

## HARKNESS HENRY LECTURE 2011

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### *Fundamentals: a constitutional conversation*

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It is more than 20 years since Sir Robin Cooke, then President of the Court of Appeal, explored elements of the New Zealand constitution in his paper “Fundamentals”.<sup>2</sup> At the time he wrote, the constitutional moment which might have led to an entrenched Bill of Rights, enforced by judicial review of legislation and beyond Parliamentary encroachment, was slipping away. The compromise eventually enacted as the New Zealand Bill of Rights Act 1990 seemed the more likely outcome.

This evening, I thought I might revisit some of the themes touched on by the President. With 21 years experience of the New Zealand Bill of Rights Act and other significant legislative reforms which can properly be regarded as “constitutional”, it seems time to take stock. There are other reasons to get our thinking in order. Persistent unease about the nature of our constitutional arrangements keeps the idea of change stirring. The Cabinet has now set up a Constitutional Advisory Panel to undertake a review and to gauge whether there is support for reform.<sup>3</sup> Reform issues identified are electoral representation (including Māori representation), the place of the Treaty of Waitangi in the constitutional order, whether we should have a written constitution, and whether the scope of the New Zealand Bill of Rights Act should be expanded (perhaps to include property rights).<sup>4</sup> A final report is to be produced by 2013.

Whether or not the review leads to major reform, the exercise will be of benefit if it proposes steps to make the existing constitution more intelligible and accessible and suggests better ways to protect its values. If even that is too ambitious, shining a light on what we have is worthwhile in itself, so opaque and misunderstood is our constitution. So it is to be welcomed that one of the purposes of the review is to “stimulate public debate and awareness of New Zealand’s constitutional

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<sup>1</sup> The Rt Hon Dame Sian Elias, Chief Justice of New Zealand.

<sup>2</sup> Sir Robin Cooke “Fundamentals” [1988] NZLJ 158.

<sup>3</sup> New Zealand Government “Constitutional Advisory Panel named” (press release, 4 August 2011).

<sup>4</sup> Annex to the Cabinet Office Minute “Consideration of Constitutional Issues: Constitutional Advisory Panel” (18 April 2011) CAB (11) M 16/17 at [11].

arrangements”.<sup>5</sup> The constitution is too important to be left to lawyers to tiptoe around.

And yet, the constitution we have is not easily explained. Although it is partly captured in some major statutes, it is largely a common law construct. As such it is a subject in constant motion.<sup>6</sup> A snapshot at any one time is not only difficult to obtain and contestable in itself but quickly becomes misleading. The conventions that make the constitution work are habits of behaviour that can be lost through non-observance. Stephen Sedley once said about the British constitution that if we ask what the governing principles of the arrangements are and how their legitimacy is derived “we find ourselves listening to the sound of silence”.<sup>7</sup> That is equally true of the New Zealand constitution today. Indeed, it is more true of the New Zealand constitution than it remains true of the United Kingdom constitution under the discipline of Europe and following devolution to Scotland and Wales.

In 2004, Parliament set up a Constitutional Arrangements Committee to review our existing constitutional arrangements. It conducted what it described as a “stocktaking exercise”,<sup>8</sup> after which it concluded that “[no problems] are so apparent or urgent that they compel change now or attract the consensus required for significant reform”.<sup>9</sup> Indeed, the Committee expressed the view that “public dissatisfaction with our current arrangements is generally more chronic than acute”.<sup>10</sup> That verdict suggests acknowledgement of grumbling dissatisfaction, not amounting to a popular will for change.

It is not my wish to suggest we need constitutional reform. It does seem to me, however, that a pervasive sense of unease about our constitutional arrangements is not a good position for any country to be in. What I think that condition suggests is that we are not really sure what our constitution is and unable to assess its strengths against values we have hardly had to confront. There are real risks for any society in which there is such confusion as we have about what is fundamental. It puts our institutions of government under great strain when there is

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<sup>5</sup> Cabinet Office Minute “Consideration of Constitutional Issues” (8 December 2010) CAB (10) M 44/3 at [4.1].

<sup>6</sup> Bagehot described the subject as “in constant change”: Walter Bagehot “Introduction to the Second Edition” in *The English Constitution* (2nd ed, Oxford University Press, London, 1872).

<sup>7</sup> Stephen Sedley “The sound of silence: constitutional law without a constitution” in *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, Cambridge, 2011) 64 at 64..

<sup>8</sup> Constitutional Arrangements Committee *Inquiry to review New Zealand’s existing constitutional arrangements* (August 2005) at [14].

<sup>9</sup> *Ibid*, at [6].

<sup>10</sup> *Ibid*.

conflict between them or at times of social stress if they march to a beat no one else hears.

There are risks in constitutional reform. A troubling question raised by some is whether the “soft” 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 the courts. 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. Professor Janet McLean has recently 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”.<sup>11</sup> And Sir Geoffrey Palmer, the architect of the Bill of Rights Act, has recently said that the Supreme Court needs to “step up” on the subject of human rights, suggesting that what he sees as the tactical reticence of the courts to get into conflict with the political branches of government is destructive of human rights.<sup>12</sup> It is difficult to judge whether these fears are well-founded. But perhaps it is time to question how realistic it is to leave it to judges to resolve how the rights and freedoms contained in the Act are to be fitted within the wider constitutional framework for which there is no democratically-conferred roadmap comparable to the Bill of Rights Act, but only the standard of a “free and democratic society”.<sup>13</sup>

A common law constitution is like a cat’s-cradle. You cannot pull a string here and not expect movement there. So I think we need to take seriously the suggestions of close observers of our constitution like Professor McLean and Sir Geoffrey Palmer that legislation such as the Bill of Rights Act may have had unintended consequences in the wider constitutional arrangements. But my principal suggestion in what follows is that if weaknesses have been exposed, the reasons may be less to do with the structure and responsibilities of the institutions and their relationships with each other than with the lack of agreement on and commitment to shared constitutional values in New Zealand society. Sir Geoffrey Palmer has described the principles and values of the Bill of Rights Act as a brake on the “only real political ideology that endures in

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<sup>11</sup> Professor Janet McLean “Bills of Rights and Constitutional Conventions” (Victoria University, Wellington, 30 August 2011).

