THE BILL OF REASONABLE RIGHTS: SOLVING A CONUNDRUM AND STRENGTHENING AN ENACTMENT

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Introduction

Those trained in the common law tradition are generally uncomfortable with statute. It is the creature of a politically partisan institution. Ironically, in a parliamentary system its word in statute is considered the highest form of law. New Zealand's Westminster constitution is grounded in the notion of parliamentary sovereignty. Diceyan absolutism posits that Parliament has the power to make or unmake any law whatever.[1] The role of the judiciary is to interpret and apply that law.

This is a deceptively simple proposition. It suggests the judicial branch of government is subservient to the will of Parliament. In reality, parliamentary sovereignty is a label depicting a legal order. Discussion on its scope and meaning is increasing, particularly in the context of human rights and freedoms.[2] The question that emerges is, essentially, whether the concept of fundamental rights ought in principle to affect the reach and exercise of democratic power.[3]

In 1985, the then Minister of Justice, Geoffrey Palmer, introduced a White Paper on a Bill of Rights[4] purporting to elevate and expand on traditionally recognised rights and freedoms, and preserve them in a supreme law statute. The resulting legislation did not achieve that status. The *New Zealand Bill of Rights Act 1990* (NZBORA) was passed as an ordinary statute with the dual purpose of affirming and promoting fundamental rights and freedoms in New Zealand, and affirming New Zealand's international human rights commitments under the *International Covenant on Civil and Political Rights* (ICCPR).[5]

The NZBORA has been described as an interpretive instrument.[6] However, its operative provisions, ss 4-6, do not sit comfortably together. The 'ss 4-5-6 conundrum' expresses the unease. Case law has attempted to clarify the methodology that is to be adopted. Unfortunately, what resulted was the lack of an agreed determination on when to invoke which provision

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1 A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 39-40.

2 See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA); *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA); *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA).

3 Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72, 82.

4 Justice and Law Reform Committee, New Zealand Parliament, *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A.6.

5 *New Zealand Bill of Rights Act 1990*, long title.

6 Sir Kenneth Keith, 'A Bill of Rights: Does it Matter? A Comment' (1997) *Texas International Law Journal* 393, 395.

and how far to employ it. The landmark case of *Ministry of Transport v Noort*[7] began the inquiry into the proper formula and was revisited by the Court of Appeal in *Moonen v Film and Literature Board of Review (No 1)*[8] with unsatisfactory results. Much academic argument ensued and in the midst of this came many other decisions[9] including those of the Court of Appeal in *R v Poumako*[10] and *R v Pora*[11] – two instances where the Court came close to declaring Acts of Parliament inconsistent with the NZBORA. It is against this backdrop that the New Zealand Supreme Court delivered its decision in *R v Hansen*.[12]

While there is now clarification of the basic approach to the NZBORA, their Honours were not unanimous and there are important shortcomings with the approach that was endorsed. For example, the test for what may constitute a justified limit under s 5 remains an issue. Furthermore, it is submitted the Court in *Hansen* did not give enough weight to s 6, the interpretation provision of the NZBORA. It was considered to be a codification of the common law principle of legality – that legislation is to be interpreted consistently with fundamental rights as recognised at common law. However, s 6 heralds a new approach to statutory interpretation. Support for this is found in legal and constitutional principle. It is a sound development to have endorsed; however, the Supreme Court refrained. The New Zealand legal system permits the theoretical possibility of oppressive legislation and, in recent years, the House of Representatives has proven its willingness to capitalise on this.[13] Section 6 is a tool that can empower the courts to flex their judicial muscle and protect individuals from the state where rights-consistent interpretations can be achieved. It is argued that the obligation of judicial obedience cannot entail the validation of oppressive legislation.[14] Inconsistency with rights protected by the NZBORA can only prevail where Parliament's deliberate intention is expressed in clear, precise language. This is due to s 4. However, should the courts object to that unambiguous purpose, the remedy is found in the rule of law. By invoking it they may refuse to recognise the validity of an offending enactment. In New Zealand the issue has remained extra-judicial.[15] However, the New

7 [1992] 3 NZLR 260 (CA).

8 [2000] 2 NZLR 9 (CA).

9 For example, *R v Phillips* [1991] 3 NZLR 175 (CA); *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*]; *Alwen Industries v Comptroller of Customs* (1993) 1 HRNZ 574 (HC); *Nicholls & Tikitiki v The Registrar of the Court of Appeal* [1998] 2 NZLR 385, (1998) 4 HRNZ 537 (CA).

10 [2000] 2 NZLR 695; (2000) 5 HRNZ 652 (CA).

11 [2001] 2 NZLR 37; (2000) 6 HRNZ 129 (CA).

12 [2007] 3 NZLR 1 (SC).

13 See Geoffrey Leane, 'Indigenous Rights Wronged: Extinguishing Native Title in New Zealand' (2006) 29 *Dalhousie Law Journal* 41-78, arguing the legislative overrule of *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) by the *Foreshore and Seabed Act 2004* was racially discriminatory as it extinguished the possibility of Maori ownership of the foreshore and seabed lands provided for by the Court of Appeal, but not existing private titles. Note that at the time of printing this legislation was under review.

14 Philip Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, 2007) 524; Trevor Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993) 282.

15 *Cooper v Attorney-General* [1996] 3 NZLR 480, 484, per Baragwanath J.

Zealand public cannot afford for the courts to hesitate, if it should arise before them, for they are the guardians of fundamental liberties.[16] Finally, it is noteworthy that while the Supreme Court entertained the possibility of issuing a declaration of inconsistency by way of remedy, their Honours did not do so. This, coupled with their Honours' view of s 6, illustrates a reluctance to take bold measures to protect human rights.

To end here would be premature. *Hansen* reveals a number of frailties in the utilitarian liberal scheme of rights protection in New Zealand. While the NZBORA has had a significant impact on New Zealand's constitutional landscape, it is a weak human rights document. The *Canadian Charter of Rights and Freedoms 1982* (Canadian Charter) is a superior alternative. It requires a legislature to follow certain procedures when it intends to encroach on protected rights and confers on courts the power to strike down inconsistent legislation.[17] Furthermore, the House of Lords in the United Kingdom, which based its *Human Rights Act 1998* (UKHRA) on the NZBORA, has pursued rights-consistent outcomes more vigorously than the New Zealand Courts. While the operative provisions are essentially the same, the divergence in application may be attributed to the external context. The effect of the regional human rights arrangements of the European Union has strengthened their mandate for rights-consistent interpretations. While there are significant advantages to the Canadian model, it would require passing amendments to the NZBORA. The lack of amendments to date means this is unlikely to occur. In order to strengthen the NZBORA in a system with no supreme law constitution or rights mechanism, the effect of a change to the external context will be considered. In particular, whether a Pacific court of human rights might be a viable possibility.

This is not to undermine *Hansen*. Its authoritative guidance was much overdue. This article advocates a bolder approach to rights interpretation, in order to strengthen the effect of the NZBORA, by developing a two-stage approach predicated on ascertaining the clear intention of Parliament. Rights-consistent interpretations should be preferred where this intention is ambiguous and where it is clear s 4 should prevail only if the rule of law allows. Part one will explore the context in which *Hansen* was delivered, highlighting the difficult questions brought before the Supreme Court. A critical analysis of *Hansen* will follow in part two, including a thorough explanation of the vital role of s 6. It is a mechanism that can provide rights-consistent outcomes in a principled way, yet its potential in this respect is still to be realised. The position in the United Kingdom will provide a useful contrast. Finally, in part three, the need to strengthen the system of rights protection in New Zealand will be explained. Suggested improvements include amendments to the NZBORA to bring the statutory regime in line with the Canadian model, as well as an enquiry into the establishment of a regional human rights mechanism.

16 Sir Robin Cooke, 'Fundamentals' [1988] *New Zealand Law Journal* 158.
17 *Canadian Charter of Rights and Freedoms 1982*, s 33.

Part One – The Hansen Context

The Uneasy Presence of the NZBORA

The key provisions which are of concern are ss 4, 5 and 6 of the NZBORA which read as follows:

> 4. Other enactments not affected – No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), –
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) Decline to apply any provision of the enactment–
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
> 5. Justified limitations – Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
> 6. Interpretation consistent with Bill of Rights to be preferred – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Neither s 4 nor s 6 appeared in their current form in the 1985 White Paper which proposed that the NZBORA be enacted as supreme law.[18] The main reason for this was to impose an institutional check on what were wide law-making powers of the legislature, after the abolition of the Upper House in 1951.[19] However, the proposal for a supreme law Bill of Rights received an overwhelmingly negative public reaction. The principal objection was the perceived unacceptability of a transfer of power from an elected legislature to an unelected judiciary where the holders of final legal authority are unaccountable to the people. As a result, the Justice and Law Reform Committee recommended that the Bill of Rights be enacted as an ordinary statute.[20] It is a piece of legislation that may be amended by a simple majority of the House of Representatives. The rights that are protected by the document are at their mercy.

The NZBORA received the Royal Assent on 28 August 1990. Since its inception the interrelationship of its operative provisions has been a vexed question. When faced with an inconsistent provision the application of the NZBORA involves three conflicting commands.[21] Section 4 requires the inconsistent provision to prevail. Section 6 requires the inconsistent provision, if possible, to be read down so as to be consistent with the NZBORA and s 5 provides that, subject to s 4, the NZBORA may be limited by the inconsistent provision provided the limit is reasonable and can be demonstrably justified in a free and democratic society. Sections 4 and 6 govern the interaction of the NZBORA with other enactments. Section 4 operates to preserve legislative supremacy. Courts are directed

18 Article 1, Draft Bill of Rights Act.

19 Sir Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2nd ed, 1987) 219-220.

20 Justice and Law Reform Committee, New Zealand Parliament, *Final Report of the Justice and Law Reform Committee on A White Paper on a Bill of Rights for New Zealand* (1988) AJHR, I.8C at 3.

21 James Allan, 'The Operative Provisions – An Unholy Trinity' [1995] *Bill of Rights Bulletin* 79.

not to grant precedence to the NZBORA where it conflicts with another ordinary statute. This was because, in the absence of such a direction, courts could legitimately suppose that Parliament would intend a rights-consistent interpretation allowing the rights instrument to prevail over the conflicting statute. Section 4 applies to 'enactments' as well as some regulations, with the extended meaning of that term provided by s 29 of the *Interpretation Act 1999*. However, the protection s 4 offers another statute is limited.[22] A conflicting provision may be impliedly repealed or revoked by a court on grounds other than its inconsistency with the NZBORA.

