

“WHICH IS TO BE MASTER?” — RIGHTS-FRIENDLY STATUTORY INTERPRETATION IN NEW ZEALAND AND THE UNITED KINGDOM

Andrew Geddis* & Bridget Fenton**

I. MAJORITY RULE, INDIVIDUAL RIGHTS, AND THE SEARCH FOR RECONCILIATION

Proponents of democracy long have struggled to balance majority decision upon social rules with respect for the individual rights of all society’s members. Traditionally, two broad intellectual traditions, or camps of thought, have sought to resolve this problem. One camp, which may be called legalist, claims that democracy, properly understood, requires that individual rights impose a substantive check on the lawmaking authority of the elected legislature. Ideally, those rights will be contained in some constitutional instrument with higher law status, ultimately interpreted by the judicial arm of the government. From this perspective, judges, whether of the ordinary courts or some special constitutional court, ought to be empowered to undertake a principled, rights-based review of the potentially tyrannous acts of an institution overly motivated to pander to the majority’s desires. The opposing camp, which may be called populist, argues that placing formal, rights-based limits on the legislature’s lawmaking authority simply hands decision-making power over such matters to the judiciary, an unelected and unrepresentative elite group. Allowing judges to impose their own particular views as to what concrete legislative measures are (and are not) consistent with nebulous, vague, and generalized statements of individual rights leads to a “juristocracy,”¹ the very nature of which offends democratic notions of participant autonomy and equality.

The essential contours of the claims and counter-claims between these camps are familiar to anyone who has even a passing acquaintance with liberal-democratic constitutional theory. It is not that there is nothing new to say on either side, nor would we deny the complexities and variation of thinking within each tradition. However, the seeming impasse reached in the debate between these apparently dichotomous positions has generated attempts to broker a synthesis.

One currently popular move is to assert a “dialogic,”² or “collaborative,”³ relationship between the judiciary and legislature where issues of individual rights

* Associate Professor, Faculty of Law, University of Otago, New Zealand. The authors would like to thank James Allan, Keith Ewing, John McGrath, John Smillie and Hanna Wilberg for their comments on earlier drafts of this paper, although their agreement with its final content should not be assumed.

** Judges Clerk, New Zealand Court of Appeal.

1. Vlad Perju, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harv. U. Press 2004), 68 *Mod. L. Rev.* 1038 (2005) (book review).

2. Peter Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All*, 35 *OSGOODE HALL L.J.* 75 (1997).

3. Philip A. Joseph, *Parliament, the Courts, and the Collaborative Enterprise*, 15 *KINGS COLL. L.J.* 321 (2004).

are at stake.⁴ Rather than being antagonistic participants in a zero-sum game, this analysis claims, judges and elected legislators really serve as co-workers in a broader enterprise of good democratic governance.⁵ Drawing on this approach, various nations have adopted institutional innovations that allow for forms of rights-review other than outright judicial invalidation of legislation.⁶ While stopping short of giving judges the final word on the constitutional permissibility of particular legislative provisions, these jurisdictions have sought to incorporate their substantive views on individual rights into the process of law making, interpretation and application.

Members of the Anglo-Commonwealth family—Australia, Canada, New Zealand and the United Kingdom—have been particularly active in exploring such bridging measures.⁷ Instruments such as the Canadian Charter,⁸ NZBORA,⁹ United Kingdom’s HRA,¹⁰ and measures adopted at a sub-national level in Australia,¹¹ all purport to combine limited rights-based judicial oversight of legislation with a continued recognition of the legislature’s authority to make law as it thinks best. Admittedly, these various rights instruments differ somewhat in form and function. As the stronger model, the Canadian Charter authorizes “strong-form”¹² judicial

4. See, e.g., JANET L. HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT’S ROLE? (McGill-Queen’s Press 2002); Jeremy Webber, *Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)*, [2003] AUSTL. J. HUM. RTS. 9; Richard Clayton, *Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998*, [2004] PUB. L. 33; Tom Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, [2005] PUB. L. 306; Ian Cram, *Judging Rights in the United Kingdom: The Human Rights Act and the New Relationship between Parliament and the Courts*, 12 REV. OF CONST. STUDS. 53 (2006); Jeremy Webber, *Democratic Decision Making as the First Principle of Contemporary Constitutionalism*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 411 (Richard W. Bauman & Tsvi Kahana eds., Cambridge 2006); Sara Jackson, *Designing Human Rights Legislation: ‘Dialogue’, the Commonwealth Model and the Roles of Parliaments and Courts*, 13 AUCKLAND U.L. REV. 89 (2007) [collectively referred to hereinafter as Dialogic/Collaborative Sources].

5. See Hogg & Bushell, *supra* note 2; Joseph, *supra* note 3; Dialogic/Collaborative Sources, *supra* note 4.

6. See Canadian Charter of Rights and Freedoms, Canada Act, 1982, c. 11, sched. B (Eng.), as reprinted in R.S.C., No. 44 (Appendix II 1982) [hereinafter Canadian Charter]; New Zealand Bill of Rights, 1990, S.N.Z. No. 109 [hereinafter “NZBORA”]; Human Rights Act 1998, 1998, c. 42, (U.K.) [hereinafter “HRA”]; Human Rights Act, 2004, AUSTL. CAP. TERR. LAWS A2004-5; Charter of Human Rights and Responsibilities Act, 2006, VICT. ACTS, No. 43.

7. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

8. Canada Act, 1982, c. 11, sched. B (Eng.), as reprinted in R.S.C., No. 44 (Appendix II 1982).

9. 1990, S.N.Z. No. 109.

10. 1998, c. 42.

11. Human Rights Act, 2004, AUSTL. CAP. TERR. LAWS A2004-5; Charter of Human Rights and Responsibilities Act, 2006, VICT. ACTS, No. 43.

