Tom Hickman

The New Zealand Bill of Rights Act going beyond declarations

The process of capturing and entrenching fundamental rights remains very much a live one in both New Zealand and the United Kingdom. In both countries there is pressure to move on from the current bill of rights legislation: the UK Human Rights Act 1998 (HRA) and the New Zealand Bill of Rights Act 1990 (NZBORA). While the two jurisdictions are subject to quite different political and cultural pressures, there remains a great deal of scope for exchange of ideas and experiences.

The Constitutional Advisory Panel report has recommended that the New Zealand government set up a process with public consultation and participation to examine options for, among other things, improving compliance by the executive and Parliament with standards contained in the NZBORA (or, by implication, any future bill of rights) and giving the judiciary powers to review legislation for consistency with the NZBORA. My argument is that New Zealand should not be persuaded to adopt the approach to judicial review of legislation found in the HRA, what I will call for ease the ‘declaration of incompatibility model’. To meet the objectives identified by the Constitutional Advisory Panel, New Zealand should go a step further than the UK in protecting human rights against legislative encroachment. The declaration of incompatibility model is unprincipled and unfair, and, moreover, is not a particularly effective mechanism for securing compliance of the legislature with protected rights through the courts. It serves as a useful constitutional fall-back or placeholder, which is the function it performs in the UK; it should not be viewed as a principled destination for constitutional reform.

These arguments challenge the views of many that the declaration of incompatibility model is both principled and effective, including the views of a number of scholars whose writings portray it as inculcating a form of debate or ‘dialogue’ with political branches. In challenging this view I want not only to draw attention to the theoretical problems with such a view, but also to descend from the ivory towers of constitutional and political theorists to consider how the model operates in practice and its

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practical deficiencies as a mechanism of ensuring that legislation is human rights compliant.

The declaration of incompatibility model
Two features of the HRA are relevant to present discussions. The first relates to the nature of the rights to which it gives effect. These are the rights set out in the European Convention on Human Rights. Most of ‘the Convention rights’, as the act describes them – albeit not quite all of them – are scheduled to the HRA and given effect by section 2.

exploring increased judicial powers that preserve parliamentary sovereignty … to ensure legislation is consistent’ with the NZBORA (Constitutional Advisory Panel, 2013, p.56). The NZBORA does not contain any express mechanism for scrutinising legislation and this is an obvious area for considering enhancement. Such a power would also tie in with another of the panel’s recommendations, which is to improve compliance by Parliament with the standards set out in the NZBORA.

In these comments the Constitutional Advisory Panel has, I suggest, nodded that in an appropriate case the court might make a more formal declaration recording the fact that the legislation has been found to be inconsistent with the NZBORA, although the jurisdiction to do so has not yet been determined.3

This nonetheless falls short of a declaration of incompatibility in two important respects. First, the courts’ responsibility to provide an advisory indication was expressed by Justice McGrath as arising in any case in which it is considering whether legislation can be read compatibly with protected rights under section 6 but concludes that it cannot be. On this approach, a claim cannot be brought squarely challenging legislation as contrary to protected rights. In an excellent article, Claudia Geiringer has suggested that the advisory indication might be sufficiently elastic to provide courts with a freestanding jurisdiction to make declarations of inconsistency (Geiringer, 2009). But that is not presently the law, as Geiringer herself accepts. In R v Manawatu the Supreme Court refused permission to challenge legislation concerned with criminal appeals, noting: ‘It is not suggested that it is open to the Court to interpret the legislation in a way that would be more consistent with rights protected by the Bill of Rights; and therefore the court had no jurisdiction.4 There is thus no mechanism under the NZBORA to bring a challenge on the ground that legislation is not compatible with protected rights, as opposed to a challenge claiming that it can be made compatible.

