THE COMMON LAW MIND OF GEORGE BARTON

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Dr George Barton's remarkable life in the law exemplified two themes of general lasting importance. The first is the need to ensure that, in its progressive development, the New Zealand legal system takes full advantage of its membership of the wider common law family of legal systems. McLachlan argues that this is not merely a matter of optional comparative reference, pursuing a vague notion of transnational law. Rather, consideration of other common law authority is integral to legal reasoning in New Zealand and essential if the New Zealand legal system is to avoid the risk of insularity. The second general theme is the contribution that New Zealand can make to the practical achievement of international human rights, particularly within the same family of legal systems. McLachlan develops these two linked themes by reference to his personal experience of working with Dr Barton on Commonwealth legal matters over the last 30 years.

> [A]ll mankind is of one author and is one volume. When one man dies, one chapter is not torn out of the book but translated into a better language, and every chapter must be so translated. ... God's hand is in every translation, and his hand shall bind up all our scattered leaves again for that library where every book shall lie open to one another.[1]

I first met George Barton in 1983 when in my final year of law studies at Victoria University of Wellington. Professor Tony Angelo mentioned to me that Dr Barton was looking to engage a research assistant to devil for him whilst Marion Frater (later Justice Frater) was on maternity leave. It was a remarkable encounter. George Barton was in the midst of his long and eminent career. He had just the previous year won a signal victory against the New Zealand Government in the Western Samoan citizenship case *Lesa v Attorney-General*.[2] He had a welter of other briefs in the courts in

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1 Meditation 17 from *Devotions upon Emergent Occasions* (1624), reprinted in John Donne *No Man is an Island* (Folio, London, 1997) at 75.

2 *Lesa v Attorney-General* [1983] 2 AC 20 (PC).

New Zealand (and also in Samoa) and was, by common consent, the leader of the New Zealand bar. I had had no experience of legal practice. My head was full of law learned from the books and from exposure to much inspiring teaching at Victoria University of Wellington, and so I wondered – nervously – how much help I could really be to him. I need not have worried. Amongst George's many great qualities, he never stood on ceremony or asserted a priority amongst those who worked with him for his own thoughts on the problem at hand, as he so easily could have done given his own vastly superior, indeed encyclopaedic, knowledge of the law. On the contrary, he was highly approachable. What he wanted was legal research which he could put to use in preparing legal argument. It mattered not a jot to him how junior his assistant was if he or she could produce results. He was always open to new ideas and approaches.

My professional as well as personal debt to George is immense. In this short reflection, I want to address two interlinked aspects of his legal mind that are of lasting general interest and significance. The first is his approach to the common law. The second (which may be less known but is of no less significance) is his internationalism.

The first major matter that I worked on for George was an object lesson in the way in which he worked. He was acting for a naturalised Samoan, Walter Vermeulen, who claimed variously that he either had been validly appointed as Director-General of Health in Western Samoa or that he was entitled to be so appointed.[3] The brief was typical of George's fearless advocacy on behalf of persons, regardless of their means, who had been wronged in particular by alleged abuses of State power. My first research task was to establish that the ancient prerogative writ *quo warranto,*[4] to restrain the usurpation of a public office, would have been available to the plaintiff under the Constitution of Western Samoa. For me this was wildly unfamiliar territory. But for George it was as much a part of his legal lexicon as the Land Transfer Act 1952 or the Judicature Act 1908 and the Code of Civil Procedure.[5] The arcane field of the application of imperial laws in the Commonwealth

3 *Vermeulen v Attorney General (No 1)* (13 December 1983) (SC Western Samoa) per Eichelbaum J, noted in (1985) 11 CLB 35; *Vermeulen v Attorney General (No 2)* [1986] LRC (Const) 786 per Mahon J.