12. The “strong-form”/“weak-form” taxonomy of review is adopted from Mark Tushnet. See, e.g., Mark Tushnet, *New Forms of Judicial Review and the Persistence of*

invalidation of inconsistent legislation, subject to an express parliamentary override. The other nations' "parliamentary bills of rights,"¹³ on the other hand, only permit "weak form" judicial review *via* rights-friendly interpretation of statutory provisions, and the issuance of non-invalidating "declarations" where such interpretations prove impossible. Despite this important difference, each nation claims to share in the general project of harnessing in tandem the comparative advantages of judicial and legislative viewpoints on matters involving individual rights.

It is questionable, however, whether such measures really have resolved the tension between the traditional positions outlined at the beginning of this article.¹⁴ Canada, for example, continues to experience energetic debate over the extent and legitimacy of the judicial role when reviewing legislation under the Canadian Charter.¹⁵ This debate reflects similarities between the rights-review function of courts in Canada and the United States,¹⁶ as well as the fact that Canada's Parliament has been unwilling in practice to use its override power under the Charter to replace the judiciary's interpretation of rights with its own.¹⁷ In such circumstances, it seems inevitable that familiar "majority tyranny" versus "judicial supremacy" arguments will arise. However, even in countries that have sought to combine parliamentary supremacy with weak form judicial review of legislation—here we focus on New Zealand and the United Kingdom—the terms of debate have not shifted as much as might have been expected. Although neither the NZBORA nor the HRA permit outright judicial invalidation of legislation, questions about the proper scope of their courts' role remain very much alive.¹⁸

Rights-and Democracy-Based Worries, 38 WAKE FOREST L. REV. 813, 814 (2003).

13. Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 M.L.R. 7 (2006) (U.K.).

14. See Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV. 2D 7 (2004).

15. See, e.g., MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (1994); F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party*, 30 OSGOODE HALL L.J. 627 (1992); CHRISTOPHER MANFREDI, *JUDICIAL POWER AND THE CHARTER* (2nd ed. 2001); KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* (Irwin Law 2001); W.J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* (2007); Hogg & Bushell, *supra* note 2; Christopher Manfredi & J. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 OSGOODE HALL L.J. 513 (1999); Peter Hogg & A. Thornton, *Reply to Six Dialogues*, 37 OSGOODE HALL L.J. 529 (1999); Andrew Petter, *Twenty Years of Charter Justification: From Liberalism to Dubious Dialogue*, 52 U. NEW BRUNSWICK L.J. 187 (2003); Luc Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT'L J. CONST. L. 617 (2005); Grant Huscroft, *Constitutionalism from the Top Down*, 45 OSGOODE HALL L.J. 91 (2007); Andrew Petter, *Taking Dialogue Theory Much Too Seriously (Or Perhaps Charter Dialogue Isn't Such a Good Thing After All)*, 45 OSGOODE HALL L.J. 147 (2007).

16. See Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. TORONTO L.J. 89 (2003).

17. See Janet Hiebert, *Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?*, 23 SUP. CT. L. REV. 169 (2004).

18. See Paul Rishworth, *The Inevitability of Judicial Review under "Interpretive" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?*, in

This article suggests that an important feature of this ongoing controversy is the judiciary's perceived freedom under the NZBORA and HRA to assign a rights-friendly¹⁹ meaning to the language chosen by Parliament in an enactment. To summarize the discussion below, judges in the United Kingdom have adopted an "adventurous"²⁰ (or, more judgmentally, "aggressive"²¹) mode of statutory interpretation, while New Zealand has largely eschewed the development of a comparable interpretive method. That is to say, the United Kingdom's judiciary has occasionally used the HRA to substantially rework the statutory language selected by Parliament in order to generate an outcome it regards as compatible with individual rights. The authors refer to this interpretive method as "teleological."²² New Zealand's judiciary, by comparison, has hewed more closely to the wording Parliament has included in its enactment, even where this results in an outcome it considers inconsistent with individual rights.²³ The authors refer to this second interpretive method as "textualist." Therefore, the same institutional development has led to divergent judicial responses to statutory provisions judged by the courts to limit individual rights in an unjustifiable fashion. This article demonstrates how this is so and explores reasons why matters have developed as they have.

As such, the following discussion is primarily descriptive, rather than prescriptive, in nature. The authors do not expressly address the issue of which interpretive approach is "correct." Instead, the article focuses on reasons why each nation's judiciary has adopted the approach that it has. Nevertheless, the normative implications raised by the issue cannot be ignored. Insofar as a nation's judiciary exercises independent judgment over what the legislature's chosen laws ought to say, it is replacing the conclusions of democratically elected representatives with its own. To rephrase Humpty Dumpty's query,²⁴ the fundamental question is whether the judiciary *should* seek to assert mastery over the words used in an enactment, to procure outcomes regarded as rights-friendly. In the final analysis, this article claims that the difference in interpretive approaches between New Zealand and the United Kingdom reflects diverging judicial views on

CONSTITUTIONALISM IN THE CHARTER ERA 233 (Grant Huscroft & Ian Brodie, eds., LexisNexis Canada 2004) (claiming that these sorts of rights instruments necessitate forms of judicial review).

19. We use the term "rights-friendly" to encompass both the New Zealand term "rights-consistent" and the United Kingdom's "convention-compatible."

20. ANDREW BUTLER & PETRA BUTLER, *THE NEW ZEALAND BILL OF RIGHTS ACT: A COMMENTARY* 169 (LexisNexis New Zealand 2005).

21. Hanna Wilberg, *The Bill of Rights and other enactments*, [2007] N.Z.L.J. 112, 115.

22. A term adopted from Francis Bennion, *What Interpretation is "Possible" Under Section 3(1) of the Human Rights Act 1998*, [2000] PUB. L. 77, 81.

23. *See infra* Part III(A).

24. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS AND WHAT SHE FOUND THERE* 191-92 (Roger Lancelyn Green ed., Ox. U. Press 1998) (1871) ("When I use a word," Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'").

this basic normative question. This article provides an account of how and why these diverging views have come to be held.