The second feature of the HRA that I wish to highlight is the manner in which it gives effect to the convention rights. It does so in three ways. Section 6 of the HRA makes it unlawful for any public authority to act incompatibly with the convention rights. Section 3 of the HRA requires all legislation to be read as far as it is possible to do so in a manner that is compatible with the convention rights. Finally, section 4 of the HRA allows higher courts in the UK to make a formal declaration that primary legislation does not comply with a convention right. The way this was reconciled with parliamentary sovereignty was by the stipulation that such a declaration does not affect the ‘validity, continuing operation or enforcement’ of that legislation (s.4(6)(a)) and ‘is not binding on the parties to the proceedings in which it is made’ (s.4(6)(b)). It is this final ‘declaratory’ feature of the HRA that I wish to focus on most directly.

Legislative compatibility with protected rights
Let me turn then to New Zealand. In its report the Constitutional Advisory Panel registered support in New Zealand for in the direction of the HRA and the power provided by section 4 for courts to declare primary legislation incompatible with the convention rights. While there is no such power in the NZBORA, the New Zealand courts have nonetheless taken a significant step in this direction, holding that the courts will indicate whether a particular legislative provision constitutes a justified limitation on a protected right in circumstances in which it is unable to give the legislation a rights-consistent reading under section 6 of the NZBORA. The courts have said that they will give such an indication for the benefit of the New Zealand Parliament, society as a whole and the United Nations Human Rights Committee.1 In R v Hansen, Justice McGrath stated that ‘a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that … there is a measure on the statute book which infringes protective rights and freedoms’. He also went as far as to say that there is a ‘reasonable constitutional expectation that there will be a reappraisal’ of the measure by the government and the executive.2 It has even been suggested that in an appropriate case the court might make a more formal declaration recording the fact that the legislation has been found to be inconsistent with the NZBORA, although the jurisdiction to do so has not yet been determined.3

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From my admittedly distant perspective as an English lawyer, it would seem very difficult for the courts to create such a right of action – which is really what it would amount to – that the New Zealand Parliament has not seen fit to include in the NZBORA. The fact that bill of rights reform continues to be a live issue, and the fact that such declaratory powers have been expressly included in the HRA and the two subsequent Australian bills of rights, makes such a judicial innovation even more unlikely because it underscores the fact that it is a matter for legislative and not judicial innovation.
One 2007 report praised the way that the HRA scheme, like other recent Commonwealth bills of rights, promotes dialogue between the courts and political branches, and was favourable to the declaration of incompatibility model ...
any merit. It has considerable merit. But its merit derives from the fact that it is a fudge. In my view it is useful as a constitutional fall-back solution or – the function it currently occupies in the UK – as a constitutional placeholder.

What is wrong with the declaration of incompatibility model? The vices are principally three.

**Decoupling rights and remedies**

The declaration of incompatibility is unfair and unprincipled because it denies individuals whose rights have been infringed any remedy in domestic covered by legislative programmes current at the time the declaration was made.

There are four reasons why a focus on the political response does not provide an answer. The first is that it does not meet the point that as a matter of principle it is constitutionally unsatisfactory for the courts to be given a power to declare whether a fundamental right has been violated but to deny the courts the power to provide a remedy for a violation they identify. Section 4 is clear: legislation remains in force and effect and the declaration is not binding, even on the parties.

It has been suggested that this arrangement is in the best traditions of the British constitution. I would argue that actually it is contrary to our most basic constitutional traditions. It is hard to find areas of agreement between Dicey and Bentham, but one thing they did agree on was an opposition to abstract declarations of rights that were not legally enforceable. Bentham famously described them as ‘nonsense upon stilts’ (Bentham, 1843, p.501). Likewise, Dicey emphasised that such declarations were objectionable unless the ‘rights of individuals are really secure’ through the provision of legal remedies. He wrote:

> It is difficult to regard the mere power to declare a breach of a right, they are therefore placed in a constitutionally unprincipled and unsatisfactory situation.

The second reason why it is no answer to look at the legislative and executive responses to declarations of incompatibility to identify an effective remedy is that it remains open to the government and Parliament to do nothing at all in response to such a declaration. It is difficult to regard the mere power to provide a remedy as even an effective political remedy. This has been recognised by the Grand Chamber of the European Court of Human Rights, which has held that unless and until individuals can be completely confident of receiving a satisfactory political response following a declaration of incompatibility, section 4 of the HRA does not provide an effective domestic remedy for breach of a right.

