PAPERS PRESENTED AT THE ALUMNI SYMPOSIUM 2012

The Constitutional Review and Entrenchment of the Bill of Rights

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I INTRODUCTION

These notes were prepared for a talk given at the Auckland University Law Review Alumni Symposium on 28 September 2012. The purpose of the symposium was to invite alumni of the Review — of which I am one as a former Editor-in-Chief — to revisit their student work on a particular legal issue and to reflect on how the law or their views on it have changed over the intervening years. The theme of the 2012 Symposium was "Constitutional Review", chosen to align with the review of New Zealand's constitutional arrangements being undertaken by the Government appointed Constitutional Advisory Panel.

One of the issues identified in the Panel's Terms of Reference is whether the New Zealand Bill of Rights Act 1990 (the Act) should be entrenched.[1] It is not clear what this means. It could mean simply protecting the Act in its current form from repeal. This would not be of any great constitutional significance given that by virtue of s 4, the Act is already expressly subject to other inconsistent legislation. Or it could mean granting the Act "higher law" status so that it may not be overridden by other acts of Parliament. This would of course represent a very significant constitutional change for New Zealand.

These notes focus on the second possibility. In keeping with the format of previous symposia, I reflect on my own student view and on how that has changed in the 15 years since graduation. I record the same caveat given orally at the Symposium, namely that for the purpose of describing an abrupt reversal in my own thinking there might be some exaggeration for effect.

II TURNING BACK THE CLOCK

My final year at Auckland Law School was 1997. My view on the desirability of a "supreme" or "higher law" Bill of Rights, enforced by a judiciary given the power of legislative review, reflected what I remember as the prevailing view at law school at the time: that this was something to which New Zealand should aspire. I suggest that there were three principal reasons why the notion of a supreme Bill of Rights was in vogue, at least amongst law

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1 Cabinet paper and minute "Consideration of Constitutional Issues: Constitutional Advisory Panel" 18 April 2011 CAB Min (11) 16/17 at 8.

students and academics, if not the wider population.

The Influence of Lord Cooke

First, this was a time when the influence of Lord Cooke, appointed a Law Lord in London in 1996 after two decades on the New Zealand Court of Appeal, the second as its President, was at its height. Large parts of many of my law school classes had been taken up with the study of his judgments, particularly in the field of public law. In April 1997, the Legal Research Foundation hosted a conference in Auckland in Lord Cooke's honour, with a session devoted to the Judge's common law "fundamentals". This was the notion that "[s]ome common law rights presumably lie so deep that even Parliament could not override them."[2] Justice Michael Kirby of the High Court of Australia was invited to the conference to play the villain. He described Lord Cooke's position as "heresy".[3] Justice Kirby put his contrary view as follows:[4]

> In the end, it is respect for longstanding political realities and loyalty to the desirable notion of elected democracy that inhibits any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of Parliament by reference to suggested fundamental rights ... .

Whilst I now broadly agree with Justice Kirby's statement, to admit so at the time, in the context of Lord Cooke's valedictory conference, would have been like cheering for the Wallabies at Eden Park.

Constitution Envy

Secondly, I was suffering from a unique form of cultural cringe. This might be described as constitution envy. Many leading New Zealand legal academics, judges and lawyers had studied in the United States in the era of liberal heroes such as Earl Warren, William Brennan and Thurgood Marshall. Those Justices had used the powers conferred on them by the United States Constitution (or at least the prevailing judicial interpretation of it)[5] to strike victories for progress in areas such as racial equality (in *Brown v Board of Education*),[6] privacy and reproductive rights (in *Griswold v Connecticut*[7]

2 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

3 Michael Kirby "Lord Cooke and Fundamental Rights" (The Struggle for Simplicity Conference, Auckland, 4–5 April 1997).

4 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 405. See also Michael Kirby "Lord Cooke and Fundamental Rights" in Paul Rishworth (ed) *The struggle for simplicity in the law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 331.

5 *Marbury v Madison* 5 US 137 (1803) and subsequent applications of that decision.

6 *Brown v Board of Education* 347 US 483 (1954).

7 *Griswold v Connecticut* 381 US 479 (1965).

and *Roe v Wade*),[8] and due process of law (in *Miranda v Arizona*).[9] The justification for judicial supremacy brought about by these decisions is nicely encapsulated in the foreword to Richard Kluger's superb book on the *Brown* decision, *Simple Justice*:[10]

> There was irony in [*Brown*] because the nine Justices, as has often been said, constitute the least democratic branch of the national government. Yet this, most likely, was one reason why the Court felt free to act: it is not compelled to nourish the collective biases of the electorate; it may act to curb those unsavory attitudes by the direct expedient of declaring them to be intolerable among a civilized people.

