“A small but not insubstantial number of replies were of doubtful value because of evident ignorance of how the New Zealand system of government works beyond the legislature. This was particularly, but not exclusively in relationship to the proposed function of the courts; many seem unaware of the whole field of administrative law. We consider that before effective consent can be given to the Bill of Rights, steps must be taken to educate the electorate on the processes of government.”³

5 Struggling with ignorance about how the law and the constitution work in New Zealand is an eternal problem. I first wrote *Unbridled Power* in 1978 and 1979 to try and dispel the ignorance and suggest some reforms. The work is now in its fourth edition and is extensively used at universities. But universities are not quite where it is at. Basic knowledge of this type has to reside in the general population. The knowledge has to be imparted at secondary school level. In New Zealand we fail at this task. We will never make any progress in changing the constitution or even understanding it, unless knowledge of civics improves in the whole community.

6 I have not always been in favour of Bill of Rights for New Zealand. In 1968 I published an essay that set out the case for and against such a move, and came out against it. My conclusion was that New Zealand conditions in 1968 did not seem appropriate for the introduction of a Bill of Rights in the form of superior law because it would give a political role to the judges to strike down legislation that was contrary to the Bill of Rights.⁴ That step might threaten the stability and respect that the judicial system enjoyed. The Judges’ decisions may be unpredictable. And in our small and sensitive political system it was not clear there was any need for it. It would, I concluded then, be contrary to the pragmatist traditions of New Zealand politics. There are many who would agree with those arguments still, but I am not one of them.

³ Justice and Law Reform Select Committee, “Interim Report on the Inquiry into the White Paper - A Bill of Rights for New Zealand” [1986-1987] X AJHR I 8A 22.

⁴ GWR Palmer “A Bill of Rights for New Zealand?” in K J Keith (ed) *Essays on Human Rights* (Sweet & Maxwell (N.Z.) Ltd., Wellington, 1968) 106-131.

- 7 The effort I spearheaded in the 1980s was to have a superior law Bill of Rights of which the Treaty of Waitangi was a part. That effort failed in its ambitious aim of making the Bill of Rights superior law to which all other law was subject. Let me quote the policy of the Labour Party on the topic, one that I wrote in 1984:⁵

“It is the policy of the Labour Party to introduce a Bill of Rights for New Zealand. It will be based on the International Covenant on Civil and Political Rights which New Zealand has ratified. It will provide:

- (a) guaranteed protection for fundamental values and freedoms;
- (b) restraint on the abuse of power by the Executive and Parliament;
- (c) restraint on the abuse of power by other organizations;
- (d) an authoritative source of education about the importance of fundamental freedoms in a democratic society;
- (e) a judicial remedy to individuals who have suffered under a law or conduct which breaches fundamental rights;
- (f) a set of minimum standards to which public decision-making must conform.”

How the 1990 Act developed

- 8 After a lot of debate the Bill of Rights was enacted as an ordinary statute that gave the courts interpretative powers in respect of the provisions of the Bill, section 6 providing, “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other.”
- 9 Yet in the assessment of Professor Philip Joseph the effect of the Bill of Rights has been significant. Writing in 2001 he said, “Today, the Bill of Rights is an integral part of our jurisprudence and represents one of the major legal developments of the modern era.”⁶ This outcome was not self-evident when it was enacted since it was originally designed as a much more potent measure that

⁵ Geoffrey Palmer *Unbridled Power: an Interpretation of New Zealand's Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 282-283.

⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 1018.

would have empowered courts to strike down legislation incompatible with the guarantees of human rights that it contains.⁷

- 10 Despite the fact that the Bill of Rights has produced an avalanche of decisions in the courts (there were 577 appeals raising Bill of Rights issues in the Court of Appeal in the first 13 years),⁸ for the most part the impact has been confined to the criminal law. Its full effect on civil litigation is yet to be felt, as Sir Ivor Richardson has pointed out:⁹

“On the civil and public law side there is a developing awareness, assisted by information on the breadth of coverage under the United Kingdom Act, of the potential reach of the *Bill of Rights* in statutory interpretation and the exercise of statutory discretion and on the development of the common law in fields as varied as free expression, administrative law, commercial law, employment law, environmental and planning law, family law, education, health, housing and social welfare law, intellectual property and sports law.”