The third reason why it is no answer to look at the political postscript to declarations of incompatibility is that the political responses to declarations of incompatibility are rarely retrospective,
and therefore they fall short of providing a remedy even where they are forthcoming. Recent research by Jeff King at University College London has shown that of the 20 declarations of incompatibility then made, there is only one instance in which remedial legislation following a section 4 declaration has been retrospective (King, 2014).

The fourth point relates to delay. Even if a political remedy is forthcoming, it may not be forthcoming for a considerable period of time. Again, we have the benefit of recent empirical work by Jeff King to highlight this point. King has shown that there have been substantial periods of delay after declarations of incompatibility have been made, with most cases taking over a year to result in remedial measures (ibid., pp.7-8). This is not a marginal issue, but also raises serious questions about the compatibility of the declaration of incompatibility model with our constitutional traditions. Chapter 29 of the Magna Carta, which is still on the statute book, provides: ‘we will not deny or defer to any man either Justice or Right’.

Incentives to bring claims
Connected to the fact that there is no effective remedy for people who obtain declarations of incompatibility is the fact that there is often a very weak incentive for people to bring claims, particularly where it is the only remedy they can realistically expect to obtain. Therefore, the problem is not just that individuals do not get an effective remedy if they manage to obtain a declaration of incompatibility, but that an unknown number of cases never get brought before the courts at all because of the lack of incentives to litigate. In designing a bill of rights which, in the words of the Constitutional Advisory Panel, is intended to be a tool to ‘assess legislation for consistency with the [NZBORA]’ and improve ‘compliance by … Parliament with the standards in the Act’, it is important that potentially rights-defying legislation is actually brought before the courts and that there is an appropriate balance of incentives to ensure this.

To be sure, the availability of a declaration of incompatibility does provide something of an incentive; more, certainly, than the prospect of an advisory indication from the New Zealand courts. There are contexts, particularly where there are wider interests at stake, where claims will be brought merely for a declaration of incompatibility in the hope of a favourable change in the law. Such cases are more likely, certainly in England and Wales, where the claimant can obtain public funding. Where legal aid is available individuals do not have to pay their lawyers, and the claimants also have costs protection against the costs of the other side’s lawyers if the case is lost.6

Legal aid will sometimes be available, particularly in cases where there is a wider public interest in the claim because of the potential benefits to other people if the primary legislation is amended, and in such cases there is perhaps more prospect of claims being pursued.

However, take the case of an ordinary private litigant or company. Ordinarily, the costs and risks of public law litigation are high for such litigants; they only bring claims if faced with little alternative (a separate problem which I will reluctantly leave aside). But then add to the mix the fact that even if such potential litigants succeed they will not obtain any remedy from the court that will affect their rights one jot. Can it really be expected that they would bring a claim to the courts for a declaration of incompatibility?

To conclude on this point about incentives, I suggest that while the declaration of incompatibility model might look like a neat way of reconciling sovereignty with human rights from a distance, or from the ivory towers of the academy, it has a different picture if you adopt the perspective of a lawyer advising his or her clients on whether they should litigate in circumstances in which primary legislation violates their human rights. Looked at from this perspective, the declaration of incompatibility does look decidedly unappealing; and if that is so, then the declaration of incompatibility model, although providing better incentives for better human rights scrutiny of legislation than is found under the NZBORA, still fails to provide an effective means of ensuring that legislation is human rights compliant.

Enhancing democratic legitimacy
We have seen that it has been suggested that declarations of incompatibility are

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Let us assume, as I happen to believe, that a democratic principle does tell strongly in favour of allowing Parliament (although not necessarily acting by simple majority) to have the last word on what the law should be, and that Parliament if it sees fit should be able to enact law knowing that it is contrary to fundamental rights. The problem with declarations of incompatibility is that they do not put the ball into Parliament’s court. They trigger no more than a power in the government to amend the infringing provision. There is no mechanism at all for Parliament to express the view that it wishes the law to remain in its rights-infringing state. Although one might assume this from its inaction, it would be a dubious assumption to make, as in all likelihood Parliament would not have considered
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The purpose of bill of rights reform is not to give effect to international law, but to develop the constitutional evolution of New Zealand (of course this must be consistent with New Zealand’s international obligations, but that is rather different).

instead should be required to make clear by an affirmative act that it does intend the legislation to continue in force, notwithstanding that it has been found to be incompatible with a protected right. This would ensure that Parliament clearly endorses and takes responsibility for laws that violate basic rights.