The authors begin in Part 2 by recounting the constitutional and historical background to the adoption of the NZBORA and HRA. The differing judicial applications of these rights instruments to the task of interpreting legislation are considered in Part 3, where the authors contrast the textualist and teleological approaches as adopted in New Zealand and the United Kingdom. Part 4 addresses three factors for why these differing interpretative approaches have developed: the framers' intent behind each instrument, the international context of each jurisdiction, and the constitutional culture of each nation. Finally, Part 5 returns to the larger question of whether instruments such as the NZBORA and HRA can successfully resolve the tension between the traditional positions outlined at the beginning of this article or whether they simply cause the tension to re-emerge in a different form.

II. PARLIAMENTARY SOVEREIGNTY AND WEAK FORM JUDICIAL REVIEW IN NEW ZEALAND AND THE UNITED KINGDOM

New Zealand's colonial relationship with the United Kingdom means the two nations share a number of core constitutional features.²⁵ In particular, both have Westminster-style governments, of which parliamentary sovereignty traditionally is a defining characteristic.²⁶ At the risk of oversimplifying, parliamentary sovereignty entails that a bare majority of the nation's elected representatives possesses legislative power to make or unmake any law they choose, free from any substantive limits.²⁷

While this concept has a long and rich historical pedigree,²⁸ the strongest contemporary justification for according Parliament sovereign lawmaking status lies in its asserted institutional advantages as a forum of democratic participation and debate.²⁹ Laws created through the process of parliamentary enactment

25. See K.J. SCOTT, *THE NEW ZEALAND CONSTITUTION* 1-31 (Ox. U. Press 1962); PHILIP A. JOSEPH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND* 103-20 (3d ed. 2007).

26. See JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (Clarendon Press 1999).

27. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39-41 (Macmillan 10th ed. 1959). See also VERNON BOGDANOR, *POLITICS AND THE CONSTITUTION: ESSAYS ON BRITISH GOVERNMENT* 5 (Dartmouth 1996) ("What the Queen in Parliament enacts is law.").

28. CHARLES HOWELL MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND* 336-388 (Yale U. Press 1910); GOLDSWORTHY, *supra* note 26.

29. See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (Cambridge U. Press 1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (Clarendon Press 1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006). See also Keith Ewing, *Just Words and Social Justice*, 5 *REV. OF CONST. STUDS* 53, 55 (1999); James Allan, *An Unshamed Majoritarian*, 27 *DALHOUSIE L.J.* 537 (2004); James Allan, *Thin Beats Fat Yet Again – Conceptions of Democracy*, 25 *L. & PHIL.* 533 (2006); Andrei Marmor, *Are Constitutions Legitimate?*, 20 *CAN. J.L. & JURIS.* 69, 81-92 (2007).

ostensibly possess a superior claim to basic legitimacy: they are more directly connected to (and respectful of) the various views of the citizenry, are subject to a broader and more informed policy analysis, and are better able to be revisited and revised in light of changing social beliefs.³⁰ Therefore, the constitutions of both New Zealand and the United Kingdom traditionally have been rooted in the “ideal of political accountability,”³¹ fidelity to which precludes allocating final constitutional authority to the judiciary.³² This basic account is now somewhat controversial, particularly in the context of the United Kingdom. Yet, neither of these rights instruments expressly overrides the orthodox understanding of Parliament’s lawmaking authority, insofar as neither purports to give the courts power to declare a parliamentary enactment invalid or to decline to enforce a statutory provision on the basis that it breaches individual rights.

The apparent weakness of the NZBORA and the HRA rights instruments in turn reflects the fact that neither resulted from a widespread legitimacy crisis, necessitating a fundamental re-evaluation of the nation’s basic constitutional arrangements. Although there undoubtedly were (and still are) concerns expressed in each jurisdiction about how government operates *vis-à-vis* the individual,³³ no generalized loss of confidence in the underlying nature of that government preceded the adoption of either rights instrument. One may compare this state of affairs to that which paved the way for the adoption of the South African Bill of Rights;³⁴ or to the collapse of communist rule in Eastern Europe, following which former Soviet states adopted bills of rights that stipulated clear separation of powers and judicially enforceable rights.³⁵ A societal choice to give the judicial branch of government final decision-making power over individual rights is more readily understandable in a democracy newly emerging from a history of widespread abuse of state power.³⁶ That was not, however, the situation confronting either New Zealand or the United Kingdom. The enactment of the NZBORA and HRA thus represented each nation being captured by, rather than driven to, the moral promise of bills of rights. Consequently, their adoption was an incremental measure designed to work in tandem with existing features of the constitutional order, rather than completely refashion it.

Nevertheless, despite their shared constitutional ancestry, New Zealand and the United Kingdom are following increasingly divergent politico-legal trajectories. New Zealand’s adoption in 1993 of a proportional representation voting system to elect members of Parliament, for example, has fundamentally

30. See Jeremy Waldron, *Do Judges Reason Morally?*, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 38, 60-63 (Grant Huscroft ed., Cambridge U. Press 2008) [hereinafter EXPOUNDING THE CONSTITUTION].

31. ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 1-2 (2005).

32. *Id.*

33. N.Z. GOV’T, DEP’T OF JUSTICE, A BILL OF RIGHTS FOR NEW ZEALAND (1985) [hereinafter DEP’T OF JUSTICE]; NZBORA, 1990, S.N.Z. No 109, § 4.

34. See Lord Steyn, *Laying the Foundations of Human Rights Law in the United Kingdom*, [2005] EUR. HUM. RTS. L. REV. 349, 352.

35. See TOMKINS, *supra* note 31, at 9.

36. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 25 (2003) (Describing an “insurance model of constitutionalism” in which emerging democracies adopt forms of judicial review to protect future electoral losers from the actions of electoral victors).

altered the relationship between its executive and legislative branches of government, as well as the process of enacting legislation.³⁷

The United Kingdom has devolved some measure of legislative authority to regional assemblies in Scotland and Wales, while arguably handing over ultimate control of much of its domestic law to supra-national European institutions.³⁸ Most importantly, in the context of this article, the United Kingdom is a member of the Council of Europe and thereby committed to the European Convention on Human Rights (“ECHR”).³⁹ Individual citizens of states that have ratified the ECHR may bring claims before the European Court of Human Rights (“ECtHR”), which possesses a discretionary remedies jurisdiction that the United Kingdom treats as de-facto binding upon its national legal order.