<sup>12</sup> Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?” (Victoria University, Wellington, 29 August 2011).

<sup>13</sup> New Zealand Bill of Rights Act 1990, s 5.

New Zealand over time”: pragmatism.<sup>14</sup> Now pragmatism may be a perfectly sound political instinct and guide, but it is not a constitutional value. So I think we need to pay closer attention to the values we regard as fundamental to the constitution. And, despite the risks of constitutional reform, I want to question whether we can continue to leave matters to drift. Without more political and wider social engagement with constitution-building and constitution-maintenance we may be setting up conditions which are ultimately destructive of constitutional values and institutions.

### **A little history**

We have been down this track of constitutional re-examination before and always to date without stimulating any real public enthusiasm either for change or for our existing arrangements. That is not surprising perhaps when we remember that there was no particular enthusiasm in New Zealand for independence, when it was first dangled before us in the Statute of Westminster.<sup>15</sup> It took over 15 years for us to adopt the Statute of Westminster<sup>16</sup> – well after the other Dominions had embraced it and not until we had been brought to a realisation that we were becoming a nuisance in clinging to the apron strings. John Beaglehole’s verdict on us in the 1950s was that “New Zealanders have little talent or desire for abstract constitutional thought”.<sup>17</sup>

In 1961, the Constitutional Society, made up of many eminent men of the day, presented a petition with a draft Constitution to Parliament for consideration.<sup>18</sup> The Public Petitions Committee of the House declined to make any recommendations on it.<sup>19</sup> The Society kept at it and in 1963 secured the appointment of a Select Committee to consider its petitions for a written constitution and the establishment of a second chamber. When the Minister of Justice, Mr Hanan introduced a Bill of Rights, in fulfilment of an election commitment, it was referred to the same Committee for consideration.<sup>20</sup> In July 1964, the Committee decided not to recommend action on any of the proposed measures – a Bill of Rights, the reinstatement of a second chamber, and the adoption of a

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<sup>14</sup> Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?”, above n 12.

<sup>15</sup> Statute of Westminster 1931 (UK) 22 & 23 Geo V c 4.

<sup>16</sup> With the enactment of the Statute of Westminster Adoption Act 1947.

<sup>17</sup> JC Beaglehole “The development of New Zealand nationality” (1954) 2 *Journal of World History* 106 at 115, as cited in Harshan Kumarasingham *Onward with Executive Power: Lessons from New Zealand 1947–57* (Institute of Policy Studies, Wellington, 2010) at 11.

<sup>18</sup> Public Petitions Committee “Report of Public Petitions M to Z Committee 1961” [1961] IV AJHR I2A at 4–23.

<sup>19</sup> *Ibid*, I2 at 3.

<sup>20</sup> (15 August 1963) 336 NZPD 1199.

written constitution.<sup>21</sup> Professor Northey noted in 1965 that the Committee on Constitutional Reform was “probably right in concluding that public interest in this sort of issue is not strong or increasing”:<sup>22</sup>

There is little prospect of any change being effected even in relation to the outmoded provisions of the Constitution Act 1852 and the instruments relating to the office of Governor-General. New Zealanders took only a small part in the development of responsible self-government; in 1947 they showed no awareness of having finally achieved this goal. It would be unrealistic to expect them to devote time and energy to uprooting the remaining vestiges of colonialism or to making innovations that have the appearance of being unnecessary.

It is a measure of the casualness about our constitution that until the 1986 Constitution Act, our principal written source was the New Zealand Constitution Act 1852, a statute of the Imperial Parliament. It was enacted to give New Zealand limited representative democracy only. Anyone reading it, at least before late 20th century amendments, would understandably have had the impression that the Governor-General had real powers, that statutes could be disallowed by the Queen and that the Governor-General could set up Māori districts governed by Māori law. It is no wonder that those of us brought up before the late 1980s would have struggled to explain our constitution. Even so, the 1986 Constitution Bill which replaced it and was therefore, by any standard, important constitutional reform, attracted only eight submissions.

If we are not interested in reform, it does not seem to be because of pride in our existing arrangements and their history. We seem to have short memories of our constitutional history. Until 1947, or arguably even later (with the repeal of the reference to “peace, order, and good government” in the conferral of legislative authority in 1973<sup>23</sup>), our legislature had limited powers. The doctrine of parliamentary sovereignty had no application to it; the courts could and occasionally did strike down legislation. (Sir Owen Dixon indeed has queried whether it is accurate to describe any of the Dominions as gaining legislatures which are sovereign by virtue of independence from the Imperial Parliament,<sup>24</sup> but as I have already found that is an argument that

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<sup>21</sup> Constitutional Reform Committee “Report of the Constitutional Committee 1964 on the Petition of J. B. Donald and Others and on the New Zealand Bill of Rights” [1964] III AJHR 114.

<sup>22</sup> JF Northey “The New Zealand Constitution” in JF Northey (ed) *The A. G. Davis Essays in Law* (Butterworths, London, 1965) 149 at 179.

<sup>23</sup> New Zealand Constitution Amendment Act 1973, s 2.