- 11 I have been surprised at the relatively low level of awareness within the legal profession of the potential impact of the Bill of Rights in fields beyond the criminal law. There is much scope and over time more impact will be felt in other fields. The New Zealand Law Society made strong submissions against a Bill of Rights for New Zealand and I do think professional thinking has been slow to change. There is much more for commercial clients in the Bill of Rights than has yet been yielded. After all, all legal persons can claim its protection, not only individuals.
- 12 Much of the reach of the Bill of Rights as a restraint on government action flows from its parliamentary nature. The Attorney-General is required to report to Parliament where a Bill introduced appears to be inconsistent with the Bill of Rights. These legal opinions, known as vets, are now made public on the Ministry of Justice’s website. As of 31 August 2005, negative reports had been made on 36 occasions, 18 of these in relation to Government Bills.¹⁰ Parliament can pass

⁷ For a full account of my experiences in attempting to pass the Bill of Rights see Geoffrey Palmer, *New Zealand’s Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) 51-64.

⁸ Sir Ivor Richardson “The New Zealand Bill of Rights: Experience and Potential, including Implications for Commerce” (2004) 10 *Canterbury L Rev* 259, 260.

⁹ Sir Ivor Richardson above n 8, 268.

¹⁰ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) para 8.13.1.

legislation notwithstanding a negative vet, but it will usually be reluctant to do so. The effect of these requirements upon the government's policy making system is substantial and has an important deterrent effect on policy makers promoting measures contrary to the rights and freedoms contained in the Bill of Rights.

- 13 A massive legal resource goes into producing these vets, and I doubt that many people understand how far the Executive Government goes to ensure its legislative proposals comply with the Bill of Rights. The impact of this work may be more significant than that of the courts in ensuring New Zealand keeps to the standards it has embraced. It is important to note that the vetting process has evolved. It is now much more transparent and all vets are placed on the Ministry of Justice's website.

What was achieved?

- 14 The interesting thing about the New Zealand experience with the Bill of Rights is that the measure has been effective in accomplishing its purpose despite the fact it is not superior law. Parliament remains primarily in charge of the law making. It needs to be said, however, that measuring its effect in empirical terms has not been done and would not be easy to do. A recent legal text on the Bill of Rights in New Zealand occupying 852 pages points out modern human rights instruments "need not be entrenched as a supreme law to be both influential and effective."¹¹ A more recent book by Andrew and Petra Butler is 1204 pages.¹² There must be something going on here.
- 15 The reality is that fundamental rights and freedoms in New Zealand are protected by the New Zealand Bill of Rights Act 1990. Although the Courts have no powers to strike down legislation incompatible with it, they may make declarations of inconsistency if a statute is not capable of being interpreted consistently with the Bill of Rights.¹³ The Bill of Rights in New Zealand gives the Courts powers that are additional to their ordinary and well established power

¹¹ Paul Risworth, Grant Huscroft, Scott Optican, and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland 2003) 2.

¹² Butler, above n 10.

¹³ Some may quibble with this statement, but I take the view that in appropriate cases it is available.

to interpret and apply the meaning of laws passed by Parliament. Coupled with the common law powers Courts have always exercised in New Zealand, the Act gives to our courts what is sometimes called a “weak-form judicial review” of legislative action compared to the strong form that exists in the other countries such as the United States.¹⁴

- 16 The constitutional issues with the Bill of Rights revolve around the powers of the Courts compared to the powers of the Executive branch and Parliament. There was a lively debate in New Zealand in 2004 concerning the appropriate sphere of judicial versus parliamentary decision-making. That debate raises the issue of who has the final word - is it Parliament or the Courts? Is the system characterized by parliamentary or judicial supremacy? Or is this question misconceived? Is there a constitutional mutation taking place and if there is, in what direction is it taking us?¹⁵
- 17 Like many issues in constitutional law and constitutional debate it comes down to a normative judgment about the appropriate distribution of powers among the branches of government. After fifteen years we are now in a position to make some judgments about what the effect of the Bill of Rights may have been had the courts back then been given the power to strike down laws that offended its provisions.
- 18 There are some examples of legislation passed that is in breach of the provisions of the Bill of Rights. The most obvious example was the legislation that retrospectively increased the penalty for home invasion.¹⁶ These measures came before the courts in two cases.¹⁷ In one of the cases the Court of Appeal condemned the amendment as being inconsistent with the rule of law but was able to avoid the big question of inconsistency with the Bill of Rights because the

¹⁴ Mark Tushnet, “Weak-Form Judicial Review: Its Implications for Legislatures” (2004) 2 NZJPIL7, 7.