New Zealand lawyers, working in a system where Judges have no established authority to countermand clearly expressed legislative choices, no matter how unsavoury, could only look on with envy.[11] This desire for "higher law" was likely heightened by the long Prime Ministership of Sir Robert Muldoon, perceived as a time when Parliament was dominated by an executive wielding "unbridled power".[12] The recognition of the Treaty of Waitangi as New Zealand's "fundamental constitutional document" and the use of its principles in litigation also offered a tempting view of the possibilities of a comprehensive written constitution.[13]

An Opportunity Missed

Thirdly, there was a strong sense of longing in respect of the New Zealand Bill of Rights Act for what might have been. The original 1986 White Paper had recommended an act that would have amounted to higher law.[14] Section 4 was added as a last minute spoiler, reflecting public concern about, in the words of the Select Committee:[15]

> The redistribution of power this was thought to entail from elected representatives of the people who were directly accountable to them to the judiciary who were appointed and held office until their retirement.

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8 *Roe v Wade* 410 US 113 (1973).

9 *Miranda v Arizona* 384 US 436 (1966).

10 Richard Kluger *Simple Justice: The History of Brown v Board of Education and Black America's Struggle for Equality* (Vintage Books, New York, 2004) at ix–x.

11 Thus ignoring FW Maitland's admonishment that "a classification of legal rules which suits the law of one country and one age will not necessarily suit the law of another country or of another age"; and FW Maitland *The Constitutional History of England: A Course of Lectures* (Cambridge University Press, 1908) at 526–527. See also Sian Elias "Constitutions and Courts" (10th AIJA Oration, Sydney, 16 June 2000).

12 A reference to Sir Geoffrey Palmer's book of that name. It was ultimately politics and a referendum that reigned in this power by remaking New Zealand's electoral system.

13 *New Zealand Maori Council v Attorney General* [1996] 3 NZLR 140 (CA) at 185 per Thomas J.

14 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6.

15 Bill Dillon "Final Report of the Justice and Law Reform Committee: On a White Paper on a Bill of Rights for New Zealand" (1988) I AJHR 8A at 3.

When introducing the weakened Bill for its second reading, Sir Geoffrey Palmer stated that public consultation had shown that "New Zealand is not ready for an entrenched bill of rights".[16] Many in legal circles agreed with Palmer's view that a more informed and mature society would one day endorse a stronger document. Section 4 was seen as a temporary provision that might one day be removed. Appointed judges would then be left to conduct a balancing exercise under s 5 and to determine whether Parliament had acted in a manner that could not be "demonstrably justified in a free and democratic society". In the meantime, the courts had to content themselves with "tugging on Superman's cape", to use Professor Taggart's phrase.[17]

III IF YOU NEVER CHANGE YOUR MIND, WHY HAVE ONE?[18]

Fifteen years on, my view on these matters is very different. This is not, as I said at the Symposium, the result of any change in political outlook; a case of conservatism brought on by arrival in the upper tax bracket. Rather, it results from reconsideration of how substantive political objectives are best achieved and by whom substantive policy choices are best made. It also reflects my view on who is likely to prove more progressive over time. For three reasons I now consider that a supreme law Bill of Rights — at least one providing for substantive (rather than procedural/participatory) rights enforced by the judiciary through legislative review — is not something to aspire to or that the Constitutional Advisory Panel should recommend.

Times Have Moved On

First, the legal debate in New Zealand has simply moved on. The Court of Appeal has accepted in clear terms that even fundamental common law rights may be abrogated or removed by Parliament so long as it speaks clearly. In the words of Thomas J: "Parliament can curb fundamental rights by making its intention to do so clear".[19] The judiciary might have a greater role only in the case of wholesale constitutional break-down. The three examples given by the Court of Appeal in *Shaw v Commissioner of Inland Revenue* concern the electoral process and the interrelationship between the branches of government rather than matters of substantive policy: [20]

> Cancellation of future elections, delegation by Parliament of its entire function to the Executive, or removal of the rights of citizens to resort

16 (14 August 1990) 510 NZPD 3449.

17 Michael Taggart "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" [1998] Public Law 266. Compare the lyrics of "You Don't Mess Around with Jim", a 1972 single by Jim Croce.

18 Attributed to Edward de Bono.

19 *R v Pora* [2001] 2 NZLR 37 (CA) at [121]. *Pora* concerned the longstanding common law rule against retrospective penalties.

20 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [16].

> to the Courts for determination of their rights.