The limited nature of protection offered by s 4 was referred to by the Court of Appeal in *Drew v Attorney-General*.[23] It was held that a general rule-making power must be read down so as to not empower the making of rules which infringed the rights of the individual. The words of the provision gave no clue to this qualification. Nonetheless, it is hard to argue it was wrong, or contrary to principle, to interpret a section in a way that upholds the rule of law.[24] The Court found that provisions that were inconsistent with the NZBORA were not protected by s 4 if the power under which they were made was capable of being interpreted in a way which would not authorise the making of NZBORA-inconsistent regulations.[25]

Section 4 only comes into play where a court has made an initial finding of inconsistency.[26] Andrew Butler and Petra Butler have pointed out that on numerous occasions judges have bypassed s 5 of the NZBORA, relying on s 4 to dispose of a statutory interpretation question altogether.[27] Often the reason is that to uphold the interpretation sought by the parties relying on the NZBORA would be identical in effect to impliedly repealing or invalidating the provision in question.[28] In some cases courts have indicated that the provision in question is probably consistent with the NZBORA in any event,[29] whilst in other cases they have not considered the merits and have assumed NZBORA-consistency.[30] This is a dangerous assumption to make. There may be occasions where there are unjustifiable limitations on protected rights and freedoms. Understanding the proper place and role of s 5 in the interpretation process is the key to avoiding assumptions of consistency with the NZBORA. Section 5 affects the structure of arguments under the NZBORA and the onus of persuasion, as well as the outcome of

22 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).
23 [2002] 1 NZLR 58 (CA), [68] per Blanchard J.
24 John Burrows, 'Interpretation of Legislation: The Changing Approach to the Interpretation of Statutes' (2002) 3 *Victoria University of Wellington Law Review* 561, 578.
25 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA), [66] per Blanchard J.
26 *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9 (CA) 16, per Tipping J.
27 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) 164.
28 Ibid.
29 For example, *Freeborn v ARCIC* [1998] 2 NZLR 371, 383-384 (HC); *Bracanov v Moss* (1995) 2 HRNZ 319, 335-336 (HC).
30 For example, *TV3 Network Services v R* [1993] 3 NZLR 421 (CA); *Re Bennet* (1993) 2 HRNZ 358 (HC); *Reille v Police* [1993] 1 NZLR 587 (HC); *R v Hansen* (Court of Appeal, 128/05, 29 August 2005).

interpretation issues. Most importantly, the s 5 analysis promotes transparency by bringing the evaluation of appropriate limits into the open where judicial reasoning can be seen.[31]

In order to assist with the interpretation of legislation that is ambiguous or inconsistent with the NZBORA the current s 6 was inserted into the Draft Bill. It is the primary statutory direction concerning the interpretation of the NZBORA.[32] It aims to ensure that where enactments contain conflicting or ambiguous statutory provisions a 'meaning' that is consistent with the NZBORA be preferred where it 'can' be given. Of note is the issue regarding the precise character of the word 'meaning'. In *Simpson v Police*[33] Hammond J noted that there are intellectual problems with the concept of 'meaning', especially because of s 4. The difficulty is that this can be what the author intended the language to refer to, what a particular reader believes it to be, or what the reasonable person would believe it to be.[34] Due to the tension between s 4 and s 6 it is not uncommon for the weight given to either section in a given case to depend on the presiding judge. Section 4 secures Parliament's law-making sovereignty. Section 6 recognises that statutory language is open to different interpretations. The provisions pull in different directions, but the tension between them need not be problematic. Unfortunately, once the s 5 inquiry is added to the formula, it has proven to be a conundrum.

Drugs, Reverse Onuses, and some Confusion

The search for a methodology

The main difficulty faced by the New Zealand Courts in applying s6 has concerned how to factor s 5 into the analysis.[35] *Ministry of Transport v Noort; Police v Curran*[36] was the first case in which the Court of Appeal explored the interaction between the NZBORA and an allegedly inconsistent statute. While the judges were unanimous as to the result, their Honours were split on the reasoning. The question involves the very functioning of the NZBORA and it is necessary to understand why a crucial question generated a difference of opinion.

The proper place of s 5 was the main point of departure. Cooke P was of the view that because s 5 was subject to s 4, any enactment which was inconsistent with a protected right would prevail over it, effectively nullifying the effect of s 5 in considering the inconsistent provision.[37] Gault J, who dissented, also saw no role for s 5 in cases requiring an evaluation of statutory inconsistency. It was Richardson J, delivering the view of the majority, whose judgment has been better received.[38] The accused, Noort and Curran, had been held under the *Transport Act 1962*. They were not told of their right to

31 Paul Rishworth, 'Two Comments on *Ministry of Transport v Noort*' [1992] *New Zealand Recent Law Review* 189, 199.
32 *R v Hansen* [2007] 3 NZLR 1, [179] per McGrath J.
33 Unreported, High Court Hamilton, AP 58/91, 17 June 1993.
34 Ibid 10.
35 *R v Hansen* [2007] 3 NZLR 1, [180] per McGrath J.
36 [1992] 3 NZLR 260 (CA).
37 *Ministry of Transport v Noort*; *Police v Curran* [1992] 3 NZLR 260 (CA) 15.
38 See Rishworth, above n 31.

consult and instruct a lawyer without delay, which they alleged was in breach of s 23(1)(b) of the NZBORA. The case could have been resolved in a similar way to *R v Butcher*,[39] by issuing an order that evidence obtained as a result of the breach be excluded. The Crown, however, advanced an argument which was not available in *Butcher*, arguing that the omission to inform of this right was authorised by statute. This was because the scheme of the *Transport Act 1962* could not operate effectively if all suspects had to be told of their right to a lawyer as tests would be delayed and results would be inconclusive. Those provisions were inconsistent with the right to a lawyer and s 4 of the NZBORA would require them to prevail.

The Court of Appeal rejected the Crown argument. They limited the right to consult a lawyer, in the breath-testing context, to consultation and receiving instruction by telephone. This would prevent unreasonable delay. Richardson J was of the view that the *Transport Act 1962* was a justified limitation on the right to consult and instruct a lawyer without delay. The reasons provided by his Honour give prominence to s 5 as the threshold section in Part One of the NZBORA. They can be summarised as follows. First, the *Transport Act 1962* set out no express limits on the right to a lawyer. However, its operation implied certain limits. That is, the statutory regime depended upon a certain amount of speed in administering the tests for ascertaining breath-alcohol levels. The need for expediency could not coexist with full recognition of the right protected by s 23(1)(b). Second, the limits implied by the *Transport Act 1962* are limits that are prescribed by law pursuant to s 5. Third, the limit that is to be read into the *Transport Act 1962* is that the right to a lawyer may only be exercised by telephone so as to not cause undue delay. Finally, this limit is reasonable according to s 5.

Having applied s 5 Richardson J did not need to invoke s 6, let alone s 4. There could be no inconsistency if the *Transport Act 1962* was only considered to have imposed reasonable limits pursuant to s 5. This suggests a basic methodology. It has formed the basis of the approach commonly preferred by commentators.[40] That is, ascertain what the meaning of an enactment is on ordinary interpretation principles; determine whether that meaning would contravene s 5 and unreasonably limit a right or freedom guaranteed by the NZBORA; and only if the answer is the affirmative need one consider whether the issue is to be resolved by reliance on s 6 or s 4. This early leading majority decision introduced the approach which would later be articulated in greater detail by the Supreme Court in *Hansen*. However, there would be another decision of the Court of Appeal which would add colour to the backdrop against which *Hansen* was delivered.

Almost exactly eight years after Noort was decided, the Court of Appeal in *Moonen v Film and Literature Board of Review (No 1)*[41] set out another methodology which it thought 'may'[42] assist with the question of whether

39 (1991) 7 CRNZ 407 (CA).

40 Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (2003) 133-134; Butler and Butler, above n 27, 196.

41 [2000] 2 NZLR 9 (CA).

42 Ibid [17] per Tipping J.

to adopt a rights-consistent approach.[43] The steps to the approach are as follows. *First*, the scope of the relevant right or freedom is determined. *Second*, the different interpretations of the words of the other enactment must be identified. If only one meaning is available, that must be adopted. *Third*, if more than one meaning is available the meaning that constitutes the least possible limitation on the right or freedom in question must be identified. It is this meaning that s 6, aided by s 5, requires the Court to adopt. *Fourth*, having adopted the appropriate meaning, the extent to which that meaning limits the relevant right or freedom must be identified. *Fifth*, there must be a consideration of the extent to which any such limitation can be demonstrably justified in a free and democratic society in terms of s 5. If the limitation cannot be so justified, there is an inconsistency with the NZBORA. However, by virtue of s 4, the inconsistent statutory provision must stand and be given effect.

There are several problems with this methodology. It is difficult to contemplate the efficacy of an instruction requiring a court to adopt the meaning of a statutory provision that places the least possible limitation on a protected right or freedom, as does step three. Further difficulty arises in the proposition that s 5 can assist in determining the meaning to be adopted pursuant to s 6 of the NZBORA in step three, if a substantive analysis under s 5 of the NZBORA has yet to be undertaken in step five.

Moonen was the final instruction left by the Court of Appeal on this matter and it was unsatisfactory. Its expression of the proper methodology was different from the preference of the majority in *Noort* and it brought uncertainty. The application of ss 4-6 remained an open question.[44] The need for an authoritative statement on the proper functioning of the NZBORA was clear and *Hansen* provided the Supreme Court with an opportunity to settle the matter.

Mr Hansen and the Supreme Court of New Zealand

Hansen concerned the proper interpretation and justifiability of s 6(6) of the *Misuse of Drugs Act 1975*. Under that provision a person found in possession of controlled drugs above specified quantities is deemed to possess the drugs for the purpose of supply or sale 'until the contrary is proved'. In the case of cannabis plants, 28 grams is sufficient to trigger this presumption. Paul Rodney Hansen was proved at trial to have been in possession of well in excess of 28 grams. The trial judge directed the jury that s 6(6) required the defence to prove on the balance of probabilities that he did not have the cannabis for the purpose of supply or sale. Hansen was convicted.