New Zealand is not without its own international legal and political obligations, but they are of a different character to those of the United Kingdom. New Zealand is a state party to the International Covenant on Civil and Political Rights.⁴⁰ This instrument has its own oversight body, the Human Rights Committee (“HRC”), which can consider communications from individuals alleging that New Zealand has breached its ICCPR obligations.⁴¹ However, when the HRC concludes that a breach of the ICCPR has taken place, it may only express its views to the state party concerned, which exercises no effective binding authority over that party’s domestic law.⁴² These differing international obligations are a reason why, although the legal systems of New Zealand and the United Kingdom may continue to share many fundamentals, their constitutional practices increasingly are becoming *sui generis*.

A. The Enactment of the NZBORA

The immediate origins of the NZBORA lie in a White Paper policy proposal presented to Parliament in 1985.⁴³ This White Paper drew on the example of the Canadian Charter in recommending an entrenched, higher law rights instrument that would empower judges to declare invalid any enactment

37. See generally RYAN MALONE, REBALANCING THE CONSTITUTION: THE CHALLENGE OF GOVERNMENT LAW-MAKING UNDER MMP (Inst. of Policy Stud. 2008).

38. Namely, the European Court of Justice and the European Court of Human Rights.

39. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

40. Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

41. *Id.* at arts. 28, 41.

42. See *Tangiora v. Wellington Dist. Legal Servs. Comm.* [2000] 1 N.Z.L.R. 17, 21, 1999 N.Z.L.R. LEXIS 72, at *12-13 (P.C.); Scott Davidson, *Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee*, in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 305 (Grant Huscroft & Paul Rishworth eds., 2001) [hereinafter LITIGATING RIGHTS].

43. DEP’T OF JUSTICE, *supra* note 33. For a full discussion and analysis of the reasons for the introduction of the NZBORA see GEOFFREY PALMER & MATTHEW PALMER, BRIDLED POWER: NEW ZEALAND’S CONSTITUTION AND GOVERNMENT 319-23 (4th ed., Ox. U. Press 2004); David Erdos, *Aversive Constitutionalism in the Westminster World: The genesis of the New Zealand Bill of Rights Act (1990)*, 5 INT’L J. CONST. L. 343 (2007).

inconsistent with its provisions.⁴⁴ It advanced two principal justifications for this move. First, there was a need to strengthen judicial oversight of New Zealand's single-chamber Parliament, which was dominated by an executive branch comprised of members of the majority political party.⁴⁵ Second, the protection of individual rights afforded by New Zealand law failed to meet the nation's international obligations under the ICCPR.⁴⁶ Countering concerns that a higher law rights instrument would transfer lawmaking power to the judiciary, the White Paper asserted that overseas experience revealed that judges entrusted with the final word on the status of legislation performed their role "responsibly."⁴⁷ Moreover, it argued, the judiciary's power under existing constitutional arrangements was not as limited as it might seem, since this role is inescapably value-laden.⁴⁸ Citing then-recent obiter comments by the judiciary,⁴⁹ the White Paper further claimed there was a "growing legal opinion" that New Zealand judges already might refuse to recognize properly enacted legislation that is inimical to an individual's deep lying, common law rights.⁵⁰

This White Paper proposal subsequently went to Parliament's Justice and Law Reform Select Committee for review and public consultation. After hearing submissions—the great majority of which ranged from indifference to outright hostility—that Committee recommended against adopting the proposal, as "New Zealand is not yet ready, if it ever will be, for a fully fledged bill of rights along the lines of the White Paper draft."⁵¹ In lieu of such a higher law measure, it instead recommended an ordinary statute, unentrenched and without provision for judicial invalidation of inconsistent legislation.⁵² Parliament subsequently adopted this model by passing the NZBORA into law.⁵³ Consequently, the finally enacted rights instrument represents the legislature's affirmation of New Zealand's commitment to the ICCPR and recognition that individuals possess the various substantive rights cataloged in Part Two of the legislation.⁵⁴ In addition to being exclusively civil and political in character, these Part Two rights are expressed

44. DEP'T OF JUSTICE, *supra* note 33.

45. *Id.* at 25-27, ¶¶ 4.1-4.3.

46. *Id.* at 30-31, ¶¶ 4.21-4.23.

47. *Id.* at 41, ¶ 6.5.

48. In support of this contention, the White Paper invoked Lord Reid's dictum that "for better or worse judges do make law." *Id.* at 43, ¶ 6.12 (quoting Lord Reid, *The Judge as Law Maker*, 12 J. SOC. PUB. TEACHERS L. 22 (1972)).

49. *Fraser v. State Servs. Comm'n* [1984] 1 N.Z.L.R. 116, 121 (C.A.) (Cooke, J.); *Taylor v. N.Z. Poultry Bd.* [1984] 1 N.Z.L.R. 394, 1984 N.Z.L.R. LEXIS 581 (C.A.) (Cooke, J.).

50. DEP'T OF JUSTICE, *supra* note 33, at 56, ¶¶ 7.16-7.17. This power, if it even exists, has never been invoked in practice. *See, e.g., Shaw v. Comm'r of Inland Revenue* [1999] 3 N.Z.L.R. 154 (C.A.).

51. N.Z. PARLIAMENT, JUSTICE AND LAW REFORM COMMITTEE, FINAL REPORT OF THE JUSTICE AND LAW REFORM COMMITTEE ON A BILL OF RIGHTS FOR NEW ZEALAND 3 (1988) [hereinafter FINAL REPORT].

52. *Id.*

53. *See* PAUL RISHWORTH ET AL., THE NEW ZEALAND BILL OF RIGHTS 8 (Ox. U. Press 2003).