4 Traced to the reign of Edward I: Theodore Plucknett *Legislation of Edward I* (Clarendon Press, Oxford, 1949).

5 George Barton *Judicature Act* (Sweet & Maxwell, Wellington, 1965).

was grist to his mill.[6] The ancient prerogative writs were living instruments of procedure to be applied, along with the other remedies of administrative law, to control illegal executive action.[7]

This Dr Barton had notably done when appearing for the plaintiff in an action alleging breach by the Prime Minister of the day, Robert Muldoon, of s 1 of the Bill of Rights 1688 in purporting to suspend the operation of the New Zealand Superannuation Act 1974 without the authority of Parliament.[8] The argument prompted Wild CJ to observe:[9]

> It is a graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe and on which no Englishman was to set foot for almost another hundred years. And yet it is not disputed that the Bill of Rights is part of our law. The fact that no modern instance of its application was cited in argument may be due to the fact that it is rarely that a litigant takes up such a cause as the present, or it may be because governments usually follow established constitutional procedures. But it is not a reason for declining to apply the Bill of Rights where it is invoked and a litigant makes out his case.

The Chief Justice might have added that the litigant had the singular advantage of representation by Dr Barton.

Returning to the case of Mr Vermeulen in Western Samoa, the deployment of the prerogative writs was to be no less successful there, albeit not immediately. In the first application,[10] Eichelbaum J, sitting as a judge of the Supreme Court of Western Samoa, held that the substantive principles of the writ *quo warranto* were indeed applicable in Samoa, but that the applicant had failed to establish that he had been validly appointed on the facts. A second action was brought. On this occasion, Mahon J found for Mr Vermeulen.[11] He held that the evidence given on behalf of the defendants in the first action had been "clearly incorrect" and that, had the correct evidence been

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6 Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens, London, 1966).

7 Other reported examples of Barton's successful use of administrative law procedures in the same period include: *New Zealand Educational Institute v Director-General of Education* [1982] 1 NZLR 397 (CA) (requirements for relativity in pay scales between primary and secondary school teachers); *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (CA) (wage freeze regulations could not suspend the operation of the State Services Conditions of Employment Act 1977); *Bullen v State Services Commission* [1985] 1 NZLR 402 (HC) (duty of State Services Commission to act fairly).

8 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC Wellington).

9 Ibid at 622.

10 *Vermeulen v Attorney-General (No 1)*, above n 3.

11 *Vermeulen v Attorney-General (No 2)*, above n 3.

available to Eichelbaum J, he might have come to a different decision.[12] Mahon J held that the Prime Minister had been wrongly motivated by a desire to appoint a native-born Samoan to the post; that the Public Service Commission had wrongly yielded to political pressure; and that the proceedings of the subsequent Commission of Inquiry had been vitiated by procedural shortcomings. The plaintiff was therefore entitled to orders of *certiorari* and to exemplary damages.

The purpose of this account is not merely to demonstrate Dr Barton's skilful and persistent advocacy on behalf of the ordinary person confronted with an abuse of governmental power, wherever it might arise. It is also to make a larger point about legal method. For him, the concept of the common law as a seamless web – a set of underlying principles that worked together to protect the liberty of the individual and to ensure constitutional government – was a living reality. His approach is one of enduring importance for a small jurisdiction, with a great appetite for legislation, such as New Zealand. It has been observed in the pages of this Law Review that statute has to a large extent eclipsed the common law as the dominant source of New Zealand law.[13] No doubt legislation offers the advantage of accessibility and the prospect of ready reform over the common law. But there are also dangers in a form of reductive legal reasoning which assumes that a legal system is nothing more than the sum of its legislative parts. Justice Chambers has warned extra-judicially of the risk of insularity in the development of New Zealand law and has emphasised the need to look beyond New Zealand sources for relevant authority, stressing the importance of identifying the legal principles underlying a particular argument.[14]

George Barton demonstrated the value of taking a broader view daily in his practice. He subscribed to, and read, the major law reports and journals of the leading Commonwealth jurisdictions as well as those from New Zealand. He was one of the few New Zealand members of that great independent body devoted to the progressive codification of the common law, the American Law Institute. He regularly participated in its meetings – most recently moving a motion at the Institute's 2009 Annual Meeting opposing capital punishment, which contributed to the withdrawal of that section from the Institute's Model Penal Sentencing Code.[15]

But, most importantly, even if the immediate context of the legal issue in dispute was statutory, he did not hesitate to place it in the context of wider common law principle. Thus, for example, in

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12 At 805.