Hansen contended that the direction by the judge was inconsistent with his right under s 25(c) of the NZBORA to be presumed innocent until proven guilty. On appeal he argued that s 6 of the NZBORA required s 6(6) of the *Misuse of Drugs Act 1975* to be given a meaning consistent with the presumption of innocence and invited the Court to follow the

43 Ibid [17]-[19] per Tipping J.
44 Petra Butler, 'Public Law' [2007] *New Zealand Law Journal* 47.

House of Lords' decision in *R v Lambert*[45] where the majority, in respect of a drugs offence provision, held that 'prove' had to be read as meaning 'to give sufficient evidence', imposing an evidential burden on the accused. In doing so, Hansen invited the Supreme Court to overturn the Court of Appeal's decision in *R v Phillips*[46] which had held that the accused bore a legal burden of proof under s 6(6). The Supreme Court unanimously dismissed the appeal. Their Honours upheld *Phillips* and found that an accused bore a legal burden. This would be the extent of their unanimity.

According to the majority in *Hansen* a number of steps are involved in the application of the NZBORA to statutory interpretation. The starting point of a ss 4-5-6 analysis is to ascertain the natural meaning of the allegedly inconsistent statutory provision.[47] This initial interpretation needs to proceed in accordance with the usual canons of statutory interpretation having regard to the proposition inherent in s 6, that a meaning inconsistent with the rights and freedoms affirmed by the NZBORA should not lightly be attributed to Parliament.[48]

The second stage of the inquiry revolves around s 5. That is, if the natural meaning apparently, or prima facie, limits a guaranteed right a s 5 analysis must follow and the court must consider whether the limit is justified.[49] If the natural meaning is justified in terms of s 5 then that meaning is not inconsistent with the NZBORA. Section 6 has no application and the natural meaning should be adopted. This is because s 5 casts a measure of legitimacy over the inconsistent provision.[50]

The final step in the process is invoked if the natural meaning places an unjustified limit on the right in question. If it does, it is necessary to consider whether another meaning could legitimately be given.[51] To be legitimate, the meaning must be 'tenable'[52] or 'genuinely open'.[53] If there is such a meaning available s 6 requires it to be adopted. However, if the provision is only capable of bearing a meaning inconsistent with the NZBORA this must be adopted pursuant to s 4.

This appears to be a sound pronouncement on the correct approach to applying the NZBORA. However, there is one important shortcoming which was not addressed by the Court. On close examination, the formulation put forward in *Hansen* is not entirely accurate when the reality of the process is considered. It will usually not be sufficient to consider s 5 just once before moving on to s 6. The court's task under s 5 and s 6 is more involved than the simple two steps envisioned. Section 5 must not be put aside once the justification for the challenged limit has been determined. It must be

45 [2002] 2 AC 545 (HL).
46 [1991] 3 NZLR 175 (CA).
47 *R v Hansen* [2007] 3 NZLR 1, [57]-[60] per Blanchard J; [88] per Tipping J; [190] per McGrath J.
48 Ibid [89] per Tipping J.
49 *R v Hansen* [2007] 3 NZLR 1, [60] per Blanchard J; [90] per Tipping J.
50 Ibid [91] per Tipping J; [191] per McGrath J; [269] per Anderson J.
51 Ibid [60] per Blanchard J; [91] per Tipping J.
52 Ibid [5] per Elias CJ; [150] per Tipping J; [179] per McGrath J; [288] per Anderson J.
53 Ibid [61] per Blanchard J.

invoked during the interpretation process once a challenged limit has been found not justified. If that interpretation exercise is to result in choosing the most appropriate meaning from among the available range the court needs to apply not only s 6, but ss 5 and 6 alongside each other. This is in order to find a meaning which can be given as called for by s 6, and one which involves a lesser limit on the right under s 5 or at least one that is more justified than the challenged limit. Butler and Butler refer to this as the court and counsel 'shuttling' between the NZBORA provisions and the provisions of the other enactment to reach the most appropriate conclusion.[54] Essentially, this sees the court undertake a balancing exercise when tackling the 'ss 4-5-6 conundrum'. The task for the court is to balance the goal of achieving reasonable interpretations of legislation and ensuring compliance against recognition that the legislature and the executive have a role to play in rights protection. Judges ought not to use s 6 as an excuse to intrude into the territories of the other constitutional organs.[55]

The reason why the prospect of this 'shuttling' exercise was not mentioned by the Court in *Hansen* may not have been merely that there was only one alternative meaning for s 6(6) of the *Misuse of Drugs Act 1975*,[56] but that it was quite clear that that alternative meaning was not one which s 6(6) could be given in light of s 6 of the NZBORA. If the meaning had been available, it would still have been appropriate to go on to consider whether it represented a justified limit in terms of s 5, giving rise to the shuttling exercise.

Despite its shortcomings the approach articulated in *Hansen* best captures the proper application of ss 4-6 of the NZBORA.[57] However, Blanchard J[58] and Tipping J[59] still emphasised that the method for applying ss 4-6 set out by the Court is not definitive and there might be cases where there are still good grounds to apply the *Moonen* approach. This suggests there is no single methodology that the courts must adopt when involved in this inquiry. Furthermore, *Moonen* was not overruled even though its approach is flawed. Whilst it is not incorrect to include a consideration of s 5 alongside and after s 6, it is unsatisfactory to omit a consideration of s 5 to assess the justification for the challenged limit before turning to consider alternative meanings pursuant to s 6. The obvious advantage of considering s 5 in the early stages of the inquiry is to avoid unnecessary consideration of s 6 in cases where the interpretive issue does not arise because the limit on the right resulting from the natural meaning is one which is prescribed by law and which can be justified in a free and democratic society. Furthermore, it avoids excessive reading down of an enactment contrary to Parliament's intention of imposing a justified limit on the right.[60] This could have been addressed more precisely by the Supreme Court in *Hansen*. Their Honours

54 Butler and Butler, above n 27, 194.
55 Ibid 169.
56 *R v Hansen* [2007] 3 NZLR 1, [91] per Tipping J.
57 Butler, 'Public Law', above n 44, 48.
58 *R v Hansen* [2007] 3 NZLR 1, [61].
59 Ibid [94].
60 Hanna Wilberg, 'The Bill of Rights and Other Enactments' [2007] *New Zealand Law Journal* 112, 114.

did, however, put the essential point beyond doubt by noting that s 6 calls for a meaning that is consistent with the limited version of the right that results from the application of any justified limits. It follows that s 6 cannot be applied before a consideration of s 5.

The elements of section 5

With s 5 having been accorded an essential role in the inquiry it is necessary to be clear on what is involved in determining whether a limit is reasonable and demonstrably justified in a free and democratic society. It has always been agreed that the test must be one of proportionality, but details have remained elusive. In *Hansen*, the Court returned to the test laid down by the Supreme Court of Canada in *R v Oakes*[61] which was first adopted in New Zealand by *Noort*.[62] The *Oakes* test involves an assessment of whether the importance of the objective pursued by the limit warrants overriding a protected right, and the proportionality of the means chosen to advance the objective.[63] The proportionality analysis consists of three stages. A court will be required to assess whether there is a rational connection between the limit and the goal being pursued by that limit; whether the right is impaired as little as possible; and whether the limit is, overall, proportionate to the objectives being pursued. The impression left by the Court in *Hansen* is that this approach is not necessarily a formulation to be rigidly applied. Nonetheless, Blanchard, Tipping and McGrath JJ went on to apply it step by step. This provides a welcome precedent.

It is argued that the main difficulty with the *Oakes* test is the requirement that the limit be of minimal impairment to the practice of the right in question,[64] which is too strict.[65] A more appropriate formulation would be to require that the limit be no greater than is reasonably necessary for attaining the objective.[66] In *Hansen*, two of their Honours adopted this qualification.[67] A clear determination on this point would have been highly desirable as it has left a point of uncertainty in an important aspect of the inquiry. Furthermore, the overall nature of the *Oakes* test was received differently by their Honours. Anderson J preferred that consideration of the importance of the objective should not occur until the final proportionality assessment, rather than as part of the first stage.[68] However, it is unlikely to make too much difference whether it is considered at the outset or not, so long as it is considered again as part of the balance in the final proportionality assessment. Tipping J suggested that the first two steps may be best understood as threshold questions.[69] His Honour, with McGrath J reaching the same conclusion, continued the analysis onto the final step of proportionality and found the

61 [1986] 1 SCR 103 (SCC).
62 *R v Hansen* [2007] 3 NZLR 1, [42] per Elias CJ; [64] per Blanchard J; [103]-[104, per Tipping J; [203]-[204] per McGrath J; [269] and [272] per Anderson J.
63 *R v Oakes* [1986] 1 SCR 103 (SCC) [69]-[70] per Dickson CJ.
64 Butler and Butler, above n 27, 141-2.
65 Ibid.
66 Rishworth et al, above n 40, 179-180, 185; Butler and Butler, above n 27, 141-2.
67 *R v Hansen* [2007] 3 NZLR 1, [79] per Blanchard J; [126], per Tipping J.
68 Ibid [270].
69 Ibid [121].

minimum impairment test not satisfied.[70] This suggests that the minimal impairment test is not a hurdle which must be passed but rather a factor that feeds into the final proportionality assessment. This confirms that the crux of the *Oakes* test is the overall proportionality assessment. However, there is a vivid lack of guidance on what is involved in this final step, besides the words of Tipping J in *Moonen*, that 'a sledgehammer should not be used to crack a nut'.[71] Nonetheless, the factors their Honours took into account when considering proportionality are instructive and warrant explanation.

Tipping J chose to weigh the severity of the limit on the right, the objective, and the effectiveness of the limit in serving that objective compared to the effectiveness of available alternatives.[72] Blanchard J considered the same factors, albeit at different stages in the process.[73] McGrath J only considered the severity of the limit but in addition considered the importance of the particular right in this type of case.[74] Taking all these factors together, the picture would resemble that laid out by Richardson J in *Noort* when the *Oakes* test was first adopted in New Zealand.[75] Considering these factors as part of the proportionality analysis goes a long way towards ensuring a comprehensive analysis of the stage of the process which determines the viability of a claim for breach of a protected right under the NZBORA. Once again, greater precision by the Court on this point would have been desirable. This illustrates that while *Hansen* has provided an authoritative statement on various aspects of the workings of the NZBORA, it is far from complete. One area of particular concern is the Court's view of s 6 and its relationship to the principle of legality in statutory interpretation.