54. NZBORA, 1990 S.N.Z. No. 109, long title & § 2.

broadly and (on the whole) without qualification.⁵⁵ They are, however, all subject to a generalized restriction on their scope through section 5: *viz*, that they “may be subject only to such reasonable limits prescribed by law and demonstrably justified in a free and democratic society.”⁵⁶

Consequently, the NZBORA does not afford absolute protection against unjustified infringement by state actors. Furthermore, its status as an ordinary Act of Parliament renders it vulnerable to amendment (or even repeal) by a bare majority of elected representatives. Section 4 also expressly affirms the supremacy of all other legislation passed before or after the NZBORA enactment, precluding a court from declaring invalid or refusing to enforce any provision in any enactment “by reason only that the provision is inconsistent with any provision of this Bill of Rights.”⁵⁷ However, the NZBORA does envision an interpretative role for the courts in ensuring legislative consistency with individual rights, with section 6 requiring that: “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.”⁵⁸ The NZBORA also provides for a degree of *ex ante* rights-protection through section 7, which imposes a duty on the Attorney General to bring to Parliament’s attention any proposed legislative provision he or she believes to be inconsistent with the individual rights affirmed therein.⁵⁹ A section 7 notice does not, however, preclude Parliament from considering and enacting the measure if it wishes to do so.⁶⁰

Given the background to NZBORA’s adoption, it is not surprising that it emerged in a somewhat muddled state. The original vision of a higher law instrument, empowering the judiciary to strike down legislation that (in the courts’ eyes) unjustifiably limits individual rights, was reduced to a simple statutory acknowledgement that these rights exist. The judiciary can still use this instrument to review the lawfulness of executive action. That is, the courts can use the NZBORA to examine an exercise of public power and see if it unjustifiably limits one of the affirmed rights, and thus is a breach of the NZBORA. Unless that exercise of public power is positively authorized by some competing statutory provision, the judiciary will declare it to be unlawful (and may award further remedies, such as damages). But if that exercise of public power is authorized by some competing statutory provision, the Courts must accept its lawfulness. Parliament then remains completely free to pass legislation authorising such rights-

55. *Compare, e.g., id.* § 9 (“Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”) and § 14 (“Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”) with *id.* § 21 (“Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.”) and § 22 (“Everyone has the right not to be arbitrarily arrested or detained.”).

56. NZBORA, 1990 S.N.Z. No. 109, § 5.

57. *Id.* § 4.

58. *Id.* § 6.

59. *See generally* Janet Hiebert, *Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes*, 1 N.Z. J. PUB. & INT’L L. 63 (2005).

60. *See* NZBORA, 1990, S.N.Z. No. 109, § 6.

limiting exercises of public power;⁶¹ and where it does so, the courts have no power to declare the enactment invalid. That said, the question whether a given statutory provision actually authorizes a rights-limiting exercise of public power ultimately is decided by the judicial branch, with the courts instructed to prefer an interpretation of the provision that is consistent with the rights affirmed by NZBORA.⁶²

The result is a confused combination of assertions:⁶³ section 4 affirms Parliament's basic authority to legislate in a manner a court may consider to be rights-infringing;⁶⁴ but section 6 directs the judiciary to prefer a rights-consistent interpretation of legislation where such a meaning "can be given." The statutory matrix then poses a dilemma, subsequently borne out by NZBORA jurisprudence and commentary. Where a court confronts a statutory provision that appears to impose an unjustifiable limit on a right affirmed by the NZBORA, when is it appropriate for the court to pronounce that the provision actually has another, rights-consistent meaning as per section 6? Alternatively, when should it abandon the search for such a rights-consistent meaning and invoke section 4, thereby applying the provision in a rights-infringing fashion?

B. The Enactment of the HRA

The United Kingdom, as noted above, committed itself to respecting the individual rights contained in the ECHR in 1951.⁶⁵ However, until the enactment of the HRA, these rights had no particular status in its domestic law.⁶⁶ Because the United Kingdom's commitment to the ECHR purely was a matter of treaty obligation, its national courts were unable to apply or enforce the rights contained therein;⁶⁷ forcing any individual alleging an infringement of his or her ECHR rights by the United Kingdom government to complain to the ECtHR in Strasbourg. Over time, the spectacle of United Kingdom citizens relying on a European court to provide a remedy for domestic rights infringements provoked increasing disquiet.⁶⁸ Perhaps most notably, the judiciary made it something of a "pet project ... to cajole

61. See Claudia Geiringer, *The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?*, 11 OTAGO L. REV. 389 (2007).

62. NZBORA, 1990, S.N.Z. No. 109, § 6.

63. See Andrew S. Butler, *Strengthening the Bill of Rights*, 31 VICTORIA U. WELLINGTON L. REV. 129 (2000).

64. NZBORA, 1990 S.N.Z. No. 109, § 4.

65. See ECHR, *supra* note 39.

66. DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 73-74 (2nd ed., Ox. U. Press 2002).

67. *Regina v. Sec'y of State for the Home Dep't, ex parte Brind*, [1991] A.C. 696 (H.L.).

68. See Francesca Klug, *A Bill of Rights: Do We Need One or Do We Already Have One?*, [2007] PUB. L. 701, 702-704.

Britain's political parties into incorporating the [ECHR] into domestic law so that Britain could have a Bill of Rights"⁶⁹

In 1998, a newly elected Labour Government responded to such calls by introducing the HRA into Parliament.⁷⁰ This legislation has the effect of incorporating into the United Kingdom's domestic law the various rights contained in the ECHR, thereby permitting its courts to directly consider and give effect to them.⁷¹ The Government claimed that the HRA would contribute to the maintenance of human rights in the United Kingdom, afford the practical benefit to United Kingdom citizens of expediting and reducing the cost of human rights litigation, and enable a "distinctively British contribution" to European human rights jurisprudence.⁷²

Although there have been notable advocates for adopting an entrenched, higher-law rights instrument,⁷³ at no stage was the HRA intended to fulfill this function.⁷⁴ In part, this was because the legislation incorporated a multilateral instrument and there was resistance to foreign law reigning supreme in the United Kingdom's domestic legal order.⁷⁵ Further, the United Kingdom's historical constitutional commitment to parliamentary sovereignty spoke against transferring to the judiciary the final say over an enactment's validity.⁷⁶ Consequently, from the outset, the HRA's architects consciously followed the example of the NZBORA, and incorporated the ECHR through an ordinary Act of Parliament,⁷⁷ with no special protection against amendment or repeal by majority vote, and no provision for judicial invalidation of inconsistent legislation.