Indeed, the declaration of incompatibility is actually less effective at enhancing democratic responsibility for rights violations than the interpretation provision contained in section 3 of the HRA and section 6 of the NZBORA. Where the courts invoke these provisions to give legislation a rights-compliant interpretation, it remains open to Parliament to overrule the decision and make clear that the rights-violating effect is intended. This involves Parliament taking responsibility for the law by unequivocal positive action. And that will require a Parliamentary debate.

For this reason, to suggest that a section 4 declaration of incompatibility (which results in Parliament taking responsibility for rights violations, if it does intend them to continue, only by omission) is more effective at ensuring that Parliament done ‘notwithstanding’ that they are not compatible with convention rights, this seems to me to better achieve the objective of ensuring Parliament addresses and takes responsibility for rights violations, and also preserves the ability of Parliament to have the last word. It also ensures that courts can provide remedies in a manner much more consistent with our constitutional traditions.

It is also said that section 4 has the happy consequence of enabling a debate to take place between Parliament and the political branches as to what the scope of our rights should be. Stephen Gardbaum argues, for instance, that following a court pronouncement on legislation, the legislature should ‘engage in a serious and principled reconsideration of the rights issue’ (Gardbaum, 2013, p.89). Gardbaum is the latest and one of the most sophisticated proponents of this view, but this notion of dialogue under the HRA has been a common theme in academic writing on the HRA since its inception. Francesca Klug, for instance, has argued that section 4 of the HRA enables the courts to generate public debate about the scope of human rights.

To my mind, a better system for ensuring that rights-defying laws remain law only if Parliament so intends, and which locates responsibility for rights-defying laws with Parliament, is a variant of the system under the Canadian Charter of Rights and Freedoms, 1982. That allows courts to invalidate laws, but permits legislatures to re-enact them, expressly stating that it is being (Klug, 2001, p.370). Tom Campbell has written that under the HRA the courts should be ‘regarded as having the right to make only provisional determinations’ which can ‘be challenged and overturned’ by Parliament (Campbell, 2001, p.82).

I have elsewhere explained why I regard this view as misguided and as resting on an inaccurate and undesirable conception of the separation of powers (Hickman, 2010, ch.3; Hickman, 2008). There is no difficulty in principle with Parliament having a residual power to enact legislation in the face of court judgments – precisely the power it has in respect of common law rights – but I do not think court judgments should be regarded as mere provisional determinations as to the scope or content of individual rights. That does not fit with what courts do or how they see their role, which is to determine what rights are. It would also undermine the legitimacy of judicial pronouncements if they were taken to be mere arguments for others – politicians – to accept or reject.

We must therefore conclude that the declaration of incompatibility model neither provides a good way of locating responsibility for legislation that violates fundamental rights with Parliament and the political branches, nor has the advantage of promoting a beneficial dialogue between courts and politicians.

The New Zealand situation

Now let us turn to New Zealand. I hope it can now be seen that New Zealand should be very cautious before going down the declaration of incompatibility model route. There are a number of reasons why it would be more problematic and less effective even than it is in the UK.

First, the context is quite different. New Zealand is not facing the problem that was addressed by the HRA of numerous applications being made each year to an international court, the judgments of which the government there is required to implement. The purpose of bill of rights reform is not to give effect to international law, but to develop the constitutional evolution of New Zealand (of course this must be consistent with New Zealand’s international obligations, but that is rather different).
Second, there is also not the same safety net in New Zealand of an international court able to provide an individual remedy where the continuing effect of primary legislation denies an individual a remedy in the case brought before the New Zealand courts. In New Zealand a declaration of incompatibility would be the end of the road: consideration by the UN Human Rights Committee (which is not a court, which is not binding and which confers remedies) is not equivalent to an application to the European Court of Human Rights. The absence of a remedy issue is therefore more acute in New Zealand.