Part Two – Hansen: A Critical Analysis

Liberating the Courts and Realising the Potential of Section 6

The common law principle of legality

The Court of Appeal has consistently held that rights-consistent interpretations under s 6 are constrained by a measure of reasonableness. Section 6 authorises rights-consistent meanings when they can 'reasonably'[76] or 'properly'[77] be given. It does not permit a 'strained'[78]

70 Ibid [130] per Tipping J; [224] per McGrath J.
71 *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9 (CA) [18] per Tipping J.
72 *R v Hansen* [2007] 3 NZLR 1, [132].
73 Ibid [79]-[82].
74 Ibid [225]-[228].
75 [1992] 3 NZLR 260 (CA) 283-284.
76 *Ministry of Transport v Noort*; *Police v Curran* [1992] 3 NZLR 260 (CA) 272 per Cooke P; *Police v Herewini & Smith* [1994] 2 NZLR 306 (CA) 313 per Cooke P.
77 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) 581 per Tipping J; *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9 (CA) [17] per Tipping J.
78 See *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] 674 per Cooke P; *R v Phillips* [1991] 3 NZLR 175 (CA) 177 per Cooke P; *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) 542 per Thomas J; *Ministry of Transport v Noort*; *Police v Curran* [1992] 3 NZLR 260 (CA) 272 per Cooke P; *Police v Herewini & Smith* [1994] 2 NZLR 306 (CA) 313 per Cooke P.

interpretation, but one which is 'fairly open'[79] and 'reasonable'.[80] The reasoning is that s6 facilitates the adoption of rights-consistent meanings through a legitimate process of statutory construction and cannot be used as a concealed legislative tool.[81] This approach is considered to bolster, not displace, the primacy of s 5(1) of the *Interpretation Act 1999*.[82] Soon after the introduction of the NZBORA, Paul Rishworth doubted whether s 6 represented a very radical departure from the position which would have applied even without the Bill of Rights, at least where the rights reflect principles already important in the law.[83] However, over time a new view has emerged that s 6 can legitimately endorse a bolder approach towards the adoption of rights-consistent meanings by the courts.[84] The Supreme Court in *Hansen* considered the meaning and effect of s 6 at length. However, their conclusion provides a precedent that may impede the New Zealand Courts from realising the potential of s 6. In light of this result, the decisions of the Court of Appeal in *Poumako* and *Pora* warrant greater attention. The fundamental difficulty with the position of the Supreme Court in *Hansen* is their Honours' endorsement of the principle of legality in interpretation exercises involving the NZBORA. The Court shied away from developing a strong approach to s 6. *Hansen* affirmed that the meanings adopted under s 6 must be reasonable and properly available in light of the context in which the question arises. Furthermore, it affirmed that in determining what is or is not reasonable the Court is constrained by the statutory language and purpose. In New Zealand, the text of a statutory provision remains the primary point of reference in ascertaining meaning.[85] Only the Chief Justice posited that s 6 may allow a court to adopt meanings that linguistically may appear strained in pursuit of rights-consistency.[86] Her Honour opined that where fundamental rights and freedoms are affected, less obvious meanings may prevail over apparent meanings under common law presumptions that are protective of bedrock values.[87] This article supports that approach. Precedence must be given to achieving rights-consistency under s 6. It gives way to s 4 only where the deliberate intention of Parliament is clear and unambiguous. However, should this preserve an intent which is abhorrent to the courts, they are under no obligation to give effect to it. By invoking the rule of law, they may declare the statute invalid to further ethical government and rights protection.

79 *Ministry of Transport v Noort*; *Police v Curran* [1992] 3 NZLR 260 (CA) 286 per Hardie-Boys J.

80 *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9 (CA) [16] per Tipping J.

81 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) 581 per Tipping J.

82 *R v Hansen* [2007] 3 NZLR 1, [252] per McGrath J.

83 Paul Rishworth, 'The New Zealand Bill of Rights Act 1990: The First Fifteen Months' in *Essays on the New Zealand Bill of Rights Act 1990* (1992) 24.

84 See Paul Rishworth, 'Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective' in R Bigwood (ed), *The Statute: Making and Meaning* (2004) 251.

85 *R v Hansen* [2007] 3 NZLR 1, [237] per McGrath J.

86 Ibid [12].

87 Ibid [13].

The principle of legality is derived from value-oriented approaches to statutory interpretation. Value-oriented interpretation is a feature of the common law method. Claudia Geiringer has argued that s 6 of the NZBORA affirms a value-oriented approach to statutory interpretation.[88] It provides that those charged with interpreting statutes must aim to adopt constructions which are consistent with values derived from sources external to the statute itself. This practice long outdates the presence of a Bill of Rights.[89] Recently, the courts in New Zealand and the United Kingdom have been found upholding a common law 'principle of legality'. That is, a common law presumption that Parliament does not intend to legislate contrary to fundamental human rights. This stance was proclaimed by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms*[90] where his Lordship stated that 'fundamental rights cannot be overridden by general or ambiguous words' and in the absence of express language or necessary implication to the contrary, the courts presume that even the most general words were intended to be subject to the basic rights of the individual.

In case law preceding *Hansen* s 6 was equated with the principle of legality. In *Ngati Apa Ki Te Waipounamu Trust v R*[91] Elias CJ echoed Lord Hoffmann's remarks in *Simms* and said that the principle of legality, recognised by the common law, has been expressly enacted by s 6 of the NZBORA. Likewise in *Pora*[92] Elias CJ remarked that by enacting s 6 Parliament has adopted a general principle of legality, applied as a principle of the common law. In *Hansen*, in dicta by Elias CJ and McGrath J, their Honours were of the view that s 6 represented a continuation of, rather than a departure from, common law conceptions of the role of fundamental values in statutory interpretation.[93]

Whilst s 6 may be considered to have legitimised the operation of the principle of legality, it cannot be simply a reflection of common law approaches to value-oriented interpretation.[94] The provision itself is part of an enactment the existence of which was the result of legislative intention. This supports the argument put forward by Butler and Butler that the practice of statutory interpretation must be carried out through 'NZBORA-tinted glasses',[95] because that is the only way in which Parliament's overarching intent may be realised. Parliament's intention cannot easily be achieved without reference to their countervailing view as expressed through s 6 of the NZBORA.

Equating s 6 with the principle of legality does not provide much guidance on, or solve the problem posed by, the provision. It does not help to establish a proper boundary between what may be acceptable interpretation

88 Claudia Geiringer, 'The Principle of Legality and the Bill of Rights' (2008) 1 *New Zealand Journal of Public and International Law* 59, 73.

89 See John Willis, 'Statute Interpretation in a Nutshell' (1938) 16 *Canadian Bar Review* 1, 17.

90 [2000] 2 AC 115, 130, quoted with approval by the New Zealand Court of Appeal in *R v Pora* [2001] 2 NZLR 37 (CA).

91 [2000] 2 NZLR 659, [82].

92 [2001] 2 NZLR 37, [53].

93 *R v Hansen* [2007] 3 NZLR 1, [13], per Elias CJ; [251], per McGrath J.

94 Geiringer, above n 88, 77.

95 Butler and Butler, above n 27, 168.

and unacceptable legislation. It does not answer the question whether s 6 may provide a mandate for a new form of statutory interpretation in which meanings are adopted on the basis that they 'can be given', even where traditional interpretation method would have led to an inconsistent meaning on the ground that it was intended. This is the disturbing shortcoming of *Hansen*. An attempt at remedying this inadequacy will follow. The key to solving the conundrum will be ascertaining the intention of Parliament which will demarcate the boundary between ss 4 and 6. Should Parliament's intention clearly authorise the override of fundamental rights and be guarded by s 4, the courts may legitimately engage in dialogue with the political branch of government by invoking the rule of law. Ultimately, they may render the enactment invalid.

Heralding a new era of statutory interpretation

The difficulty with the view of the Supreme Court regarding s 6 and the principle of legality is that when it is applied to the formulation prescribed for the interaction of the operative provisions of the NZBORA, it effectively renders s 6 redundant. The initial stage of the *Hansen* methodology, as set out above, involves ascertaining Parliament's intended meaning of the allegedly inconsistent statutory provision. It is unlikely that this would proceed outside the common law context in which the courts have traditionally carried out their interpretive role. In fact, Tipping J stated that the initial interpretation exercise should proceed according to all relevant construction principles, 'including the proposition inherent in s 6 that a meaning inconsistent with rights and freedoms affirmed by the NZBORA should not be lightly attributed to Parliament'.[96] Therefore, it is difficult to determine what the later, s 6 inquiry is supposed to add. In *Hansen*, the Court expressed their view of the limited scope of s 6 and it is difficult to consider circumstances in which a s 6-mandated inquiry would deliver a different result. There is little point in the existence of s 6 in statute if it simply replicates what judges have always done.[97]

At this point, it is necessary to acknowledge that the values protected by the NZBORA may differ slightly from the values traditionally protected by the common law. However, Geiringer argues that the prospect of a right attracting the protection of s 6 but not the common law presumptions is negligible for two reasons.[98] First, there exists the common law principle of legislative consistency with international law which includes the ICCPR from which the NZBORA was fashioned. This is an avenue for protecting rights reserved in both spheres. Second, the principle of legality has been accompanied by a willingness to update the content of common law rights to better reflect twenty-first century sensibilities. An example of this is found in *Ngati Apa Ki Te Waipounamu Trust* where Elias CJ implied that the right of minorities to enjoy their culture[99] is also protected by the common law principle of legality.[100]

96 *R v Hansen* [2007] 3 NZLR 1, [89] per Tipping J.
97 Rishworth, 'Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective', above n 84, 251.
98 Geiringer, above n 88, 84.
99 *New Zealand Bill of Rights Act 1990*, s 20.
100 [2000] 2 NZLR 659, [82].