13 John Burrows "Common Law Among the Statutes: the Lord Cooke Lecture 2007" (2008) 39 VUWLR 401.

14 Robert Chambers "Current Sources of Law: a Commentary" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 131.

15 Barton's motion of 13 May 2009 read: “Go ahead and adopt the Clark-Podgor motion [that the Institute condemn the death penalty] and make the non-American members of the ALI feel proud to belong to the Institute”, available at <www.ali.org/doc/Comment-Barton.pdf>. The Clark-Podgor motion was jointly authored by Professor Roger Clark of Rutgers University, another alumnus of Victoria University of Wellington, who has also contributed to this edition of the Victoria University of Wellington Law Review.

seeking to persuade the High Court (on this occasion unsuccessfully) to issue another prerogative writ – *ne exeat regno* – to prevent the All Black tour to South Africa, he cited in argument Fitzherbert's *New Natura Brevium,* Coke's *Institutes,* Viner's *Abridgement of Law and Equity,* Blackstone's *Commentaries,* Holdsworth's *History of English Law* and Jones's *Elizabethan Court of Chancery.*[16] Barton's vision of the common law was the very opposite of a slavish and unthinking adoption of inherited English dogma. Rather, it encompassed wide reference to authorities from other major common law jurisdictions in search above all of the underlying principles that animate the rules.[17]

This wider frame of reference is of singular contemporary importance in New Zealand. We cannot expect that our own litigation process will throw up sufficient cases to enable us to develop our own jurisprudence, particularly at appellate level, on every issue. In that sense external reference to authority developed elsewhere is a necessity, not a luxury. Even in larger jurisdictions, the value of comparative reference is recognised by enlightened jurists.[18] Contrary to the view expressed in the United States by Justice Scalia, this is not the imposition of "foreign moods, fads or fashions",[19] but rather assists in finding solutions to similar problems, and in identifying underlying principle.

In contemporary legal discourse, this is now frequently presented as the application of 'transnational law'.[20] But what the more general current debate about judicial reference to transnational legal materials fails to take sufficiently into account is the process of legal reasoning that determines the persuasive weight of different external legal sources. At the risk of stating the obvious, the secondary rules of the doctrine of precedent exist not merely to establish the relative binding quality of New Zealand judicial decisions. They also help us to identify which non-New Zealand sources are relevant and why. In this context, decisions from other Commonwealth appellate courts are of particular importance, because they may actually state authoritatively a common law principle, which is directly applicable as part of New Zealand law. In that sense, such authorities can offer much more than mere comparative interest and we neglect them at our peril.

George Barton was equally at home with international law materials. In *Ashby v Minister of Immigration*,[21] now widely regarded as a watershed decision on the relationship between

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16 *Parsons v Burk* [1971] NZLR 244 (SC Wellington) at 245.

17 For a general defence of this approach see Sian Elias "From Professing to Advising to Judging: Opening address" in Claudia Geiringer and Dean Knight *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 3 at 12–13.

18 Tom Bingham *Widening Horizons: the Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press, Cambridge, 2010).

19 *Lawrence v Texas* 539 US 558 (2003) at 598, citing *Foster v Florida* 537 US 990 (2002).

20 See for example Brian Flanagan and Sinead Ahern "Judicial Decision-Making and Transnational Law: a Survey of Common Law Supreme Court Judges" (2011) 60 ICLQ 1.

21 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

international law and the New Zealand legal system, he drew the attention of the Court of Appeal to decisions of the Committee under the International Convention on the Elimination of All Forms of Racial Discrimination 1965. With the advent of the New Zealand Bill of Rights Act 1990, this form of citation has become much more common. But it was nothing short of revolutionary two decades ago. Barton lit the path to a much greater acceptance of reference to public international law sources, subsequently taken up notably by Sir Kenneth Keith in his time on the New Zealand bench.[22]

In the context of the transnational law debate, it is equally important to stress that reference to international law in a municipal court is, and should be, approached in a different manner to reference to comparative law materials. When the court refers to international law it is consulting a distinct legal system in order to determine whether it contains legal obligations that bind New Zealand on the international plane.[23] In so doing, it must pay particular attention to the proper identification and application of the sources of international law – a legal system that operates with a very different set of rules of recognition than any national legal system. Only if it is satisfied that there is indeed an international legal obligation binding upon New Zealand should it then proceed, at the second stage, to determine whether, and if so to what extent, those obligations may also apply within New Zealand domestic law, or inform the interpretation of New Zealand law.