The HRA, section 3(1) further borrowed from the NZBORA, section 6, in mandating rights-friendly judicial interpretation of legislation: "So far as it is

69. TOMKINS, *supra* note 31, at 7. As evidence of this project, Tomkins cites "among many, many examples," LORD SCARMAN, *ENGLISH LAW – THE NEW DIMENSION* (1974); Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights* [1992] PUB. L. 397; Thomas Bingham MR, *The European Convention on Human Rights – Time to Incorporate* 109 L. QUART. REV. 390 (1993).

70. See SECRETARY OF STATE FOR THE HOME DEPARTMENT, *RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL* (1997), Cm. 3782, ¶ 1.14 [hereinafter *RIGHTS BROUGHT HOME*].

71. More precisely, the HRA states that the ECHR rights are to "have effect for the purposes of this Act." HRA, 1998, c. 42, §1(2).

72. See *RIGHTS BROUGHT HOME*, *supra* note 70, cmt. 3782, ¶ 1.14.

73. See LORD SCARMAN, *ENGLISH LAW – THE NEW DIMENSION* (1974); LORD HAILSHAM, *THE DILEMMA OF DEMOCRACY: DIAGNOSIS AND PRESCRIPTION* (Collins 1978); MICHAEL ZANDER, *A BILL OF RIGHTS?* (3d ed. 1985); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 352-372 (Harv. U. Press 1996).

74. See, e.g., U.K. Labour Party, *Manifesto, General Election 1997*, <http://www.psr.keele.ac.uk/area/uk/man/lab97.htm>, (last modified Mar. 11, 2008) ("We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts.").

75. See, e.g., 584 PARL. DEB., H.L. (5th Ser.) 1271 (1998) ("there may . . . be occasions when it would be right for the UK courts to depart from Strasbourg decisions" such as where judgments were "given decades ago") (comments of Lord Irvine, then Lord Chancellor, during debate over the passage of the HRA in the House of Lords).

76. *RIGHTS BROUGHT HOME*, *supra* note 70, at ¶ 2.13. See also Lord Lester of Herne Hill, *First Steps Towards a Constitutional Bill of Rights*, [1997] EUR. HUM. RTS L. REV. 124.

77. *RIGHTS BROUGHT HOME*, *supra* note 70, at ¶¶ 1.13, 2.11.

possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the [ECHR] rights.”⁷⁸ Unlike the NZBORA, however, if there is no possible reading of a statutory provision compatible with ECHR rights, section 4(2) expressly empowers the judiciary to issue a formal “declaration of incompatibility.”⁷⁹ This provision is the extent of judicial remedial discretion with respect to any legislation unable to be read compatibly with the ECHR. Section 4(6) provides that a section 4(2) declaration neither impugns the validity of legislation, nor binds the parties in respect of which it is made.⁸⁰ Sections 10 and 19 underline the parliamentary character of the HRA, respectively providing for *ex post* and *ex ante* considerations by Parliament of issues raised by ECHR rights.⁸¹ Section 19 provides that a Minister must, in respect of a Bill of which he or she is in charge, declare that the Bill is ECHR-compatible; or that notwithstanding any ECHR-incompatibility, he or she wishes the Bill to proceed.⁸² Section 10 is engaged where a section 4(2) declaration of incompatibility is made. In such cases, section 10(2) permits a Minister to undertake a “fast-track” amendment in order to render the legislation compatible with the ECHR, should he or she consider there are “compelling reasons” to do so.⁸³

Neither the structure nor the language of the HRA expressly indicates the primary remedy a court should apply when confronted with legislation it considers incompatible with the ECHR.⁸⁴ Should a court view section 3(1) as a license to generate a meaning for the provision in question that avoids incompatibility with the ECHR, even where doing so appears to conflict with the particular language adopted by Parliament to achieve its legislative objective? Conversely, should a court feel bound to respect the apparent goals of the incompatible legislative provision and apply it as written, but issue a declaration of incompatibility under section 4(2), and hope that Parliament will amend the legislation to remedy this defect?

Overshadowing this choice of remedial action is the reality of the United Kingdom’s place in Europe. The fact that the HRA “brings home” the rights contained in the ECHR inextricably intertwines the two instruments. This link is reinforced by section 2(1), which requires any United Kingdom court that is

78. HRA, 1998, c. 42, § 3(1).

79. *Id.* § 4(2).

80. Furthermore, section 3(2)(b) of the HRA states that the requirement to interpret legislation in a manner compatible with the ECHR “does not affect the validity, continuing operation or enforcement of any incompatible primary legislation,” while section 6(2) authorizes public authorities to act in a manner that is incompatible with ECHR if required to do so by primary legislation.

81. See generally Keith Ewing, *The Parliamentary Protection of Human Rights*, in CONSTITUTIONALISM AND THE ROLE OF PARLIAMENTS 253 (Katja S. Zeigler, Denis Baranger & Anthony W. Bradley eds., 2007).

82. HRA, 1998, c. 42, § 19.

83. Any such “fast track” amendment must be approved by a resolution of Parliament. See *id.*, sched. 2, § 4. In practice, amendments through this route have been very rare.

84. See, e.g., Aileen Kavanagh, *Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication*, in EXPOUNDING THE CONSTITUTION, *supra* note 30, 184, at 214.