Having realised this shortcoming with the position in *Hansen*, consideration must be given to the possibility that their Honours intended the initial inquiry to proceed independently of value-laden analysis. However, this would be a dangerous prospect as the resulting methodology would entail an initial inquiry into the meaning of a provision in isolation from the rich context in which statutory interpretation traditionally takes place. More specifically, the human rights context would no longer form part of the background against which statutes are construed. Instead, it would be introduced at a later stage of the inquiry once textual or purposive deficiency is established.[101] These difficulties expose the necessity of resolving the relationship between purposive interpretation and s 6-mandated interpretation as a matter of legal and constitutional principle rather than statutory interpretation.

Considering the position in *Hansen* and the legal, constitutional and historical backdrop to this question there are two points that warrant explanation. First, the widening and deepening of international human rights law has provided common law judges with an updated set of values to protect. It is a movement which has been described as the 'rise'[102] and 'renaissance'[103] of constitutionalism. This has brought with it greater constitutional expectation that judges will act as guardians of these values.[104] New Zealand can benefit from this international movement by building on present arrangements.[105] The NZBORA is one instrument that could do more in this respect. Second, Geiringer has argued that it is consistent with the view that there are strong parallels between s 6 and the common law presumptions to find that it nevertheless has a galvanising effect.[106] Section 6 authorises the courts to draw on traditional common law conceptions of the role of values in the interpretation process and apply them in relation to the updated list of rights in order to protect them. On this basis, there may be grounds which entitle the courts to adopt meanings that may run contrary to statutory purpose. In light of both these arguments, the position of the Court of Appeal in *Phillips* which did not allow for strained interpretations is not necessarily erroneous, but out of date.

Butler and Butler have posited that to say s 6 of the NZBORA does not authorise interpretations contrary to Parliament's intent is trite, simplistic, and misses the point.[107] Following this to its logical conclusion, should there be ambiguity between statutory provisions a rights-consistent meaning should be adopted pursuant to s 6, even if it is linguistically strained, for it will nonetheless mean that it is a meaning that 'can' be given. This approach

101 Geiringer, above n 88, 85.

102 Lord Steyn, 'Human Rights: The Legacy of Mrs Roosevelt' in J Steyn, *Democracy Through Law: Selected Speeches and Judgments* (2004) 151, 159.

103 Lord Cooke of Thorndon, 'The Constitutional Renaissance', paper delivered at the New Zealand Law Conference, Rotorua, April 1999, first plenary session, 2.

104 Geiringer, above n 88, 85.

105 Philip Joseph, 'The Higher Judiciary and the Constitution: A View From Below' in R Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (2006) 213, 214.

106 Geiringer, above n 88, 85.

107 Butler and Butler, above n 27, 171-172.

found favour with Elias CJ in *Hansen*.[108] If a meaning 'can' be given, it follows that there will be meanings that cannot be given. In such circumstances s 4 would prevail. Parliament may, if it chooses, legislate to contravene fundamental rights.[109] Should a linguistically strained meaning that is rights-consistent contravene Parliament's deliberate intention as expressed by the inconsistent provision, s 4 precludes the adoption of that meaning.[110] *Simms* held that deliberate intention is conveyed through unambiguous words.[111] Before this decision, *R v Home Secretary, ex parte Pierson*[112] and *R v Lord Chancellor, ex parte Witham*[113] affirmed that fundamental rights are to remain unimpaired unless unequivocally taken away. The legislature must 'speak clearly'[114] when overriding fundamental rights and in achieving an acceptable legislative override Parliament may need to use language that is 'unrealistically specific'.[115] However, if there is a clear encroachment on the rights of individuals by the legislature the judicial branch of government, invoking the rule of law, may declare the statute invalid. The courts are an independent institution involved in the business of government. They must be able to exercise their ultimate authority as final arbiters of the law to uphold ethical governance under the rule of law. Philip Joseph has argued that in such situations, by stepping outside the institutional confines that realise the sovereignty of Parliament, the judiciary may properly refuse to recognise the validity of a statute.[116] Governments must not be accorded the authority to enact unjust legislation[117] and courts cannot be obliged to obey a statute which contradicts the fundamental tenets of Western political morality.[118] Resolving such difficulties is an important test for the common law constitution and Joseph has said that no amount of judicial obedience can validate such action by a legislature.[119]

A heightened rights consciousness

The main trend in support of a bolder approach to s 6 is the shift that has taken place with respect to the precedence that is now given to the protection of fundamental rights. The first signs of the human rights movement having reached a New Zealand court came with the sentiments of Cooke J sitting in the Court of Appeal. His Honour questioned whether Parliament was able to

108 [2007] 3 NZLR 1, [12].
109 [2000] 2 AC 115 (HL) 131 per Lord Hoffmann.
110 Butler and Butler, above n 27, 196.
111 [2000] 2 AC 115 (HL) 130 per Lord Hoffmann.
112 [1998] AC 589 (HL).
113 [1998] QB 575.
114 *R v Pora* [2001] 2 NZLR 37 (CA) 50 per Elias CJ and Tipping J.
115 Lord Cooke of Thorndon, 'The Basic Themes' (2004) 2 *New Zealand Journal of Public and International Law* 113, 114.
116 Joseph, *Constitutional and Administrative Law in New Zealand*, above n 14, 524. See also, John Caldwell, 'Judicial Sovereignty: A New View' [1984] *New Zealand Law Journal* 357; Michael Kirby, 'Lord Cooke and Fundamental Rights' and Paul Rishworth, 'Lord Cooke and the Bill of Rights' in Paul Rishworth (ed), *The Struggle for Simplicity in Law: Essays for Lord Cooke of Thorndon* (1997) 331; Tom Campbell and Jeffrey Goldsworthy, *Judicial Power, Democracy and Legal Positivism* (2000).
117 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999) 259-260.
118 Allan, above n 14, 282.
119 Joseph, *Constitutional and Administrative Law in New Zealand*, above n 14, 524.

override fundamental rights and freedoms in general.[120] His most definitive statement came in *Taylor v New Zealand Poultry Board*[121] where his Honour doubted whether legalising torture would be within the lawful legislative powers of Parliament and opined that some common law rights lie so deep that even Parliament could not override them.

Despite Cooke J's clear purpose in suggesting a rights-based limitation on Parliament's powers of legislation, a court is yet to invalidate a statute on these grounds.[122] This indicates that it would be a very difficult task in practice. Furthermore, Baragwanath J in *Cooper v Attorney-General*[123] has remarked that in New Zealand the debate is extra-judicial and one which the good sense of parliamentarians and judges has kept theoretical. Whilst his Honour said that it would be inconceivable that the legislature should infringe the rule of law so as to destroy a fundamental right,[124] the rule of law is a tool at the disposal of the courts should they come across pernicious legislation conveying an instruction expressed in unrealistically clear language authorising the override of fundamental rights. The rule of law has been rehabilitated. A plethora of recent decisions have prompted its revival as a tool that can trump parliamentary sovereignty.[125] Should the issue arise in New Zealand, the will of the majority may no longer be absolute.[126]

Before the rise of constitutionalism, judicial acknowledgement of rights was sporadic at best.[127] Common law method subordinated civil and political rights and readily identified with majoritarian values.[128] However, there has been a change. Courts must now evaluate the competing interests in a legal environment of enhanced rights-protection.[129] The modern worldwide rights movement embraces the UKHRA, the United States under its historical *Bill of Rights*, Canada under its *Charter of Rights and Freedoms 1982*, Australia's 'implied rights' jurisprudence as well as the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT), and the NZBORA and the *Human Rights Act 1993* (NZ). Furthermore, international jurisprudence has spread beyond common law jurisdictions

120 *L v M* [1979] 2 NZLR 519 (CA) 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) 78; *New Zealand Driver Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) 121.

121 [1984] 1 NZLR 394 (CA) 398.

122 Joseph, *Constitutional and Administrative Law in New Zealand*, above n 14, 522.

123 [1996] 3 NZLR 480, 484.

124 Ibid 498.

125 *R (on the application of Jackson and others) v Attorney-General* [2005] 3 WLR 733 (HL); *A and others v Secretary of State for the Home Department* [2004] UKHL 56; *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 (HL); *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL). See also, Jeffrey Jowell, 'The Rule of Law's Long Arm: Uncommunicated Decisions' (2004) *Public Law* 246.

126 Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges' (2006) 3 *European Human Rights Law Review* 243, 249.

127 Joseph, 'The Higher Judiciary and the Constitution: A View From Below', above n 105, 229.

128 See *Police v Christie* [1962] NZLR 1109 (SC); *Price v Police* [1965] NZLR 1086 (SC); *Derbyshire v Police* [1966] NZLR 391 (SC); *Mesler v Police* [1967] NZLR 437 (CA); *Wainwright v Police* [1968] NZLR 101 (SC) all of which concern the offence of disorderly conduct under the former s 3D of the *Police Offences Act 1927*.

129 Joseph, 'The Higher Judiciary and the Constitution: A View From Below', above n 105, 229.

to embrace European human rights law under the *European Convention on Human Rights and Fundamental Freedoms 1950* and the *European Charter of Rights 2000*. The dicta in *Phillips* warning against strained interpretations were delivered 1991, much earlier than the decisions of the House of Lords in *Simms*[130] and *Pierson*,[131] or the English Divisional Court's decision in *Witham*.[132] Even with Sir Robin Cooke presiding over the Court of Appeal, it was a time when the move for greater recognition of rights and freedoms under a corresponding instrument was still gaining momentum. In *Hansen*, the Supreme Court needed to keep up with transnational developments. However, it did not expressly do so. Its effect as a powerful precedent may impede the progress of the system of rights protection in New Zealand. It was in *Poumako*, a case preceding *Hansen*, where the Court of Appeal was outspoken and in favour of an audacious approach to s 6, especially due to their preparedness to forgo the requirement of reasonableness in order to achieve a rights-consistent meaning.