<sup>24</sup> See Sir Owen Dixon “The Common Law as an Ultimate Constitutional Foundation” in Sir Owen Dixon *Jesting Pilate* (2nd ed, William S. Hein & Co Inc, New York, 1997).

generates more heat than is helpful, I do not enlarge on it here). It is worth remembering also that our original form of representative government enabled a form of federation both in the arrangements for provincial government and in the space left for self-government within Māori Districts. These earlier limitations on Parliament and forms of devolution suggest that we should not be too quick to dismiss contemporary calls for similar modern constitutional adaptations as contrary to our history and traditions. They were not unthinkable in the past.

The Constitution Act 1986, which replaced the 1852 Constitution Act, rather prosaically sets out the working parts of the constitution – the Parliament, the executive and the judiciary – and simply says flatly that they continue to have the powers they had at the coming into force of the Act. The Constitution Act 1986 is part only of the statutory contribution to the New Zealand constitution. And the statutory contribution is part only of the constitution. The statutory bits of the constitution are to be found scattered through a number of important statutes: some (like Magna Carta) of great antiquity, others (like the New Zealand Bill of Rights Act or the Official Information Act 1982), comparatively recent. The Electoral Acts stand in a special category because they establish the conditions of democratic government and have long been subject to supermajority requirements for amendment as a result.

In 2003 we set up a court of final appeal, the Supreme Court, to replace the Privy Council. In a break from our usual reticence about constitutional fundamentals, the Supreme Court Act 2003 provides:<sup>25</sup>

Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

Although perhaps you could be excused for not thinking immediately of the Supreme Court Act as the place to look for a statement of the fundamental principles of our constitution, this statement is as forthcoming as it gets to date. Section 3 of the Supreme Court Act describes the twin poles around which our constitution seems now to revolve. The sovereignty of Parliament is shadowed by the rule of law.

I am not sure that it is widely understood that our system is based upon parliamentary rather than executive government. In practice, the executive promotes the legislation and is usually able to get it enacted. The executive, headed by the Prime Minister, is the face of Government. That does not detract from the constitutional position that, apart from

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<sup>25</sup> Supreme Court Act 2003, s 3(2).

the shrinking prerogative powers of the Crown, the executive in our legal system has no independent authority, as it has under the Constitution of the United States. It must identify a statutory or prerogative authority for everything it does (apart from powers necessarily incidental to its lawful functions).

It is the constitutional responsibility of the courts to hold the executive within its lawful powers. Professor Trevor Allan is right to point out that the perception may be different. He thinks it a central problem for modern public law that the executive is widely seen as an “independent source of policy formulation and governance, reflecting its own views of the public interest”.<sup>26</sup>

The foundational constitutional elements remain Parliament and the courts, as in the New Zealand Supreme Court Act the twin constitutional doctrines of parliamentary sovereignty and the rule of law suggest. The executive is answerable to both and must observe the limits set by Parliament and the interpretation of what those limits are by the courts. If, however, the executive is popularly thought to have independent constitutive powers, then the courts in holding the executive within the law may be seen as thwarting executive will instead of insisting on observance of Parliament’s will as expressed in legislation. This twists the constitutional position.

It is in my experience quite common to encounter New Zealanders who do not think we have a constitution at all because we have no single constitutive document. That is quite wrong, if understandable. The constitution is principally common law, so is to be found in all the sources of law, including the decisions of the courts and custom. Because the constitution evolves, description of its common law elements may turn on predictions of what the courts will do. The writings of political philosophers have been highly influential, but their dogma remains to be tested in application. These are not easy concepts to grasp, much less explain. The written elements of the constitution are in small part composed of statutes, such as those I have mentioned. They also include arrangements such as those to be found in the Standing Orders of the House of Representatives, in the Cabinet Manual governing the operation of the executive, and in the rules which control access to the courts. These measures can and do change, often informally and below the radar. We may not be vigilant enough to see changes to these arrangements as impacting on the constitution and deserving of close scrutiny and public process. And I want to come on to say something about the special vulnerabilities to the courts in such

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<sup>26</sup> TRS Allan “Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction” [2003] Public Law 429 at 433.

changes. But for present purposes, my point is that we have a number of written sources of constitutional rules.

It would be possible to draw these texts – or at least references to them – into a single constitutional document. There are, however, a number of risks in attempting such an exercise. First, there is the risk of under-inclusion, excluding texts of constitutional importance. Secondly, there is the risk of introducing too much rigidity and impeding needed evolution. We may need to be more vigilant to recognise when change to the Standing Orders of Parliament, or to the Cabinet Manual, or to the Rules of Court impact upon fundamental constitutional values. But that is to prompt awareness and care in changes. It is not an argument for removing parliamentary or Cabinet or court control over change into a constitutional process. Thirdly, there is some real virtue in not having a single constitutional text. It means we are spared searching for the original intent of the framers, a form of ancestor-worship we see tearing the United States Supreme Court apart and which can be a dead hand on living societies. More importantly, no written text can capture the constitution. As Australia, the United States, Canada and all countries with written constitutions have found, values immanent in the constitution have to be treated as implicit in order to make the text work. Such values are behind the constitutional conventions, the habits of institutional behaviour, that are essential to constitutional observance. It is a mistake to see a constitution as a system of rules. Constitutional observance depends on a constitutional culture built on shared principles.

Such principles cannot be left to be worked out on the hop, if the need arises. We run real risks if as a society we are indifferent to the values which are fundamental. There are risks in reform if we do not have an understanding of the role of institutions like the judiciary or the police in a system of democratic government. It is not always easy to appreciate that proposals which seem quite innocent or efficient or pragmatic may trample on basic principle. And yet there are real risks too in letting matters drift. In a common law constitution, that leaves exposition of the constitution in the lap of the courts. Is this good enough?