“determining a question which has arisen in connection with a Convention right” to consider relevant ECtHR decisions.⁸⁵ Although such decisions do not create formally binding precedent for United Kingdom courts,⁸⁶ the fact that a complainant unable to get a remedy at the domestic level can take the matter to Strasbourg increases the pressure on UK courts to produce outcomes consistent with European jurisprudence.⁸⁷ It is argued below that this European context is critical to understanding the United Kingdom judiciary’s interpretative approach under the HRA, section 3(1).⁸⁸

C. The Basic Dilemma: What Are the Proper Limits to Judicial Interpretation?

With the exception of some idiosyncratic features explicable in terms of the HRA’s European origin, along with the express availability of judicial declarations of incompatibility and fast-track legislative amendment procedures, the NZBORA and the HRA are mechanically analogous. In terms of the interpretative instructions they give to the judiciary, the two Acts are identical on their face.⁸⁹ The NZBORA, section 6 and the HRA, section 3(1) (“the interpretive sections”) each mandate a rights-friendly interpretation of legislation, provided such an interpretation “can be given” or is “possible.”⁹⁰ This direction constitutes the extent of the judiciary’s role under the two Acts in ensuring that an enactment does not impose an unjustifiable limit on individual rights, at least with regard to the particular case under consideration. The limits to this judicial role then depend on a fundamental issue: When is it “possible” to, or when “can” a court, provide a rights-friendly meaning; and when is it *not* “possible” to, or when “cannot” it, provide such a meaning? After all, both the NZBORA and HRA envision that Parliament will enact statutory provisions that—at least in the eyes of a court applying the legislation to a particular case—limit individual rights in an unjustifiable manner, and in a manner that allows for no alternative interpretation.⁹¹ That is the *conditio sine qua non* of the principle of parliamentary sovereignty, which these rights instruments do not expressly overturn.⁹² The point at which a

85. HRA, 1998, c. 42, § 2(1).

86. *See* Leeds City Council v. Price [2006] 2 A.C. 465, 466 (H.L.).

87. *See* Roger Masterman, *Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg*, [2004] PUB. L. 725, 731-35.

88. *See infra* Part IV(B).

89. We cannot see any material linguistic difference between the two interpretive sections. For a similar view, *see* RISHWORTH ET AL., *supra* note 53, at 122-25; Paul Rishworth, *Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective*, in THE STATUTE: MAKING AND MEANING 251-52 (Rick Bigwood ed., 2004); R. v. Hansen, [2007] 3 N.Z.L.R. 1, ¶¶ 13, 243-44, 287, 2007 N.Z.L.R. LEXIS 17, at *31-32, 236-38, 269-70 (S.C.). *But see* Regina v. Dir. of Pub. Prosecutions, *ex parte* Kebilene [2000] 2 A.C. 326, 373 (H.L.) (Lord Cooke); Regina v. A [2002] 1 A.C. 45, 67 (H.L.) (Lord Steyn).

90. NZBORA, 1990 S.N.Z. No. 109, § 6; HRA, 1998, c. 42, § 3(1).

91. *See* NZBORA, 1990 S.N.Z. No. 109, §§ 4-6; HRA, 1998, c. 42, §§ 3, 4.

92. *See* DICEY, *supra* note 27, at 39-41.

court has to accept the unpalatable fact that Parliament actually has taken such a step then becomes a critical issue under each rights instrument.

III. INTERPRETATIVE PRACTICE UNDER THE NZBORA AND HRA

The enactment of the interpretative sections in the NZBORA and HRA did not thrust New Zealand and United Kingdom judges into completely new territory. Applying the general words used in legislation to the particular facts of individual cases was a core part of the judicial function long before the passage of these rights instruments.⁹³ Determining what the statutory language requires as applied to the concrete circumstances confronting a judge often necessitates a choice between two or more possible meanings.⁹⁴ Moreover, courts in both New Zealand and the United Kingdom traditionally have applied an overarching, common law “principle of legality”⁹⁵ to help guide such interpretative choices. This principle comprises a cache of “fundamental” rights that the courts presume Parliament would wish to respect when making law.⁹⁶ For example, the courts expect that Parliament would not intend to legislate to deprive persons of their property without compensation,⁹⁷ or contrary to the right to a fair hearing,⁹⁸ or to prevent access to the Courts,⁹⁹ and so on.¹⁰⁰ Applying this presumption may then justify a court adopting a restricted or linguistically strained interpretation of a legislative provision that appears, *prima*

93. See, e.g., Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights*, [1992] PUB. L. 397, 405.

94. Such choice is an inevitable consequence of the nature of language and the process of inter-subjective communication. See, e.g., 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:1, AT 5 (7th ed., Thompson/West 2007) (“Semanticists have pointed out that words do not have single, fixed, and immutable meanings established by some authority, natural or supernatural. Instead, they have only such meanings as are given to them from time to time when they are spoken, written, heard, or read by persons endeavoring to participate in the communication process.”).

95. This term is used in *Regina v. Home Secretary ex parte Pierson*, [1998] A.C. 539, 587-89 (H.L.) (Lord Steyn) and in *Ngati Apa Ki Te Waipounamu Trust v. Regina* [2000] 2 N.Z.L.R. 659, 675, 2000 N.Z.L.R. LEXIS 192, at *47 (C.A.) (Elias, C.J.).

96. See FRANCIS BENNION, STATUTORY INTERPRETATION 705-35 (Butterworths LexisNexis 4th ed. 2002); J.F. BURROWS, STATUTE LAW IN NEW ZEALAND 219-28 (LexisNexis 3rd ed. 2003).

97. *Att’y-Gen. v. De Keyser’s Royal Hotel*, [1920] A.C. 508 (H.L.); see also Michael Taggart, *Expropriation, Public Purpose and the Constitution*, in THE GOLDEN METWAND AND THE CROOKED CORD 91, 104-105 (Christopher Forsyth & Ivan Hare eds., 1998).