In *Poumako*[133] a majority of the Court of Appeal stated that the direction given to the courts by the legislature is that wherever a meaning consistent with the NZBORA can be given, it is to be preferred; it is not a matter of what the legislature may have intended in the other provision, for they intended their s 6 instruction as well. Both Henry and Thomas JJ dissented on this issue. They were of the opinion that this position undermined s 4. Thomas J delivered a vigorous dissent and would have issued a declaration of inconsistency. His Honour stated that to attribute to a statutory provision which is neither equivocal nor malleable in its terms a meaning which is contrary to Parliament's discernible intent is to effectively challenge Parliament's primacy.[134] The divergence of opinion in *Poumako* illustrates the problems created by the centrifugal relationship between ss 4 and 6. It shows the tendency for judges who believe in the goals of rights protection to give greater weight to s 6, whilst those who value orthodoxy and believe that inconsistent provisions should be departed from only where there is real ambiguity, give greater weight to s 4. In this instance, the case was decided in favour of s 6.

In line with the thesis of this article, where a rights-consistent meaning could be given, it was. Arguments have now entered the realm of whether Parliament's intention is sufficiently clear to substantiate a departure from s 6. The pre-occupation with the correct methodology is no longer centre-stage. For the majority, Parliament's intention was not considered to be so unequivocal as to warrant invocation of s 4. *Poumako* was an example of a superior court being of service to rights protection in more than just 'high-sounding language'.[135] The same could be said of *Pora*.[136] Whilst a rights-consistent meaning was preferred, the approach of Elias CJ and Tipping J has been criticised for going

130 [2000] 2 AC 115 (HL).
131 [1998] AC 589 (HL).
132 [1998] QB 575.
133 [2000] 2 NZLR 695 (CA); (2000) 17 CRNZ 530 (CA) [37] per Gault J.
134 Ibid [80]-[81].
135 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] 676 per Cooke P.
136 [2001] 2 NZLR 37 (CA); (2000) 18 CRNZ 270 (CA).

too far in its reliance on s 6. It is argued that *Pora* was a case where the deliberate intention of Parliament was sufficiently clear to warrant use of s 4 and the fact that it was not has produced an erroneous outcome.[137] Nonetheless, the issue here revolves around legislative intention as the boundary between ss 4 and 6. Determining legislative intention may be challenging. The exercise may involve a measure of subjectivity. This is typical, however, of a myriad of legal questions put before the bench. Judges must work with what Parliament has given them and such questions provide the judiciary with the opportunity to engage in healthy dialogue with the political branch.

The English Experience

Matching provisions, diverging approaches

The House of Lords has been particularly adventurous in its application of the UKHRA. The provision equivalent to s 6 is s 3(1) of the UKHRA, where the empowering view has become much more prominent.[138] It reads:

> 3. Interpretation of legislation –
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Lord Cooke of Thorndon has suggested that s 3(1) is materially different from New Zealand's s 6.[139] Lord Steyn has said that on drafting s 3(1) the slightly weaker model in s 6 was considered but that stronger language was preferred.[140] Lord Irving of Lairg has expressed the view that s 6 of the NZBORA is less robust than the formulation found in s 3(1) of the UKHRA.[141] If this is so, the difference in the vigour with which these provisions are applied can simply be attributed to statutory language. However, commentators are of the view that the wording of the provisions is not very different at all.[142] Section 6 says rights-consistent meanings should be preferred 'wherever an enactment can be given a meaning that is consistent' and s 3(1) says compatible meanings should be given 'so far as it is possible'. Geoffrey Marshall has made the point of their congruence quite succinctly, albeit inadvertently, by saying that 'if something is possible it can be done … [i]f it is impossible it cannot … [w]hat cannot be done is impossible to do'.[143] Furthermore, both provisions use strong mandatory language regarding the nature of the obligation. The language alone cannot substantiate a difference in emphasis or intention.[144] Despite having essentially the same provision operating in the two jurisdictions, in the United Kingdom

137 Andrew Butler, 'Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand' [2000] *Public Law* 586.
138 Rishworth, 'Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective', above n 84, 252.
139 *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 373.
140 *R v A* [2001] 2 WLR 1546.
141 Lord Irving of Lairg, 'Activism and Restraint: Human Rights and the Interpretive Process' [1999] *European Human Rights Law Review* 350, 365.
142 See P Rishworth, 'Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective', above n 84, 252; Butler and Butler, above n 27, 160.
143 Geoffrey Marshall, 'The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?' [2003] *Public Law* 236, 240.
144 Butler and Butler, above n 27, 161.

there is now judicial consensus that s 3(1) may require a court to depart from the unambiguous meaning that legislation would otherwise bear in order to adopt meanings that are compatible with Convention rights.[145]

In *Ghaidan v Godin-Mendoza*[146] the House of Lords held that a provision of the *Rent Act 1977* (UK) which it had held to be unavailable to same-sex couples due to the statutory reference to 'husband and wife'[147] should be re-interpreted to include such couples in light of the Court's duty under s 3(1) of the UKHRA to interpret legislation consistent with, inter alia, the *European Convention on Human Rights and Fundamental Freedoms 1950* prohibition on discrimination. In doing so their Lordships expressly held that 'possible' in s 3(1) is not glossed by a requirement of reasonableness,[148] and the statutory language is not determinative of whether a rights-consistent meaning is 'possible' in light of s 3(1).[149] Lord Nicholls of Birkenhead went so far as to say that s 3(1) empowers the courts to read in words which may change the meaning of legislation in order to make it Convention-compliant.[150] Furthermore, it was held that s 3(1) may require a departure from parliamentary intention in using the language in question.[151] Whilst this is a bold step in encouraging greater rights-consistent interpretations, the House of Lords emphasised two overlapping limits to the operation of s 3(1) – the underlying thrust of the legislation and the courts' institutional capacity. It was held that s 3(1) does not authorise the adoption of a meaning that runs counter to a 'fundamental feature',[152] the 'underlying thrust',[153] or the 'very core and essence'[154] of the legislation. Finally, the courts may not make decisions for which they are unequipped. Examples given were where making the legislation Convention-compatible would involve the substitution of a detailed statutory scheme,[155] or if a policy choice needs to be made between different methods for achieving Convention compliance.[156]

Despite these warnings, a 3:2 majority of the House of Lords handed down a disconcerting decision in *Sheldrake v Department of Public Prosecutions; Attorney-General's Reference (No 4 of 2002)*.[157] Parliament had enacted a new anti-terrorism regime, including a new offence related to being a member

145 Aileen Kavanagh, 'Choosing Between ss 3 and 4 of the *Human Rights Act 1998*: Judicial Reasoning After *Ghaidan v Mendoza*' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (2007) 114, 119. See *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 (HL) [29]-[30] per Lord Nicholls of Birkenhead; [44] per Lord Steyn; at [119] per Lord Rodger of Earlsferry; [67] per Lord Millet.

146 [2004] 3 WLR 113 (HL); [2004] 2 AC 577 (HL).

147 *Rent Act 1977* (UK), paragraph 2(2), schedule 1.

148 [2004] 2 AC 577 (HL) [44] per Lord Steyn.

149 Ibid [31]-[32] per Lord Nicholls of Birkenhead; [44] per Lord Steyn; [110] and [123] per Lord Rodger of Earlsferry.

150 Ibid [32].

151 Ibid [30] per Lord Nicholls of Birkenhead.

152 Ibid [115] per Lord Rodger of Earlsferry; [33] per Lord Nicholls of Birkenhead.

153 Ibid [33] per Lord Nicholls of Birkenhead.

154 Ibid [111] per Lord Rodger of Earlsferry.

155 Ibid [110] per Lord Rodger of Earlsferry; [49] per Lord Steyn.

156 Ibid [33] per Lord Nicholls of Birkenhead.

157 [2005] 1 AC 264 (HL); [2004] 3 WLR 976 (HL).

of a proscribed organisation. Parliament had provided a defence to the offence and had expressly placed the legal onus of proof of the defence on the accused. The House of Lords held that to place a legal onus of proof on an accused in order to escape criminal liability would offend the presumption of innocence in article 6(1) of the *European Convention on Human Rights and Fundamental Freedoms 1950* and held that the defence had to be interpreted as only placing an evidential onus on the accused. It was said that s 3(1) of the UKHRA required this outcome even though there could be no doubt that Parliament had intended a legal burden.[158] In *Lambert*, a case concerning a very similar point, Lord Hope of Craighead said that s 3(1) preserves parliamentary sovereignty and does not give judges the power to overrule decisions which the statutory language indicates have been issues considered and decided by the legislature.[159] In light of this and the limits laid down by the House of Lords in their earlier decision of *Ghaidan*, this is an astonishing result. When Parliament has considered the point in question and made a legislative decision on it,[160] it seems to be incompatible with the interpretative nature of the obligation to prefer a meaning directly contrary to that legislative decision.

However, not all United Kingdom case law is consistent with the bold approach articulated in *Ghaidan*. Of note is *R v Commissioners of Inland Revenue, ex parte Wilkinson*[161] where Lord Hoffmann, speaking for a unanimous Court, reasserted the importance of text and purpose as constraints on the interpretive possibilities available in light of s 3(1) and even invoked the gloss of reasonableness.[162] Thus, in the United Kingdom there currently exist two competing visions of the role of s 3(1) of the UKHRA in statutory interpretation. One is as a strong, far-reaching obligation to the construction of statutes,[163] that is quite unlike any previous rule of statutory interpretation.[164] The other sees it as the statutory expression of the common law approach to value-oriented interpretation.

The New Zealand Courts have not considered themselves to be faced with the same dilemma. The reason for the stark difference in approach, despite the very similar wording of s 3(1) and s 6, is twofold. First, as part of the context in which the UKHRA was enacted, it is important to note that the government's White Paper, 'Rights Brought Home', says that s 3(1) goes far beyond the present rule of interpretation.[165] This supports the bolder

158 [2004] 3 WLR 976 (HL) [50] per Lord Bingham of Cornhill.

159 [2002] 2 AC 545 (HL) 585.

160 United Kingdom, *Parliamentary Debates*, House of Commons, 25 January 2000 <http://www.publications.parliament.uk/pa/cm199900/cmstand/d/st000125/pm/pt2/00125s01.htm> at 30 January 2009 (Mr Charles Clark): 'I heard what he said … [h]owever, we decided to keep the sentence set out there, and I think it reasonable to keep the same sentence in clause 11.'

161 [2006] 1 All ER 529 (HL).