¹⁵ Rt Hon Dame Sian Elias GNZM “Sovereignty in the 21st Century: Another spin on the merry-go-round” (2003) PLR 148 and Michael Cullen “Parliamentary Sovereignty and the Courts” [2004] NZLJ 243.

¹⁶ Criminal Justice Amendment Act 1999; Crimes (Home Invasion) Amendment Act 1999.

¹⁷ *R v Poumako* [2000] 2 NZLR 695; *R v Pora* [2001] 2 NZLR 37

sentence given would have been appropriate under the prior legislation as well. In the other case the court also avoided having to apply section 4 of the Bill of Rights Act by finding that the offending occurred before the power to impose minimum periods of imprisonment came into existence. But one judge went as far as to say the provision “is incompatible with the cardinal tenets of a liberal democracy.”¹⁸

- 19 The problem arose in part because the legislation had been amended by Supplementary Order Paper agreed to by the House at the Committee of the Whole stage, late in the legislative process and for which there was no Bill of Rights Act report. Nor is there any provision for a report on amendments made at the Select Committee stage or later. New Zealand ought to be able to do better than that.
- 20 In essence, the Bill of Rights achieved two things. It required rigorous processes to be gone through by the executive branch in reporting to Parliament when legislative measures were in breach of the Bill. While Parliament has the right to legislate despite breaching the Bill there is a reluctance to advocate measures that do so. Second, it provided the Courts with a new weapon on carrying out statutory interpretation. Both have been important. But in the final analysis neither is controlling.

Future Policy Options

- 21 The policy issues concerning the New Zealand Bill of Rights Act to be addressed in the future deserve consideration. There are at least six broad directions on offer. The first is to retreat and repeal the Bill of Rights Act and go back to where New Zealand was prior to the developments of the past fifteen years. Strange as it may seem this is an option that has supporters. Take for example, the position of Professor John Smillie of Otago University that has been articulated recently.¹⁹
- 22 Professor Smillie offers the following policy prescription.

¹⁸ *R v Poumako*, above n 17, para 70 Thomas J.

¹⁹ J Smillie, “Law, Social Policy and the Courts: Who wants Juristocracy”, (2006) 11 Otago LR 183.

1. Repeal the New Zealand Bill of Rights Act.
2. Reduce the number of Judges.
3. Abolish the Supreme Court.
4. Abolish the position of Judges' Clerk.
5. Train career Judges.

23 It is not an exaggeration to characterise this as a radical agenda. On the internal evidence of the article it is fair to claim that Professor Smillie has little confidence that his agenda will be adopted. He offers this explanation: "Even though I have spent most of my life in the deep south of New Zealand I realise that my recommendations for change are not likely to find a sympathetic ear in Wellington".²⁰ So he offers an alternative prescription should his Plan A not be adopted. His alternative is to extend the Bill of Rights to cover social and political rights because, he argues, the social justice element has been neglected in Bill of Rights jurisprudence. Advocates of Bills of Rights will want, he says, judges to be charged with making really important decisions that impact directly on the lives of people.

24 While I do not have time to deal in full with the argument he runs, it seems to me that its fundamental flaw stems from the fact that in advocating a Bill of Rights that includes judicial review of legislative action it is important to recognize the limitations on the judicial method. To say the Courts are good at some things does not imply a judgment that they are good at everything. The limits of justiciability need to be firmly kept in mind.