Even in respect of these matters the bridge of legislative review is only to be crossed, or not as the case may be, when we come to it.[21]

Be Careful What You Wish For

Secondly, by the time I studied in the United States a number of its prominent legal academics had themselves fallen out of love with legislative review. This is nicely reflected in the titles of their books: *Taking the Constitutional Away from the Courts* (Mark Tushnet);[22] *The People Themselves* (Larry Kramer);[23] *Here, the People Rule* (Richard Parker);[24] *Weak Courts, Strong Rights* (Tushnet again).[25] Even Lawrence Tribe, a great proponent of legislative review, seemed to be having his doubts, if not as to the system then at least as to its functioning in the hands of the incumbent members of the United States Supreme Court.

My impression on this last matter may have reflected the fact that I took Professor Tribe's class at Harvard shortly after his client, Vice-President Gore, had been on the receiving end of what Tribe's faculty colleague Alan Dershowitz has characterised as naked partisanship.[26] That year Professor Tribe wrote of the Supreme Court that it had shown:[27]

> Little but disdain for Congress as a serious partner in the constitutional enterprise, and not much patience with "We the People" as the ultimate source of sovereignty in this republic.

This perception that the Supreme Court, at least in the Rehnquist era, showed scant deference to the policy choices of elected officials was derived in part from the bare statistics. As noted by Cass Sunstein, the Rehnquist Court:[28]

> ... has struck down more federal laws per year than any other Supreme Court in the last half century. ... Indeed, [it] has been significantly

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21 At [17].

22 Mark Tushnet *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton, 1999).

23 Larry Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, New York, 2004).

24 Richard Parker *Here, the People Rule: A Constitutional Populist Manifesto* (Harvard University Press, Cambridge (Mass), 1994). I first read Professor Parker's book when taking his seminar, "Majority Rules", at Harvard Law School in 2001/2002. I have re-read it several times since and it has greatly influenced my thinking on the issues summarised in this talk.

25 Mark Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, 2008).

26 See Alan Dershowitz *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford University Press, New York, 2001).

27 Laurence Tribe "eroG v hsuB and Its Disguises: Freeing Bush v Gore from Its Hall of Mirrors" (2001) 115 Harv L Rev 170 at 290.

28 Cass Sunstein "Judicial Nominations 2001: Should Ideology Matter?" (Testimony Before the Subcommittee on Administrative Oversight and the Courts, Washington, 26 June 2001) at 64. Speaking at the end of the 2000 Term, former acting United States Solicitor General Walter Dellinger noted: "Twenty-four acts of Congress have been invalidated in the past five years. If that isn't a record, it is close to it." quoted in Warren Richey "New Era of Supremacy?" Christian Science Monitor (Washington, 3 July 2000).

> more aggressive in invalidating federal statutes than the Warren Court [the supposed pinnacle of judicial activism] ... .

The same charge has been levelled at the Roberts Court; in finalising these notes I have just read Lexington's column in *The Economist* which concludes: "This is a Supreme Court which does not hide its disdain for Congress. ... Expect more to follow."[29]

The Evidence

Thirdly, the evidence as to why a country might entrust the protection of its fundamental liberties to judges rather than elected politicians is incredibly thin. Of course, what one regards as evidence of good decision-making depends heavily on one's political leanings. Taking, however, a "liberal" or "progressive" standpoint, there are very few instances I can think of where judges have shown themselves to be more progressive (to use a loaded term) than elected legislatures.[30] Judges did not use the United States Constitution to secure the blessings of liberty to black Americans in 1890s Louisiana,[31] to Japanese-Americans during World War Two,[32] to many of the victims of McCarthyism,[33] to sexual minorities in the 1980s[34] (or for that matter in 2000),[35] to name just a few. In other instances the Supreme Court has, in the Constitution's name, invalidated legislative efforts to benefit (most notoriously) escaped slaves,[36] minorities generally,[37] and women,[38] not to mention the intended beneficiaries of early 20th century welfare legislation.[39]

I have twice taken the public tour of the United States Supreme Court in Washington DC. On both occasions, to the best of my memory, the only decision of the Court that was mentioned by the guide was the unanimous one in *Brown* rather than, say, the 29 per cent of cases in the most recent term decided by a five to four majority,[40] or *National Federation of Independent Business v Sebelius* where President Obama's signature political achievement survived by a single unexpected vote,[41] or the divided

29 Lexington "Above the Fray but Part of it: Why the Supreme Court annoys both left and right" *The Economist* (London, 29 June 2013) at 40.

30 These notes are only concerned with the relationship between the judiciary and the legislature and do not address the judiciary's crucial constitutional role in upholding the rule of law against the executive.

31 *Plessy v Ferguson* 163 US 537 (1896).