162 Ibid [17].

163 *R v Lambert* [2002] 2 AC 545 (HL) [78] per Lord Hope of Craighead; *Sheldrake v Director of Public Prosecutions; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264 (HL) [28] per Lord Bingham of Cornhill.

164 *R v A* [2002] 1 AC 45 (HL) [108] per Lord Hope of Craighead.

165 Secretary of State for the Home Department, United Kingdom, *Rights Brought Home* (1997) paragraph 2.7.

approach to s 3(1). Second, it is clearly stated in s 3(1) that the aim should be Convention-compatibility. The external context has had a marked impact on the way in which statutes are construed in the United Kingdom. It was the authoritative finding in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)*[166] which rendered domestic legislation subject to the powers of the institutions and the provisions of the Treaties of the European Community.[167] New Zealand lacks such an external context. Europe boasts what is said to be the most sophisticated and effective system of rights protection at the regional level.[168] The Americas lay claim to the Inter-American Court of Human Rights, an institution of the Organisation of American States. The African Union has established the African Court on Human and Peoples' Rights which has had a significant impact on the protection of human rights in the region.[169] However, there is a marked absence of such institutions in the Pacific region. Introducing an institutional human rights framework for the Pacific could usher in an attitude similar to that in the United Kingdom and have the effect of liberating the New Zealand Courts as it would require them to rethink and modify their approach to human rights in order to accommodate the obligations of the New Zealand government in adopting such a framework.

Part Three: Beyond *Hansen*

Strengthening the NZBORA

The external context

The most basic requirement of good legislation is that its operational structure be clear.[170] The difficulties with the interrelationship between its provisions have weakened the NZBORA and have led Andrew Butler to call for s 4 to be abandoned.[171] However, this may not be necessary if s 6 is used before s 4 when applying the NZBORA, and the boundary between s 4 and s 6 is based on the clear intention of Parliament. The main weakness of the document arises from its status as an ordinary statute. The courts have been reluctant to take a bold approach to statutory interpretation under s 6 in order to give effect to protected rights. They have also shied away from issuing declarations of inconsistency under the NZBORA which, particularly after the passage of the *Human Rights Amendment Act 2001*, is now another remedy that is part of the arsenal of the New Zealand Courts.[172]

166 [1991] 1 AC 603 (HL).

167 Butterworths, *Halsbury's Laws of England*, vol 8(2) Constitutional Law and Human Rights, '1 Introduction: Basic Principles of the Constitution of the United Kingdom' [17].

168 Rhona Smith, *Textbook on International Human Rights* (2007) 106.

169 Ibid 135.

170 Andrew Butler, 'The Bill of Rights Debate: Why The New Zealand Bill of Rights Act 1990 is a Bad Model for Britain' (1997) 17 *Oxford Journal of Legal Studies* 323, 326.

171 Andrew Butler, 'Strengthening the Bill of Rights' [2000] 31 *Victoria University of Wellington Law Review* 129, 130.

172 Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights Act' (2004) 15 *Public Law Review* 103, 108. See also, Andrew Butler, 'Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?' [2000] *New Zealand Law Review* 43, 59.

In over eighteen years of NZBORA jurisprudence there has never been a declaration of inconsistency. The Supreme Court in *Hansen* toyed with the idea of delivering one. However, they did not. It is surprising that it should be both a reasonable constitutional expectation that a court will conduct reappraisals of statutes and a constitutional obligation to identify legislative inconsistencies with the NZBORA, only for the New Zealand Supreme Court to refrain from doing so.[173] If there was ever a case where a declaration of inconsistency would have been clearly appropriate, *Hansen* was one.[174] This disinclination to energise the courts to invoke the tools available to them, has prompted an inquiry into alternative ways in which the NZBORA can be strengthened. This article will first consider the prospect of a Pacific court of human rights and what that would mean for New Zealand.

Nations of the Pacific region are infamous for their human rights violations.[175] For example, institutionalised discrimination against women remains rife. Out of Vanuatu's 52-member legislature, only two are females, and in the Solomon Islands, even though land title devolves along matrilineal claims, only males can litigate them.[176] These nations have been reluctant to sign or ratify international human rights instruments, often due to fiscal constraints and claims of cultural relativism.[177] Establishing a regional court would expose them to international standards and scrutiny, but would require the adoption of a founding instrument which will prove difficult. The presence of a supranational human rights system may assist with establishing basic measures to protect fundamental rights in some Pacific nations, but in New Zealand it is sought in order to strengthen the external context in which the NZBORA operates. Nonetheless, it is plain that the adoption of a founding document must appeal to the conscience of the nations of the Pacific in a relevant and meaningful way in order to induce commitment and compliance.

In 1980 the then Chief Human Rights Commissioner for New Zealand, Patrick Downey, called for the establishment of a human rights commission for the Pacific region. The United Nations has encouraged the creation of regional mechanisms to deal with security and human rights[178] because they are able to take better account of regional conditions and peculiarities.[179] If human rights instruments and institutions were established for Pacific

173 *R v Hansen* [2007] 3 NZLR at [253]-[254] per McGrath J.

174 Joseph, *Constitutional and Administrative Law in New Zealand*, above n 14, 9.

175 Law Commission Study Paper 17, 'Converging Currents: Custom and Human Rights in the Pacific,' September 2006, Wellington, New Zealand, 90-91; Caren Wickliffe, 'Human Rights Education in the Pacific: A Paper Prepared for the United Nations Education Scientific and Cultural Organisation Asia/Pacific Meeting on Human Rights Education' (1999) 3 *Journal of South Pacific Law* 1.

176 Dejo Olowu, 'The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific' (2006) 7(1) *Melbourne Journal of International Law* 155, 161.

177 Ibid 162-166.

178 *United Nations Charter 1945*, chapter VIII; United Nations General Assembly, Resolution 32/127, 16 December 1977.

179 Ibid. See also, Dinah Shelton, 'The Promise of Regional Human Rights Systems' in B H Weston and Stephen Marks (eds), *The Future of International Human Rights* (1999) 351, 353-356.

countries they would be region-specific, and would naturally be expected to take into consideration any perceived values and customs unique to the societies of the Pacific.

While the initiatives led by the Law Association of Asia and the Pacific (LAWASIA) have generated considerable scholarly and institutional contributions,[180] a pervading undercurrent of these and subsequent initiatives is the lack of consensus on the conceptual, institutional and geopolitical parameters of any regional system. Prior to a LAWASIA conference in April 1985, there had been a plethora of ideas outlining proposals for the structure of the regional system. While there were contributors who favoured an 'Asian' or 'Asia-Pacific' approach which would encompass the broader Pacific, some called for a 'strictly Pacific' organisation and others desired a 'South Pacific' system.[181] The lack of consensus has continued to manifest itself in the divergent directions in which contemporary discussions on the issue have been moving.[182] Nonetheless, in 1989, under the auspices of LAWASIA a Draft Pacific Charter of Human Rights was created.[183] Whilst it did not prevail, it was a step in the right direction.

The failure of the Draft Charter has been attributed to the leadership role of Australia and New Zealand in its promotion, close partners and the largest states in the Pacific region. Smaller Pacific nations felt disconnected from its substance. It has been argued that the adoption of any regional document must begin and be led by those smaller nations. In fact, a conference held in Western Samoa in April 2008 sought to do this and revived discussion regarding a framework for human rights in the Pacific.[184] The Final Statement made reference to factors unique to small island nations. For example, recognising the need for adequate resources in order to meet baseline human rights standards. Most of the nations of the Pacific region have constitutionally entrenched and enforceable human rights. Such nations include Western Samoa, Fiji, Papua New Guinea and Vanuatu. This raises the question of why a regional level institution is necessary. Regardless of the constitutional entrenchment of rights, violations are still occurring. Pacific States were colonised by imperial powers and, post-independence, have been left with the legal machinery that was established for them. On examining the Pacific constitutional provisions on human rights, two targets

180 See Anthony Angelo, 'Lo Bilong Yumi Yet' (1992) 22(2) *Victoria University of Wellington Law Review* 33, 39; Tony Deklin, 'Strongim Hiumen Raits: A Proposal for a Regional Human Rights Charter and Commission for the Pacific' (1992) 20 *Melanesian Law Journal* 93.

181 See Patricia Hyndman (ed), *Conference on the Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific Convened by the LAWASIA Human Rights Standing Committee in Fiji*, 12-14 April 1985 (1985) 25, 466.

182 See Jon Van Dyke, 'Prospects for the Development of Intergovernmental Human Rights Bodies in Asia and the Pacific' (1988) 16 *Melanesian Law Journal* 28, 28-33; Ralph Wilde, 'NGO Proposals for an Asia-Pacific Human Rights System' (1998) 1 *Yale Human Rights & Development Law Journal* 137, 137-41; Seth Harris, 'Asian Human Rights: Forming a Regional Covenant' (2000) 1(2) *Asia-Pacific Law & Policy Journal* 1, 18-20.

183 See Patricia Hyndman, 'Appendix 1: Report on a Proposed Pacific Charter of Human Rights Prepared under the Auspices of LAWASIA, May 1989' (1992) 22(2) *Victoria University of Wellington Law Review* 99.

184 Final Statement, *Strategies for the Future: Protecting Human Rights in the Pacific*, Apia 27-29 April 2008.

are common. First, they aim to protect the rights of the individual against actions of others who may either be individuals or groups.[185] Second, the provisions focus on protecting the individual against abuses of state power.[186] Pacific Island culture is group-oriented. In light of this, it is the second aim which is problematic. This shows the artificiality of the process through which a foreign culture was brought to the Pacific. It shows the potential for a meaningful, relevant regional framework to resonate favourably with Pacific governments. Furthermore, it is of note that New Zealand and Australia do not have constitutionally entrenched rights. The benefit of having a regional instrument is to introduce minimum standards that cannot be derogated from at a national level. It will mean that their actions at the state level will have to be rethought and brought in line with regional obligations. This is relevant to New Zealand and Australia as their treatment of their indigenous populations leaves a lot to be desired.[187] The essential point is that rights provisions at the national level are inadequate or lack potency. The existence of a regional framework would enhance domestic rights protection. The recent conference in Western Samoa, along with the current inquiry by the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade on human rights mechanisms in the Pacific region,[188] brings with it a degree of optimism for the future of rights protection in the region.