25 So Professor Smillie offers the second policy option, at the other end of the spectrum to his first, which is to adopt a Bill of Rights as superior law that includes not only civil and political rights but also social and economic rights. The prime model for that approach flows from the modern South African Constitution.²¹ South Africa has a constitutional court. That Court played an important role in the formation of the new constitution. It had to approve the draft

²⁰ Smillie above n 19, 193.

²¹ Constitution of the Republic of South Africa, as adopted by the Constitutional Assembly on 8 May 1996.

that was hammered out in the political negotiations and the Court made significant alterations.

26 But what is even more striking are the powers of the Constitutional Court to strike down decisions and legislative enactments not only in the realm of civil and political rights but also social and economic rights. These are judicial powers of a broader character and with deeper implications than those enjoyed by the Supreme Court of the United States. Among the principles that can be litigated in South Africa are included the right to an environment that is not harmful to a person's health or well-being;²² the right to adequate housing and the requirement that the state must take reasonable legislative and other measures within its available resources to achieve progressive realisation of this right;²³ everyone has the right to have access to health care services, including reproductive services and sufficient food and water.²⁴ Everyone has a constitutional right to a basic education including adult basic education.²⁵

27 Some of the decisions of the South African constitutional court have been bold. In one famous decision the court invalidated a government policy on the treatment of AIDS, requiring the government to provide the drug Nevirapine to pregnant women that would prevent the mother-to-child transmission of HIV. The government policy provided for trialing the drug but not general distribution.²⁶ The court ordered the Government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access of health services to combat mother-to-child transmission of HIV and a number of other detailed policy prescriptions. Another case invalidated government decisions on the provision of housing for the homeless on the grounds that the measures were inadequate.²⁷ It ordered the State to meet the obligation imposed by the housing

²² Constitution of Republic of South Africa 1996, art 24.

²³ Above n 22, art 26.

²⁴ Above n 22, art 27.

²⁵ Above n 22, art 29.

²⁶ *Minister of Health v Treatment Action Campaign and Others (1)* 2002 (10) BCLR 1033.

²⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

provisions of the Constitution and to devise, fund, implement and supervise measures to provide relief to those in desperate need.

- 28 For myself I cannot see that such judicial encroachment into key government activity can be acceptable in New Zealand's political culture and it runs contrary to our traditions. Nor do I believe our judges have the background or capacities to make that sort of decision. It is best left to politics. In South Africa the constitutional court administers a constitution born out of circumstances quite different from New Zealand's. For me the South African arrangements translated to New Zealand do raise the spectre of Professor Smillie's "juristocracy."
- 29 It is not my view and never has been that the Judges should be let loose on the broader aspects of social policy to alter in significant ways fiscal policy, taxation policy, education, health, social welfare policy or any of the other broader political issues that constitute the stuff of politics in New Zealand. My aim has always been more limited - limited to those issues relating to civil and political rights that lie at the bedrock of our democratic system, where the common law judges have traditional expertise in our legal culture. Having dealt with the options that lie at the two extremes of the continuum, now I put forward a third.
- 30 An extension of the judges' powers can be considered within the defined areas contained in the Bill of Rights Act. They could be given the power to invalidate legislation. Section 4 of the Bill of Rights would have to be repealed. The experience New Zealand has had with the Bill of Rights over the past fifteen years does not indicate to me that the net impact of such an extension would be dramatic. Indeed, in broad terms, I suggest it would have less impact on the Executive Government and Parliament than the growth of judicial review of administrative action. Since the passage of the Judicature Amendment Act in 1972 this growth has been dramatic. Yet these significant increases in judicial power do not appear to have been resented by the Executive, the Parliament or the citizenry. No serious effort has been made to curb the growth of modern administrative law. Neither has it hampered the capacity of the Executive and Parliament to carry out their functions. Justice in an individual case is not the same thing as social justice for the community as a whole.