32 *Korematsu v United States* 323 US 214 (1944).

33 See for example *Cafeteria & Restaurant Workers Union v McElroy* 367 US 886 (1961).

34 *Bowers v Hardwick* 478 US 186 (1986).

35 *Boy Scouts of America v Dale* 530 US 640 (2000).

36 *Dred Scott v Sandford* 60 US 393 (1857).

37 *Adarand Constructors, Inc v Pena* 515 US 200 (1995).

38 *United States v Morrison* 529 US 598 (2000).

39 Most notoriously in *Lochner v New York* 198 US 45 (1905). I recognise that this summary is a simplification of complex cases, which turned on their own facts and in some cases the division of legislative powers between Congress and state legislatures.

40 Kedar Bhatia "Final October Term 2012 Stat Pack" (26 June 2013) SCOTUSblog <www.scotusblog.com>.

41 *National Federation of Independent Business v Sebelius* 567 US___(2012).

Court of *Bush v Gore*.[42] One case, however celebrated, is a thin justification for a constitutional system.

Turning back to New Zealand, a majority of the Court of Appeal in *Quilter v Attorney-General* made it clear that they would not have used even a supreme law Bill of Rights (one that expressly includes sexual orientation as a prohibited ground of discrimination) to find that legislation defining marriage as a union between a man and a woman is discriminatory.[43] Marriage equality in New Zealand resulted from legislative rather than judicial action. The same is true in a number of states in the United States and countries around the world. In its recent decisions in *United States v Windsor* (*DOMA*)[44] and *Hollingsworth v Perry* (*Proposition 8*),[45] the United States Supreme Court has merely recognised a societal change that was already well advanced.

The same was arguably true of *Brown*. In an article in *The New Yorker* on the 50th anniversary of the decision, Cass Sunstein summarised the view of many progressives that its importance has been overstated: "social forces and political pressures, far more than federal judges, were responsible for the demise of segregation".[46] Moreover, this view goes, *Brown* conferred "excessive prestige on an institution whose tendencies are better symbolised by *Bush v. Gore*".[47] That decision and a very few others misled progressives into expending valuable energy and resources on legal proceedings that would have been better used advocating for legislative change.

IV THE COURT AS GUARANTOR OF POPULAR DECISION-MAKING

Returning to the Symposium's theme, one might approach the question of entrenchment from the starting point that the electorate, "[t]he people themselves" in the words of James Madison,[48] rather than the judiciary, is the best keeper of the country's liberties. Such a majoritarian approach to the Constitutional Review may lead beyond a simple reaffirmation of parliamentary supremacy. Rather, it could cause the Panel to endorse the adoption and entrenchment of justiciable rights to political participation such as those found in s 12 of the New Zealand Bill of Rights Act. Which other rights should be included turns on one's view of democracy and whether certain matters are regarded as a precondition to effective participation.[49]

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42 *Bush v Gore* 531 US 98 (2000).

43 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

44 *United States v Windsor* 570 US ___(2013).

45 *Hollingsworth v Perry* 570 US___(2013).

46 Cass Sunstein "Did Brown Matter?" *The New Yorker* (online ed, New York, 3 May 2004) at 1.

47 At 3.

48 James Madison "Who Are the Best Keepers of the People's Liberties?" *National Gazette* (Philadelphia, 22 December 1792).

49 Compare the debate between Jurgen Habermas and Ronald Dworkin. See Frank Michelman *Brennan and Democracy* (Princeton University Press, Princeton, 1999).

Whatever the precise scope of procedural entrenchment, its justification would not be any perceived need to restrain the "unsavoury attitudes" of the electorate. On the contrary, constitutionally guaranteed rights to electoral participation would affirm the country's commitment to majoritarian decision-making,[50] the very commitment that the 1986 White Paper was criticised for undermining. New Zealand's written constitution could be designed around the idea that popular decision-making should be encouraged, not restrained (as its unwritten one arguably already is). In the words of one of the best known proponents of limited legislative review, John Hart Ely, the judiciary should "concern itself only with questions of participation, and not with the substantive merits of the policy choice under attack".[51] All matters of substantive policy would be up for debate, "a debate which is necessarily without any guarantor and without any end".[52]

50 To the extent that the so-called weakest branch of government can ever guarantee anything; "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it": Learned Hand "The Spirit of Liberty (1944)" in Irving Dilliard (ed) *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Vintage Books, New York, 1959) at 144.

51 John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge (Mass), 1980) at 181. Of course this is not always an easy line to draw and one that is susceptible to mission creep by the judiciary.

52 Claude Lefort *Democracy and Political Theory* (Polity Press, Cambridge (UK), 1988) at 39.