Where New Zealand is concerned, it can be argued that if there is any asset present in our system of rights protection it is the courts' willingness to invoke what is called the presumption of consistency with international law. Where a statutory provision is purportedly inconsistent with international law, the New Zealand Courts have been prepared to presume that Parliament did not intend to legislate contrary to its international obligations.[189] The international law of human rights is primarily contained in treaty obligations. This means that citizens may have recourse to the *International Covenant on Civil and Political Rights* as an incorporated international treaty obligation in the New Zealand Courts. In dealing with treaties that are incorporated, the New Zealand Courts have shown a tendency to invoke the presumption of consistency even where Parliament's intention is clear.[190] Treaties which are unincorporated raise further issues. Traditionally, the starting point is the constitutional maxim uttered by Lord Atkin in *Attorney-General for Canada v Attorney-General for Ontario*[191] that the executive does not, by entering into a treaty, change the law. According to this orthodox constitutional principle, if the performance of a treaty entails the alteration of domestic law, legislation to that effect is required. However, it does not follow that obligations by to

185 Deklin, above n 180, 94.

186 Ibid.

187 See Leane, above n 13, 41.

188 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Human Rights Mechanisms and the Asia-Pacific, Terms of Reference*, (2008) <http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/tor.htm> at 30 January 2009.

189 *Governor of Pitcairn and Associated Islands v Sutton* [1994] 1 NZLR 426 (CA); *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

190 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

191 [1937] AC 326 followed in New Zealand by *New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269.

which the government has intended to be bound should be irrelevant. In this area, the United Kingdom has taken a conservative approach whilst New Zealand has opted for a bolder approach to whether unincorporated treaties comprise a source of domestic obligation. In *R v Secretary of State of the Home Department, ex parte Brind*,[192] Lord Bridge of Harwich said that where domestic legislation is ambiguous the courts will presume Parliament intended to legislate in conformity with the *European Convention on Human Rights and Fundamental Freedoms 1950*, but that where government officials are exercising discretionary powers there is no obligation that they exercise that power in line with treaty obligations that are not yet incorporated. This was reaffirmed by Lord Hoffmann in *R v Lyons*.[193]

In New Zealand, *Tavita v Minister of Immigration*[194] is credited with ushering in a new era in the judicial use of New Zealand's international human rights obligations.[195] The question in *Tavita* was whether a decision-maker exercising discretionary powers is entitled or obliged to consider New Zealand's unincorporated human rights treaty obligations when reviewing the exercise of administrative power. It was held that they were. Cooke P, for the Court of Appeal, said that the argument that the provisions of international human rights instruments by which New Zealand is bound are irrelevant due to their non-incorporation, was unattractive because it suggested that accession to the treaty was mere 'window-dressing'.[196] Following this decision there are two pleasing developments for rights protection in New Zealand. First, in line with the presumption of consistency, courts will presume that Parliament did not intend to legislate in conflict with its international obligations. Second, human rights obligations must be considered by the executive in discretionary decision-making. This was because New Zealand was a party to the ICCPR and its first Optional Protocol and there might be legitimate criticism of New Zealand, including its courts, if they were to accept that the executive could ignore its international human rights obligations when making decisions.[197] Despite this trend, the Court of Appeal has issued statements of warning in *R v D*[198] that a provision could only be interpreted consistently with international obligations if the statutory language would allow it. It is a warning not to take the presumption of consistency too far. It is in line with the thesis of this article to prefer rights-consistent outcomes unless the intention of Parliament, as expressed through the words of the statute, is clear. Geiringer has argued that the promise of *Tavita* has only been met in part.[199] However, she acknowledges that in the decade since the decision, international human rights obligations have achieved an unimagined

192 [1991] 1 AC 696 (HL); [1991] 2 WLR 588 (HL) 591-592.
193 [2003] 1 AC 976 (HL); [2002] 3 WLR 1562 (HL) 1575.
194 [1994] 2 NZLR 257 (CA).
195 Claudia Geiringer, '*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law' (2004) 21 *New Zealand Universities Law Review* 66.
196 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266.
197 Ibid.
198 [2003] 1 NZLR 41 (CA).
199 Geiringer, '*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law', above n 195, 66.

prominence in New Zealand's legal and judicial consciousness.[200] In contrast with the more conservative approach of the United Kingdom in this area, the New Zealand courts have shown good resolve in the pursuit of rights protection. The only remaining detail to ponder is how much more superior is the Canadian model which inspired the NZBORA.

Amendment and entrenchment of the NZBORA

The Canadian Charter contains a measure of constitutional entrenchment,[201] yet has an inbuilt mechanism to preserve parliamentary sovereignty.[202] It is not a supreme law document. However, it is a sophisticated instrument. Its key advantage lies in s 33(1). It states:

> 33.–(1) Parliament or the legislature of a province may expressly declare an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

This 'notwithstanding' clause is said to have a number of distinct advantages over the NZBORA and the UKHRA.[203] First, the way in which the enactment is to operate is clear. The problems New Zealand has had with the interrelationship between ss 4-6 do not arise. Under the Canadian Charter, the citizen bears the onus of demonstrating a prima facie infringement of their rights. If this is established, the Crown must then show that the provision in question amounts to a justified limitation pursuant to s 1 of the Canadian Charter. Whether Parliament has sought to exercise its sovereignty is clearly identified because the enactment will contain a declaration pursuant to s 33. If it does, the courts defer to the terms of the declaration. If there is no declaration, the judges move to the question of substantive rights and limitations without worrying about trespassing on Parliament's legislative supremacy.

The second advantage is the presence of s 33 itself. It ensures that any decision to encroach on protected rights and freedoms by Parliament is done with full political responsibility and awareness of the effects of the legislation. It also provides a simple avenue through which Parliament may clearly and unequivocally assert its sovereignty. Third, the Canadian Courts are not left in an awkward position; s 33 provides that the primary guardians of parliamentary sovereignty are the legislatures themselves, allowing the primary role of the judges to be the guardians of human rights norms.[204]

For a statute inspired by the Canadian Charter to omit an equivalent to s 33 is a noteworthy exclusion. If the NZBORA is ever amended, the introduction of a mechanism such as s 33 should be considered. Its procedure allows the intention of Parliament to be clearly determined. Consequently, it will assist with ascertaining the boundary between s 4 and s 6. If a statute encroaching on rights contains no declaration, s 6 will be applied even if the meaning is linguistically strained; where there is a declaration, Parliament's

200 Ibid.
201 *Constitution Act 1982* (Canada), Part V.
202 *Canadian Charter of Rights and Freedoms 1982*, s 33.
203 Butler, 'Strengthening the Bill of Rights', above n 171, 141.
204 Ibid 142.

intention is clear and unequivocal and s 4 will prevail. If the latter should transpire and there is continued objection to the legislation, the courts may be invited to invoke the rule of law and consider the validity of the statute.

If such a provision is introduced, it would still remain vulnerable to amendment by simple majority. Furthermore, there are characteristics embedded in New Zealand society which suggest that if the legislature does not introduce change, the constituency will not seek it. It has been noted, for example, that the nature of the relationship between the individual and the state is not so sharply etched into the culture of New Zealand as it is in North America.[205] Rights discourse is rarely a topic of debate. Should entrenchment be contemplated, it is of note that a supreme law Bill of Rights would bring with it a degree of distance from a traditionally protective state.[206] New Zealanders have a history of welfarism and paternalism which has generated a measure of scepticism of the judiciary. From a legal standpoint, Joseph has argued that an unentrenched Bill of Rights promotes political-judicial dialogue similar to that observed under written constitutions[207] and therefore there is no pressing need for an entrenched document. Furthermore, in the context of international terrorism, Chris Gallavin has argued that our unentrenched Bill of Rights may be heralded as a successful means of dealing with the recent threats to human rights rather than be perceived as weak because it can be legislatively overridden.[208]

The NZBORA may be a weak human rights document, but it has had significant constitutional impact. Whether or not it is elevated to supreme law status the New Zealand public ought to warm to the judiciary. The recognition and protection of fundamental rights and freedoms is ultimately a judicial responsibility.[209] The courts are the entity that stands between the individual and the state.[210] They must be empowered to deliver judgment on the illegitimacy of legislation and comment on its illegality, especially since there is an absence of higher law to provide legal constraint on the legislature.

Conclusion

The courts are the authoritative expositors of legal meaning and the final arbiters of the law. *Hansen* is a disturbing reminder of the reluctance of our highest court to use available avenues to uphold protected rights. Declining to issue a declaration of consistency begs the question of when a more appropriate case for one may arise and, more poignantly, whether those presiding will be prepared to take that step. Lord Woolf of Barnes has

205 Geoffrey Leane, 'Enacting Bills of Rights: Canada and the Curious Case of New Zealand's "Thin" Democracy' (2004) 26 *Human Rights Quarterly* 152, 178.

206 Ibid.

207 Joseph, 'The Higher Judiciary and the Constitution: A View From Below', above n 105, 215.

208 C Gallavin, 'New Zealand Bill of Rights Act 1990 and a Post-September 11 Morality: Community Rights versus Individual Rights' (2005) 8(1) *Yearbook of New Zealand Jurisprudence* 163.

209 Sir Robin Cooke, 'Fundamentals', above n 16, 165.

210 Ibid.

strongly praised the NZBORA.[211] It is considered to have been the catalyst for a subtle rebalancing of the relationship between the legislature and the judiciary.[212] Whilst it has had a significant constitutional impact, on close examination its operational structure has brought confusion. The decision of the Supreme Court in *Hansen* could have contained greater precision on key questions of methodology. Consequently, it has revealed the weaknesses of the utilitarian liberal rights regime in New Zealand. The NZBORA may have achieved an elevated status for rights by preserving them in positive law. However, s 6 is a key provision with untapped potential.[213] It is 'a weapon of justice of an effective nature and reach'.[214] Drawing on legal and constitutional principle, it is hoped that the courts will feel empowered to use it in that way.

211 Lord Woolf of Barnes, 'Droit Public – English Style' [1995] *Public Law* 57, 70-71.
212 Joseph, *Constitutional and Administrative Law in New Zealand*, above n 14, 769-772.
213 Sir Robin Cooke, 'A Sketch from the Blue Train' [1994] *New Zealand Law Journal* 10.
214 Ibid.