Barton was a gifted international law scholar and practitioner. He was part of an influential group of research students who studied under Professor Hersch Lauterpacht at Cambridge in the immediate post-War period. He wrote his thesis on the status of visiting armed forces, which he then published in successive issues of the British Yearbook of International Law,[24] before going on to work in the United Nations Human Rights Division and then to teach international law as a member and later Dean of the Law Faculty at Victoria University of Wellington. His research on this topic, which continues to be cited as authoritative,[25] was an early example of his characteristic meticulous scholarship. But it also demonstrated a healthy scepticism of the earlier orthodoxy (which had

22 Treasa Dunworth "Law Made Elsewhere: the Legacy of Sir Ken Keith" in Claudia Geiringer and Dean Knight *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith*, above n 17, 126 at 126.

23 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1.

24 GP Barton "Foreign Armed Forces: Immunity from Supervisory Jurisdiction" (1949) 26 BYIL 380; GP Barton "Foreign Armed Forces: Immunity from Criminal Jurisdiction" (1950) 27 BYIL 186; GP Barton "Foreign Armed Forces: Qualified Jurisdictional Immunity" (1954) 31 BYIL 341.

25 Robert Jennings and Arthur Watts *Oppenheim's International Law* (9th ed, Longman, London, 1992) vol 1 at 1157.

supported a generalised immunity of visiting forces) in favour of a much more modern notion of the concurrent jurisdiction of both the sending and the receiving state.[26]

Later professional life at the New Zealand Bar presented fewer opportunities for George to continue his work in the international law field. But he nevertheless made a signal contribution in the field of international human rights. This deserves mention here, as it may be less well-known in New Zealand and involved a felicitous opportunity for George and me to continue our collaboration. Above all, it exemplified his ability to put his scholarship and commitment to the best ideals of the common law tradition to practical use.

Barton had long had close links with the Commonwealth Secretariat (the international organisation based in London, which administers the Commonwealth). In the 1980s, the Legal Division was directed by another remarkable New Zealander, Jeremy Pope.[27] Barton had, in 1980, been commissioned to prepare a report on legal resource needs in the small island States of the Pacific, which he had submitted after thorough research and consultation.[28] He was kind enough to introduce me to Jeremy, and to Neroni Slade, then Assistant Director of the Division.[29] When I went to London in 1985, the Secretariat took me on in a very junior capacity to write a number of reports, and to edit the newly-founded law journal Commonwealth Lawyer.

But there was then a major unaddressed issue at the heart of the Commonwealth association: its unwillingness to address the human rights record of its own member States. The Commonwealth had found common cause in its opposition to apartheid in South Africa, but member States were much less willing to engage in any collective process to examine their own human rights shortcomings. Such a position seemed unsustainable in view of the fact that a shared commitment to human rights and the rule of law was part of the very foundations of the Commonwealth association. This was what the shared inheritance of the common law really meant. In the Singapore Declaration of 1971, Commonwealth States had affirmed this expressly:[30]

> We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political

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26 See further the contribution of Roger Clark in this edition of the Victoria University of Wellington Law Review.

27 LLB (Well); sometime editor of the New Zealand Law Journal, Pope was, after his time at the Commonwealth Secretariat, founding Managing Director of Transparency International. He is currently a Commissioner of the New Zealand Human Rights Commission.

28 George Barton *Legal Resource Needs in Small States* (Commonwealth Secretariat, London, 1980).

29 LLB (Well); sometime Attorney-General of Western Samoa, Slade was, after his time at the Secretariat, Samoa's ambassador to the United Nations. He is currently Secretary-General of the Pacific Islands Forum Secretariat.

30 Declaration of Commonwealth Principles, Singapore 1971.

> processes in framing the society in which they live. We therefore strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law that are our common heritage.