I want to explore three particular potential vulnerabilities arising from the obscurity of the constitution: to the rule of law, to human rights, and to sensible engagement on the place of the Treaty of Waitangi in the constitutional order. These illustrate risks to constitutional values. In particular, they risk the role of the courts in fulfilling their constitutional responsibilities.

### **The rule of law**

In the British constitutional system we have inherited, the constitution used to be the entire body of law, institutions and customs that comprised the Commonwealth.<sup>27</sup> That is no longer the sense in which we refer to the “constitution”, perhaps because of the influence of the United States Constitution and others patterned on it. But the original understanding and our constitutional history mean that some of the more significant principles on which the constitution is based remain judge-made principles of the common law. Common law constitutional principles include the rule of recognition of the pre-eminent law-making authority of Parliament and the denial of any dispensing power in the executive (an achievement of the common law later captured in the 1688 Bill of Rights). Like the common law more generally, a common law constitution is a developing system the sources of which are to be found in legislation, custom, precedent and agreement.<sup>28</sup>

Sometimes the obligation to say what the law is brings the judiciary into collision with the executive. It is often overlooked that a principal virtue of the supervisory jurisdiction of the courts over executive action is to provide authoritative vindication for what has been done, stilling controversy. While from time to time some heat may be generated in decisions of the courts which displease the executive, this function is the constitutional responsibility of the courts under the rule of law.

In some cases however, often entailing application of legislation enacted to give effect to international obligations, the appropriateness of what Parliament has done may be the subject of judicial comment. The most obvious example is under the New Zealand Bill of Rights Act where it is sometimes necessary to consider whether a measure enacted by Parliament, or adopted by the executive by regulations, is a justifiable limitation of rights in a free and democratic society under s 5 of the Act.

If the New Zealand constitution is in part to be seen in the law of the land, it is difficult for judges to avoid describing the constitution through cases when required to do so. I am not one who thinks that our constitution is deficient because the courts do not disallow statutes of Parliament as unconstitutional but it is worth remembering that judicial review arose in the United States because Chief Justice Marshall famously pointed out that it is the role of the judges to say what the law is.<sup>29</sup> Saying what the law is remains the responsibility of judges even if the formal omnipotence of Parliament is respected. And it is their responsibility under an unwritten constitution as it would be under a written constitution. Those who fear empowering judges miss the point.

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<sup>27</sup> Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 120.

<sup>28</sup> PJ Fitzgerald (ed) *Salmond on Jurisprudence* (12th ed, Sweet & Maxwell Limited, London, 1966) at 112–114.

<sup>29</sup> *Marbury v Madison* 5 US 137 (1803) at 177.

The choice is not conferral of such responsibility, which already exists as an aspect of the rule of law. It is whether we provide judges with values to apply to which we have all committed in a political process (as has been done for human rights in the Bill of Rights Act) or whether we leave it to them to discover such values for themselves.

In his “Fundamentals” paper, Sir Robin Cooke expressed the view that the constitution is built on “two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts”.<sup>30</sup> If either of these two planks were significantly undermined, “whether by legislation or otherwise”, he thought it would be the responsibility of the judges to say so.<sup>31</sup> What is more, he considered that honesty compelled the admission that “the concept of a free democracy must carry with it *some* limitation on legislative power” by rights and freedoms implicit in the concept of a free democracy.<sup>32</sup> Working out the rights and duties that are “truly fundamental” is, he claimed, “ultimately an inescapable judicial responsibility”.<sup>33</sup> It is not, however, *solely* a judicial responsibility.

The suggestion that there remain fundamental values which are beyond the reach of Parliament remains controversial. My concern in this paper is not to speculate about what the courts would or could do faced with legislation that undermined the democratic legitimacy of Parliament or the independence of the courts. Even to state these propositions is to demonstrate that such action would never consciously be taken by a democratic Parliament – it offends against our deepest constitutional sense. My point, rather, is to ask why it is not desirable to make this position plain and recognise unmistakably that it is law observed by Parliament not as a matter of grace but as a matter of obligation undertaken formally.

Taking as an example the constitutional fundamental of access to independent courts, there are three reasons why the idea of constitutional recognition should not perhaps be dismissed out of hand, even though direct threat to this value is hard to imagine. The first is that laws and practices may chip away at both access to the courts and their independence without any conscious design. The heightened constitutional vigilance that comes with authoritative statement may well be best policy. The second is that, if there is agreement that access to independent courts is a necessary constitutional good, there seems no good reason to exclude wide public participation in commitment to it through formal process. Over the long haul, a constitution has to have

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<sup>30</sup> Sir Robin Cooke “Fundamentals”, above n 2, at 164.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, at 164–165.

the allegiance of the society it binds together. The third reason, allied to the second, is that I wonder whether it is appropriate to leave so much to the courts in development of the common law constitution. Experience with the Bill of Rights Act (a matter I go on to discuss in what follows) may suggest that the constitution is a work best shared and that the authority of the courts is fragile when so isolated. It may well be the case that, as one senior English judge put it, the courts must speak for the constitution.<sup>34</sup> But it is necessary for someone to be listening. The constitution needs wider commitment.

I think there are signs that the courts are isolated and aspects of their independence precarious. Court resources are within the responsibility of executive government. Regulations prescribe the terms on which citizens have access to the courts. Court fees are within executive control. These are matters which should be subject to more public discussion than has been the case, perhaps because they are not popularly seen as touching on the constitutional principle of access to the courts. One of my colleagues has asked in a previous Harkness Henry lecture, not entirely in jest, whether we would regard with similar equanimity the imposition of fees to have access to a member of Parliament or a responsible Minister.<sup>35</sup> Judges and lawyers may get the point. But if the wider community does not, it is no jesting matter at all.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive and judicial branches of government.<sup>36</sup> It is not my claim that the judicial branch is other than the junior and the least powerful of the working parts of the constitution. But in its work it is subject to the direction of Parliament only through legislation. It is not subject to the control of the executive at all. This separation is better understood in constitutional arrangements where each branch has direct authority conferred by the constitution. In New Zealand the practical independence of the judiciary from other sources of state power is fragile. Judges have security of tenure and salary and can be removed from office only by Parliament.<sup>37</sup> They are however dependent for court support upon the Ministry of Justice, a significant policy department with direct interest in much litigation. The executive, more generally, is the principal litigant in the courts.