31 A fourth option similar to that just discussed comes from Canada. In this respect it is important to recall that our own Bill of Rights was based in important respects on Canada's Charter of Rights and Freedoms. It would be a relatively simple change in technical terms to repeal section 4 of the New Zealand Bill of Rights Act and enact in its place a version of the Canadian provision, section 33 of the Charter:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

32 Some rights in Canada cannot be overridden. These are democratic rights and some equality rights. But for those that can, the override only lasts five years, although it can be re-imposed. The interesting thing about this provision in Canada is how little it has been used. The political arms of government have to pay a reasonably high price to use the override and they do not seem willing to do so. The politics of overriding fundamental rights in a democracy are never good.²⁸ Giving Parliament the final say is consistent with New Zealand's traditions and making the judgment to invade rights a political decision is also consistent with our traditions. This option would protect rights and restrain government, but at the same time it would not disturb the supremacy of Parliament.

33 The fifth option comprises a number of smaller changes that could be pursued independently of one another. The Human Rights Act 1998 in the United

²⁸ Peter W Hogg *Constitutional Law of Canada* (3 ed, Carswell, Toronto, 1992) 898.

Kingdom owes a significant debt to the New Zealand Bill of Rights Act 1990. The influence of the New Zealand model has been acknowledged by Lord Lester, the principal proponent of the measure.²⁹ It has been influential elsewhere as well in the proposed Victoria Charter of Rights and the Human Rights Act 2004 in the Australian Capital Territories.

- 34 In some respects the Courts in the United Kingdom have been bolder in interpreting their Act than their New Zealand counterparts have been in dealing with ours.³⁰ And the Act itself goes further than the New Zealand Act in some important detailed respects, particularly concerning treaties and declarations. Looking at the British experience it would be possible in New Zealand to engage in some modest tweaking so as to give express power to make declarations of inconsistency and perhaps providing the power to examine the nature of the international obligations New Zealand has assumed, and the consistency of New Zealand's domestic law with those obligations.
- 35 Another option would be to give power to the courts to invalidate subordinate legislation on Bills of Rights grounds, as they can do on *ultra vires* grounds. Another beneficent tweaking would be to ensure that reports are made to Parliament on amendments to bills made by Select Committees or by supplementary order papers in terms of their consistency with the Bill of Rights. Procedurally this will not be easy to achieve but it would be a worthwhile reform. Yet another tweaking option includes the protection of property rights by the Bill of Rights. I took a deliberate decision to exclude this in the 1980s but on reflection I believe it should be included.³¹ There may, however, be other candidates for inclusion although I have not examined their merits.
- 36 The sixth policy option and the one most likely to be followed in the immediate future is to leave things as they are. As pointed out earlier there is a great deal more to be achieved through the existing Bill of Rights in areas of the law other

²⁹ Anthony Lester QC "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" (2002) 33 VUWLR 1.

³⁰ *A v Secretary of State for the Home Department* [2005] 2 AC 68.

³¹ Geoffrey Palmer "Westco Lagan v A-G" [2001] NZLJ 163.

than crime. The Bill could be left to do its work in this regard without any change at all.

Conclusion

- 37 New Zealand’s constitutional traditions are conservative. The immediate prospect of either repealing the Bill of Rights Act or advancing it in the ways discussed here, do not appear to be high. These issues are not on any political or policy agenda so far as I am aware. It is perhaps not unsurprising that I retain a lingering affection for a superior law Bill of Rights. It may occur in the fullness of time.
- 38 After fifteen years my own conclusion is that what we have now is certainly better than not having a Bill of Rights at all. It has been “a set of navigation lights for the whole process of government to observe,”³² and governance in this country has been more principled because of it.
- 39 New Zealand has always prided itself on respecting fundamental human rights. Prior to the enactment of this measure, however, the rhetorical political tendency was to say that New Zealand always honoured fundamental human rights without looking to see whether the claim was valid. Too often it was not. Administrative convenience, a tendency to trust the state and the use of its powers, and a homogenous political culture with a unicameral legislature made New Zealand in historical terms rather self satisfied and uncritical about rights.
- 40 Our world is altogether different now. New Zealand is a highly pluralist society with many diverse sets of values shared among its inhabitants. This pluralism places pressures on fundamental rights. But it also provides the essential need for their protection. It is not too much to say that the Bill of Rights has changed New Zealand’s legal culture and widened its horizons. Analysis has replaced rhetoric.

³² Ministry of Justice “A Bill of Rights for New Zealand: A White Paper” [1984-85] I AJHR A 6 6.