With all the innocence of the boy in *The Emperor's New Clothes*, I had raised this question whilst at the Secretariat in 1985, but politically the time was not ripe. Two years later, in 1987, the representatives of several other Commonwealth NGOs saw a renewed opportunity to take action where Commonwealth governments had themselves been unable to agree.[31] I was asked to prepare the paper, based upon consultations with a number of Commonwealth NGOs and professional organisations.[32] The essence of the proposal was that the NGO community should create a Commonwealth Human Rights Initiative which would itself establish an Eminent Persons Group. That Group would investigate the state of human rights in the Commonwealth and make specific recommendations. This model was based loosely upon that used by the Commonwealth in 1986 to investigate apartheid in South Africa.[33] The members of the Group would be appointed in their personal capacities, and would be entirely independent of their national governments. They would be drawn from around the Commonwealth and from different walks of life. Their recommendations would carry weight simply because of the personal standing of the members of the Group and would be avowedly independent of state interference.

In 1989, after much work by others to implement this idea, the Commonwealth Human Rights Initiative's first Advisory Group was established under Flora MacDonald, a former External Affairs Minister of Canada. The Group was to have members nominated by each of the five sponsoring Commonwealth NGOs: the Commonwealth Lawyers' Association; the Commonwealth Legal Education Association; the Commonwealth Trade Union Council; the Commonwealth Medical Association; and the Commonwealth Journalists' Association. I proposed that the Commonwealth Lawyers' Association nominate Dr George Barton QC. George, with his characteristic sense of wider public service, accepted.

In 1991, the Group published its report, addressing its recommendations to Commonwealth Heads of Government (CHOGM), who were then imminently due to meet in Harare.[34] The report did not pull its punches. On the contrary, it spoke of the wide gap between legal form and the reality of human rights observance in many Commonwealth countries. It castigated the widespread practice

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31 The political context and an account of the Commonwealth Human Rights Initiative is given in Clyde Sanger "A Clear and Steady Voice: the Commonwealth Human Rights Initiative at 20" (2007) 96 The Round Table 477.

32 Ibid at 479–480.

33 Commonwealth Group of Eminent Persons *Mission to South Africa: the Commonwealth Report* (Penguin, Harmondsworth, 1986).

34 Commonwealth Non-Governmental Advisory Group *Put Our World to Rights* (Commonwealth Human Rights Initiative, 1991).

of suspension of human rights through proclamations of emergency; indefinite detention without trial; torture; the degradation of the environment; the prevalence of ethnic conflict; and the social and economic deprivation of women and children.[35] The report also observed the formidable difficulties in the way of a Commonwealth policy on human rights but proposed that these be faced "squarely rather than sweep them aside as misconceived or mischievous."[36] Of course, the report is the work of many hands. But one cannot help hear the voice of George Barton in its content and approach – unflinchingly speaking the plain truth about conditions necessary to the dignity of the individual.

The report had a galvanising effect. It led to the adoption of the Harare Commonwealth Declaration 1991 – the principal subject-matter of which was the practical implementation of human rights in the Commonwealth. Heads of Government did not go as far as the Eminent Persons Group would have liked, leading some to bemoan "the enduring gap between governments and NGOs".[37] But the Declaration nevertheless amounted to an official and collective acknowledgement by Commonwealth Governments of the need to address human rights of a kind that would have been unthinkable even a few years earlier. That pioneering report started an ongoing Commonwealth Human Rights Initiative, as an independent NGO monitoring the Commonwealth human rights record and reporting prior to CHOGM meetings.[38] It has also kept human rights at the forefront of the Commonwealth agenda. Political forces pulling against intervention are still at work.[39] But the conspiracy of silence that formerly prevailed on this subject is at least now over.

George Barton's passing is a great loss. But his legacy of commitment to the best of the common law tradition lives on. This special issue of the Law Review, published by the Law School for which he did so much, can only hope to capture a small portion of his contribution.

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35 At 7–8.

36 At 13.

37 Clyde Sanger "A Clear and Steady Voice: the Commonwealth Human Rights Initiative at 20", above n 31, at 481.

38 See their website at <www.humanrightsinitiative.org>.

39 See for example the reaction of Heads of Government in their *communiqué* following the Perth CHOGM, 30 October 2011 to the recommendations of another Commonwealth Eminent Persons Group *A Commonwealth of the People: Time for Urgent Reform* (2011). A number of the Report's recommendations were accepted, but a key proposal that there be a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights was deferred for further study.