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<sup>34</sup> Stephen Sedley, above n 7, at 72.

<sup>35</sup> The Hon Justice John Priestley "Chipping Away at the Judicial Arm?" (2009) 17 Wai L Rev 1 at 14.

<sup>36</sup> Part 2 (ss 6–9C) of the Constitution Act 1986 deals with the executive. Part 3 (ss 10–22) concerns the legislature. Part 4 (ss 23–24) touches on the judiciary.

<sup>37</sup> Ibid, ss 23–24.

International statements of basic principles for judicial independence adopted both by the United Nations General Assembly<sup>38</sup> and by the Commonwealth<sup>39</sup> recognise that judicial independence has an institutional dimension. The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of such independence.<sup>40</sup> In the United States, Canada, the United Kingdom and Australia, considerable operational autonomy is given to judges. The United Kingdom Supreme Court, recently removed from the House of Lords, has its own budget, a Registrar answerable to the Court, staff answerable to the Registrar and separate IT support. The courts of England and Wales are now supported by a court service answerable to the judges.

In 1995 in New Zealand, the former Chief Justice succeeded in having the administration of the courts administered by a stand-alone department separated out from the Ministry of Justice. Although the Department for Courts was ultimately answerable to a Minister for Courts and not the judges, it nevertheless set up a loose partnership between the department and the judiciary in the administration of the courts. That step was seen by Sir Thomas Eichelbaum as an intermediate one on the way to greater judicial responsibility. In fact, only a few years later, in a decision in which the judiciary was not asked for its views, the Department for Courts was folded back into the Ministry for Justice.

Judicial support staff are Ministry employees. The Registrars of the courts are managers employed by the Ministry although nominally responsible to the judges for their registry functions. The judges have no effective say in the allocation of the budget for courts and have had little influence in the priorities set by the Ministry. It seems to be assumed that the administration of the courts (including the administration of judges) is an executive function and that judicial independence is sufficiently preserved if individual judges are not directed how to decide particular cases.

Decisions affecting court performance are largely outside judicial control. The technology we use for internal communication and in preparation of our judgments is part of the Ministry system. Proposals to share court information with other government agencies (police, corrections, legal aid, public defenders) are put forward for reasons entirely sensible from the perspective of the executive, but often without thought for the

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<sup>38</sup> *United Nations Basic Principles on the Independence of the Judiciary*, endorsed in GA Res 40/32 and 40/146 (1985).

<sup>39</sup> *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting (Abuja, 2003) at IV.*

<sup>40</sup> *Valente v The Queen* [1985] 2 SCR 673 at [47]–[52].

independence of the courts and their role as a distinct branch of government. At present there is talk of co-location of courts, police, and corrections in “justice precincts”. Ownership of a number of courthouses in the country has been transferred in Treaty settlements negotiated by the executive. Control of court processes through rules or regulations is seen in some reform proposals to offer opportunities for the executive to achieve desired outcomes: reduction of the prison population, movement of cases out of the system (through settlements or guilty pleas), case management to reduce costs and promote efficiency, diversion of cases to less costly forums. These may well be appropriate ends and may be achieved by means which do not breach fundamental values. But if we value the independence of the courts and access to them as constitutional goods, it is hard not to be uneasy that the boundaries between executive and judicial responsibility are often not directly confronted. Recognition that there are constitutional values here which underpin the rule of law would provide a platform for more principled attention.

## Human Rights

In New Zealand then we have had legislative expression of fundamental rights and freedoms since 1990. In an early case on the Act, Cooke P said that the Act was intended to run throughout the whole fabric of New Zealand law.<sup>41</sup> He may have been ahead of his time in this, as in other things. Although he stressed that the Act “does not merely repeat the old law”,<sup>42</sup> the more generally held view has been that the Act was intended to reflect existing law and to be “evolutionary”.<sup>43</sup> It may be that this concern to fit the new Act within the existing law was a strategic response to the political controversies which attended its adoption as Sir Geoffrey Palmer has speculated.<sup>44</sup> The legislation as enacted is a statutory Bill of Rights, not fundamental law. Under it, the courts are obliged to give effect to legislation which cannot be interpreted in conformity with the rights and freedoms contained in the Bill of Rights Act.<sup>45</sup>

Despite his preference for an entrenched Bill of Rights, Sir Robin Cooke in his “Fundamentals” paper expressed optimism that a non-entrenched statement of rights might prove almost as effective.<sup>46</sup> It would be launched, he thought, into a culture of human rights brought about by

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<sup>41</sup> *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

<sup>42</sup> *R v Te Kira* [1993] 3 NZLR 257 (CA) at 262.

<sup>43</sup> *R v Jefferies* [1994] 1 NZLR 290 (CA) at 299 per Richardson

<sup>44</sup> Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?”, above n 12.

<sup>45</sup> New Zealand Bill of Rights Act 1990, s 6.

<sup>46</sup> Sir Robin Cooke “Fundamentals”, above n 2, at 159.

the International Covenant on Civil and Political Rights<sup>47</sup> and the European Convention on Human Rights.<sup>48</sup> Does such a culture yet exist in New Zealand society? Twenty years is not a long time for a cultural shift. And the New Zealand Bill of Rights Act is a bigger shift in the legal culture than followed the adoption in Canada of the Charter of Rights and Freedoms. In the United Kingdom, the Human Rights Act 1998 arrived in a legal culture that had been adapting for many years to the authority of Europe and the values in the European Convention on Human Rights.