Third, the absence of an incentive for claims to be brought to test legislation would also be more pronounced in New Zealand. Two incentives that have played a part in litigation in the UK – the ability to disapply legislation within the scope of EU law, and the need to exhaust remedies under article 34 of the European Convention on Human Rights – do not arise in New Zealand. While there would be some cases brought and there would be more of an incentive for claims to test legislation than there is currently under the NZBORA, it is still likely to provide a very patchy approach to human rights protection.

I emphasise that these three points do not exhaust the reasons for not adopting a declaration of incompatibility; they compound the problems and deficiencies that are to be found in the declaration of incompatibility as it operates in the UK which I have set out above.

Tested against the objectives identified by the Constitutional Advisory Panel of an enhanced judicial power to ensure legislation complies with protected rights and that there are effective means of ensuring that Parliament complies with standards in the bill of rights, the declaration of incompatibility does not, I suggest, make the grade.

Conclusion

I hope I have said enough to suggest at least that New Zealand should be very cautious before adopting the mechanism for protecting human rights against legislative curtailment found in the HRA as a means of meeting the objectives identified in the Constitutional Advisory Panel report. The declaration of incompatibility model was developed in the context of the system of individual petition to the European Court of Human Rights, which does not pertain in New Zealand. As a system of giving effect to constitutionally protected rights, the declaration of incompatibility model, I have argued, is unfair, unprincipled and not particularly effective as a means of ensuring legislation is rights-compliant. The benefit of the declaration of incompatibility model is that it forms a reasonably workable placeholder in an ongoing process of constitutionalising human rights. But New Zealand should have higher ambitions. The Constitutional Advisory Panel report has higher ambitions for New Zealand. New Zealand already has a non-entrenched, non-supreme bill of rights. I doubt that it needs another one.

To contend that New Zealand, or the UK, should give fundamental rights entrenched and higher-order protection is not radical. Far from it: of the 53 members of the Commonwealth, almost every one gives fundamental rights such status in their law; a number still have final appeals in the UK before the very judges that decide the cases under the HRA (Leckey, 2015, ch.3). New Zealand and the UK, together with Australia, are outliers. New Zealand set the pace for the UK and Australia back in 1990. In this article I have set out the case for it doing so again.

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Commission on a Bill of Rights, A Bill of Rights for the UK?: the choice before us (Dec. 2012), <https://www.justice.gov.uk/downloads/about/cruck-bill-rights-vol-1.pdf> at [69]; [96]. It was said consultees had had no appetite for a strike-down power; my consultation response was evidently not read.
X (Minors) v Bedfordshire County Council (1995) 2 AC 633 at 663.
It is worth emphasising that this may be the costs not only of the government’s lawyers but private parties or other organisations who have an interest in the legislation or who benefit from it.
It would be preferable if the notwithstanding clause only applied after a court judgment, whereas under the Canadian Charter it can be used pre-emptively. The ‘overspill’ is also adopted by the Victorian Charter, s.31.

2 Hansen v R [2007] NZSC 7; [2007] 3 NZLR 1 at [25]–[26]; [253]–[254].
3 Hansen at (153) (McGrath J); McDonnell v Chief Executive of the Department of Corrections [2009] NZCA 252, at (121)(b); Belcher v The Chief Executive of the Department of Corrections (2007) NZCA 174 at (16)-(17); Milner v The New Zealand Parole Board (2010) NZA 600 at (75); Bracken v Attorney-General (No 21) [2008] 8 HRNZ 520 at [58]; [2009] NZA 12 at [55]-[56]. It is also the case that the courts have suggested that they will not make a declaration where the rights infringement does not require section 5 to be considered: McDonnell at [123][c]). However, in such cases the reason for not reading the legislation consistently with the protected right will be equally apparent from the judgment.
4 Manawatu v R [2007] NZSC 13 at [6].
5 Commission on a Bill of Rights, A Bill of Rights for the UK?: the choice before us (Dec. 2012), <https://www.justice.gov.uk/downloads/about/cruck-bill-rights-vol-1.pdf> at [69]; [96]. It was said consultees had had no appetite for a strike-down power; my consultation response was evidently not read.
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