And yet I think it is clear that the enactment of the legislation has had a transformative effect on public administration and the administration of justice. Its success is not principally to be gauged from reading court decisions. It has permeated the processes of power as appears from the Cabinet Manual down. Huge effort has been applied to observance of the Bill of Rights Act by public servants and Parliament. It has changed how government works. The exercise of the coercive powers of the state against individuals is increasingly subject to disclosed standards. I do not see that there is danger of descent into a “tick the box” formality because there has also been a revolution in what has been required of those exercising public power by way of reasons. This shift may have been prompted by the working of the Official Information Act,<sup>49</sup> but it also meets the methodology of proportionality imported with Bill of Rights supervision, and a climate of justification which has transformed public power.

In the courts, it is striking that some of the more difficult questions relating to the New Zealand Bill of Rights Act are only just emerging more than 20 years after its enactment. Some are prompted by examples that have arisen in other jurisdictions. 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 and when we were sensitive to charges of judicial over-reaching are being rejected in other jurisdictions. We have also come to understand that, except in the requirement of loyalty to legislation, judicial consideration of human rights does not differ greatly in countries in which such standards constitute fundamental law. We are now being stretched by the developing case law in the United Kingdom. Unlike the early New Zealand diet of drunken drivers and petty criminals, the courts of the United Kingdom have been pitch-forked into applying human rights in the most

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<sup>47</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976). New Zealand acceded to the First Optional Protocol to the International Covenant on 26 May 1989.

<sup>48</sup> Which was challenging orthodoxies of English law inherited by New Zealand.

<sup>49</sup> Which requires good reasons to exist for withholding official information following request: Official Information Act 1982, s 18.

contentious cases of the day, those concerned with the threat of terrorism. Although in New Zealand human rights adjudication has not been conducted against such high public anxiety, it has become clear that our methods need to be kept under review. We need to engage with the values behind human rights and to understand how they fit within the domestic constitutional and international legal orders. We may need to reconsider our approach to precedent in such cases.<sup>50</sup>

Although the New Zealand Bill of Rights Act is a New Zealand statute and to be interpreted in the light of New Zealand conditions, the differences over time between jurisdictions may be less important than the common derivation. Our Act is after all enacted to bring our domestic laws more closely into line with the International Covenant on Civil and Political Rights.<sup>51</sup> The ideas thrown up through engagement with the underlying values contained in the Covenant and in the other international instruments it draws on cannot help but affect the development of our legal thinking. It can be expected, too, that the work of international agencies such as the United Nations Human Rights Committee will provide encouragement towards commonality. It would be bold to suppose that legal cultural differences will not shift under such external influences.

The record to date is that the Act has had a profound effect on both government administration and the work of the courts. We should expect that to continue. Even if (as Sir Geoffrey Palmer suggests) the courts have been a little cautious,<sup>52</sup> we should expect them to keep in touch generally with the case law in other comparable jurisdictions.

What then about the wider aspirations held for the Bill of Rights Act on its enactment? One of the hopes of those who promoted the New Zealand Bill of Rights Act was that it would become part of the political and social discourse as well as a source of vindication through the courts. It was to be a “set of navigation lights” for legislators.<sup>53</sup> It was also to be an accessible statement of shared values which would raise public consciousness about constitutional fundamentals and the level of civil discourse about such values. There is reason to be optimistic that such a culture is developing and that the principal contribution of the courts may be in explaining the application of rights in context. Sir Geoffrey Palmer has described the Act as a parliamentary bill of rights,

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<sup>50</sup> A similar point was made by Cooke P in the early years of the New Zealand Bill of Rights Act 1990: see *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 270; *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 676.

<sup>51</sup> New Zealand Bill of Rights Act 1990, long title.

<sup>52</sup> Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?”, above n 12.

<sup>53</sup> Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] 1 AJHR A6 at 6.

which relies principally upon the processes of government rather than court decisions for the protection of human rights.<sup>54</sup> It seems to me that even in jurisdictions where judicial review is available for legislative breaches of rights, the role of the courts in protecting rights may similarly be less important than the culture of government to which the decisions of courts contribute.

One of the reforms in the Act of which much was expected was the parliamentary scrutiny for human rights breaches. It is in connection with the success of this aspect of the Act that Janet McLean has expressed some doubt and which requires some additional comment.

Consistently with the responsibilities imposed upon the legislative branch, the Act provides that the Attorney-General is obliged to bring to the attention of the House of Representatives any provision in a Bill that “appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights”.<sup>55</sup> New Zealand’s experience to date with the s 7 obligation appears mixed. Initial expectations were that the vetting procedure and reporting to Parliament would contribute significantly to the creation of “a rights culture that [is] sufficiently robust to protect rights”.<sup>56</sup> Since 2003, the Attorney-General has adopted the practice of publishing the legal advice relied upon in making s 7 reports. I am not sure to what extent this has led to wider public awareness of the human rights issues but it is a development to be highly commended.

As at May 2011 there had been 27 negative s 7 reports in respect of government Bills. Professor McLean has expressed alarm about this. She emphasises that in the case of all 27 negative reports the Government was prepared to proceed with a Bill which “it openly acknowledged as limiting protected rights unreasonably in a way that *could not be justified*”.<sup>57</sup> In few cases of adverse report did the House debate the report. McLean contrasts this record with that in the United Kingdom since enactment of Human Rights Act 1998 where there have been only two negative reports. They led to heightened Parliamentary scrutiny, led by the Joint Committee on Human Rights (a reform that Lord Lester of Herne Hill urged unsuccessfully on New Zealand<sup>58</sup>) and more substantial justification of the preferred approach. What is more, in the United Kingdom declarations of incompatibility by the courts are

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<sup>54</sup> Geoffrey Palmer “Foreword” in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (Lexis Nexis NZ Ltd, Wellington, 2005) at v.

<sup>55</sup> New Zealand Bill of Rights Act 1990, s 7.

<sup>56</sup> Janet L Hiebert “Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes” (2005) 3 NZJPIIL 63 at 65.

<sup>57</sup> Janet McLean, above n 11.

<sup>58</sup> See Anthony Lester “Parliamentary Scrutiny of Legislation under the Human Rights Act 1998” (2002) 33 VUWLR 1.

treated very seriously indeed. In every such case, the government has given an undertaking to repair the constitutional defect.

McLean suggests that “something is amiss” in New Zealand. Her concern is less with the record of non-compliance with human rights than with “absence of a systematic process of parliamentary justification”. If s 7 reports are not being taken sufficiently seriously in the political process she wonders about “corrosive flow on effects” and the risk of “bad habits”, especially in criminal law where an adverse report she fears is treated almost as a badge of honour. If adverse Attorney-General’s reports are not taken seriously, she thinks we should be concerned about what will happen to formal declarations by courts that legislation is incompatible with the Bill of Rights Act. If court declarations too are shrugged off, then McLean thinks that what is at risk is the constitutional tradition that declarations of the courts will be obeyed. It is in this connection that she speculates that a perverse consequence of the experience with the Bill of Rights Act may be that Parliament is no longer observing the constitutional conventions by which it “limited itself” but is acting on “a kind of ‘s 4 ... anti-constitutionalism’”.

It is worrying if an astute observer of the New Zealand constitution sees that a consequence of enhanced judicial responsibility for protection of rights may be a shrugging of parliamentary responsibility, undermining previous constitutional convention. I am not sure that this pessimistic and tentative assessment is accurate. I would like to think that it is not. But it may suggest that we need to take care that we do not set up a view, contrary to s 3 of the Bill of Rights Act, that human rights are the responsibility of the courts alone. Perhaps it is time to think again about the recommendation of Lord Lester that we would benefit from a Human Rights Committee of Parliament to keep a close watch on legislation which impacts on fundamental rights and freedoms. Such a Committee might even with advantage take on a wider responsibility to scrutinise measures which impact upon constitutional values.

Apart from the response to adverse s 7 reports which is the concern of Professor McLean, perhaps it is time to question a procedure followed since 2001 which excuses report to Parliament where there is a legal opinion that a right is properly limited because the limitation is demonstrably justified in a free and democratic society. The procedure (which may not sit particularly well with the wording of s 7 which requires report where a provision in a Bill “*appears* to be inconsistent with any of the rights and freedoms contained in this Bill of Rights”) follows a recommendation of the Legislation Advisory Committee and is consistent with the judgment of the Supreme Court in *R v Hansen*<sup>59</sup> that

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<sup>59</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

the Act protects only rights not justifiably limited. But legal opinion as to what is a justified limitation in a free and democratic society may be highly contestable. And what is justified in a free and democratic society is an assessment one would have thought the House of Representatives was well qualified – perhaps best qualified – to consider. More importantly, I wonder whether preferring legal opinion to parliamentary judgment is calculated to promote legislative responsibility for human rights or constitutional values. As McLean reminds us, New Zealand is one of the very few jurisdictions to hold out against strong judicial review.<sup>60</sup> In such a constitutional setting, we need more political responsibility for human rights, not less.

James Madison's vision of the separation of powers was of distinct but connected constitutional authority.<sup>61</sup> If this is right, as I think it is, the roles of all those who have primary responsibility for the observance of human rights are interconnected. The legislature, having legislated for human rights, sets the limitations that are justifiable in a free and democratic society. The executive exercises its discretions in carrying out legislation within the boundaries set by Parliament. The courts patrol the boundaries and grant remedies for breach of rights. All have responsibility to illuminate the discharge of their responsibilities where human rights are affected. The courts are obliged to give reasons. Increasingly justification by the executive is critical for the demonstration of rationality and to counter claims of arbitrariness. Perhaps Parliament needs to participate more directly in this culture of justification in discharging its responsibilities, as through a Select Committee with responsibility for reporting to Parliament on compliance with human rights.

As I have tried to indicate, it is an inadequate view of a statement of rights to regard it as principally directed to the courts or to regard the courts as the principal mechanism for vindicating rights. Ultimately, whether human rights are observed depends upon whether they are valued and understood by the wider community. And all three branches of government have responsibilities to bring that about.

### **The Treaty of Waitangi**

The Treaty of Waitangi Act in 1975 appeared a very modest statute, but it has been transformative of New Zealand society. The work of the

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<sup>60</sup> Citing Harvard Professor Mark Tushnet: "How Different are Waldron's and Fallon's Core Cases for and against Judicial Review" (2010) 30 *Oxford J Legal Stud* 49 at 69.

<sup>61</sup> James Madison "The Federalist No 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments" in Alexander Hamilton, James Madison, and John Jay *The Federalist* (Harvard University Press, Cambridge, 1961).

tribunal set up under it to make recommendations to the government about how to meet its responsibilities under the Treaty provided a bridge in understanding and brought the Treaty out of the legal dustbin into which it had been relegated in the 1860s. We have come a long way very fast.

In 1968 when I studied constitutional law, the Treaty of Waitangi was not mentioned. In a collection of essays published a few years earlier the Professor of Public Law at Auckland University, Jack Northey, in a significant essay on “The New Zealand Constitution” omitted the Treaty altogether.<sup>62</sup> In my 1970 dissertation on constitutional law and whether we should have a Bill of Rights, the Treaty of Waitangi was not referred to.

Only a few international lawyers, such as Sir Kenneth Keith (now on the International Court of Justice), were interested in treaties. In the same collection of essays in which the essay by Professor Northey appeared in 1965, Sir Kenneth expressed the tentative view that the Treaty of Waitangi might be enforced as a contract.<sup>63</sup> I doubt whether any of his contemporaries in 1965 were thinking of such things. Indeed the Treaty had been famously described as a legal nullity in the New Zealand domestic courts in 1877,<sup>64</sup> a result eventually (but not without some hesitations along the way) acquiesced in by the Privy Council when it confirmed that, as an international treaty, the Treaty of Waitangi had no force in domestic law.<sup>65</sup>

Sir Kenneth questioned that apparent orthodoxy at least in its application to treaties of cession which otherwise effectively become unenforceable because the ceding party loses standing in international law.<sup>66</sup> More recently, Antony Anghie has suggested that the way positivist dogma repudiated the treaties by which colonialism was undertaken is an embarrassment to international law.<sup>67</sup> These ideas have yet to be considered in New Zealand law.

Before we recoil from suggestions that the Treaty of Waitangi might be part of New Zealand constitutional law, we should remember not only the work of such scholars as Sir Kenneth Keith but also some of the arguments made at the beginning of New Zealand. In the 1840s and

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<sup>62</sup> JF Northey “The New Zealand Constitution” in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) 149–179.

<sup>63</sup> KJ Keith “International Law and New Zealand Municipal Law” in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) 130 at 146–148.

<sup>64</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

<sup>65</sup> *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) at 596–597.

<sup>66</sup> KJ Keith “International Law and New Zealand Municipal Law”, above n 63.

<sup>67</sup> Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005).

early 1850s there was considerable support for the view that the Treaty of Waitangi was a foundation of New Zealand law and able to be applied by the domestic courts. James Busby, who had as much to do with drafting the Treaty as anyone, staunchly maintained that it was equivalent to the 1706 Treaty of Union between England and Scotland and was foundation law in New Zealand.<sup>68</sup> Editorial writers of the day supported his claims which were, unfortunately, never resolved authoritatively by the Privy Council as was attempted.<sup>69</sup>

The moral authority of law and the virtue of government were acknowledged in the speeches at Waitangi. Perhaps never has any country been formed with such optimism, with such conscious constitutive purpose, and without the spur of oppression or war. Our country was formed by consent, in faith, and with courage. With such beginnings, it is incomprehensible that the Treaty should be seen to be an impediment to constitutional development.

Sir Robin Cooke said of the Treaty that “a nation cannot cast adrift from its own foundations”.<sup>70</sup> He also said, whatever constitutional status the Treaty has, can only remain.<sup>71</sup> It would be good to think that the Treaty, far from being an impediment to achieving greater clarity in our constitutional arrangements, is, rather, an important source of the values that bind us and set us apart from others. Professor Quentin-Baxter, a distinguished New Zealand constitutional lawyer, said in this vein, that if New Zealand does have a future as an independent nation it is because these islands “were a meeting-place of two great races” and that, even in the worst of times that followed, their dealings together have always had a “certain grandeur”.<sup>72</sup>

A constitution needs values, such as those of justice spoken of at Waitangi. It needs to look to speak to the future with optimism, as the leap of faith taken in that beautiful setting did. It needs to bind us together and set us apart from other nations, as the Treaty accomplished. It needs to be grand – as what was done at Waitangi was grand.

## Conclusion

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<sup>68</sup> Ned Fletcher and the Rt Hon Dame Sian Elias “A Collusive Suit to ‘confound the rights of property through the length and breadth of the colony’?: *Busby v White* (1859)” (2010) 41 VUWLR 563 at 583.

<sup>69</sup> *Ibid*, at 599.

<sup>70</sup> *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308–309.

<sup>71</sup> *Ibid*, at 309.

<sup>72</sup> RQ Quentin-Baxter “Themes of Constitutional Development: The need for a favourable climate of discussion” [1984] NZLJ 203 at 207.

On more than one occasion when wrestling with questions about our constitution, I have thought about the English Cabinet Minister lost in a fog on Exmoor. Eventually, after stumbling around for some time, he came across a local and asked which way he should go to get to London. The local stared. “If I was going there”, he said, “I wouldn’t start from here”.

Well, we have to start from here. Here is where we are. And it is a good place to start from if we recognise the history behind us and the principles we can draw from our heritage to keep the constitution dynamic and responsive to the changing needs of New Zealand society.

In difficult times, such as we have experienced over the last year, we need to remember that we are a community with shared values. A constitution expresses those shared values as law. A constitution underpins the rule of law, under which all have security. Aristotle believed that law was “the principal and most perfect branch of ethics”.<sup>73</sup> A constitution is the most ethical branch of law. In the journey ahead of us as a country, we have some choices to make. In the end, what will define us is the sharing of common values. Whether we build on what we share and move forward together or whether we fracture along fault lines of difference is the question. How we answer it may be the defining point for us as a nation. If we do not have common values – public values which set us apart as a nation – then it is hard to see why we would resist the Federation next door. Its Constitution, as my Australian friends like to remind me, was drafted to include New Zealand, should we wish to join up. Given the emigration rate, including among Māori, this is a question we have to confront. So it is time for a conversation about our own constitution: the responsibilities and limits of its working parts; the rule of law; human rights; and the Treaty of Waitangi; the public values that make us our own nation still.

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<sup>73</sup> As cited in William Blackstone *Commentaries on the Laws of England: Book the First* (Dawsons of Pall Mall, London, 1966) at 27.