98. See *Wiseman v. Borneman*, [1971] A.C. 297, 314-315 (H.L.); *Drew v. Att’y-Gen.*, [2002] 1 N.Z.L.R. 58, ¶ 29 (C.A.).

99. See *Anisimic Ltd. v. Foreign Compensation Comm’n*, [1969] 2 A.C. 147, 153 (H.L.); *Bulk Gas Users Group v. Att’y-Gen.* [1983] N.Z.L.R. 129, 1983 N.Z.L.R. LEXIS 415, 423-25 (C.A.).

100. See generally *Perkins v. Police*, [1988] 1 N.Z.L.R. 257, 261 (C.A.) (stating that the court’s role is to “preserve the balance which was the aim of the legislation so that personal freedom, privacy and dignity are not infringed beyond the extent prescribed in the greater public interest”).

facie, to infringe upon such rights. A half-century ago, New Zealand's Court of Appeal summarized this approach in the following terms:

Where the Legislature uses plain unequivocal language capable of only one meaning, it must be taken to mean what it has plainly expressed whatever may be the consequences. But, unless the language produces a conviction that it was the intention of the Legislature to effect what would constitute a most serious interference with the liberty of the subject and to perpetuate what can fairly be regarded as an injustice, one should be slow to attribute such an intention to the Legislature.¹⁰¹

Describing this interpretive approach as realizing “legislative intent” allowed the courts to avoid the slight of undemocratic “judicial activism.”¹⁰² However, using the lens of presumed intent to divine what a particular Parliament means by its enactment does present obvious difficulties in a jurisdiction predicated on that body's supreme law-making status. Because parliamentary sovereignty entails that any measure Parliament enacts is, *ipso facto*, legally valid, a claim that Parliament did not intend to legislate contrary to the principle of legality must rest on some external evaluative criteria.¹⁰³ In reality, therefore, these common law presumptions reflect the judiciary's concern to protect a range of individual rights and values from parliamentary encroachment, thereby imposing something of a substantive check on legislative measures purporting to have this effect.¹⁰⁴

Even so, applying the principle of legality during the interpretative process can provide only limited protection for individual rights. For one thing, the range of so-called “fundamental” rights traditionally encompassed by the principle was restricted, with obvious legitimacy problems involved should the courts seek to expand it.¹⁰⁵ Furthermore, the application of this principle always stands in uneasy tension with Parliament's role as sovereign lawmaker. Claiming that Parliament could not possibly mean to legislate in a way that limits certain fundamental rights

101. *Comm'r of Inland Revenue v. West-Walker*, [1954] N.Z.L.R. 191, 212 (C.A.). See also *Regina v. Sec'y of State for the Home Dep't, ex parte Simms*, [2000] 2 A.C. 115, 131 (H.L.) (Lord Hoffman) (“Fundamental rights cannot be overridden by general or ambiguous words.”).

102. See, e.g., *Bropho v. W. Austl.*, (1990) 171 C.L.R. 1, ¶ 13 (“The rationale of all such rules lies in the assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear.”).

103. See Jim Evans, *Controlling the Use of Parliamentary History*, 18 N.Z.U.L. REV. 1, 44 (1998).

104. For this reason, the content of the principle of legality has been characterized as “a sort of common law ‘Bill of Rights.’” John Willis, *Statutory Interpretation in a Nutshell*, 16 CAN. BAR REV. 1, 17 (1938); Kent Roach, *Common Law Bills of Rights as Dialogue between Courts and Legislatures*, 55 U. TORONTO L.J. 733, 734-35 (2005). See also The Right Honourable Lord Justice Laws, *The Impact of the Human Rights Act 1998 on the Interpretation of Enactments in the UK*, in *THE STATUTE: MAKING AND MEANING* 241, 243 (Rick Bigwood ed. 2004) (claiming that the principle of legality “is not Parliament's law; it is the Judges' law”).

105. Michael Kirby, *Deep Lying Rights - A Constitutional Conversation Continues*, 3 N.Z.J. PUB. & INT'L L. 195, 199-201 (2005).

is problematic where the language of the statutory provision in question apparently demonstrates that it *does* have this purpose.¹⁰⁶ A court then must either accept Parliament's apparent rights-infringing purpose (as indicated by the specific language it has chosen), or perpetuate a fiction that Parliament could not possibly intend what it appears to be saying (because the courts do not approve of the outcome it would produce). Framing this choice in terms of the ostensible clarity of Parliament's language does little to resolve the problem—especially when judges suggest that the greater the perceived rights-infringement, the clearer Parliament's words must be to achieve its goal.¹⁰⁷ Questions inevitably arise as to the basis of the courts' authority to undertake these sorts of judgments. Recourse to its purported "common law" basis then appears to be more an exercise in bootstrapping than a convincing account of the practice's legitimacy.¹⁰⁸

The enactment of the interpretative sections of the NZBORA and HRA go some way toward ameliorating such legitimacy concerns.¹⁰⁹ By choosing what to include in (and what to exclude from) those rights instruments, the legislature has indicated the range of individual rights that the courts should consider and seek to protect when interpreting legislation. Moreover, the fact that Parliament itself has authorized the courts to approach enactments with the goal of giving them a rights-friendly reading answers any assertion that the courts are acting illegitimately by doing so.¹¹⁰ The interpretative sections, after all, take the form of a mandatory prescription from the legislature to the judiciary.¹¹¹ At the very least, they represent parliamentary recognition of, and blessing upon, the judiciary's application of the principle of legality when interpreting an enactment.¹¹² Whether they go beyond

106. See, e.g., Jeffrey Goldsworthy, *Unwritten Constitutional Principles*, in EXPOUNDING THE CONSTITUTION, *supra* note 30, at 277, 296 ("It is undoubtedly true that judges have used common law presumptions to interpret legislation more narrowly than Parliament intended, resulting in the frustration of its purposes. This is notorious, for example, in relation to a good deal of legislation dealing with taxation and industrial relations, and attempting to restrict judicial review of administrative decisions.").

107. *Simms*, 2 A.C. at 131 (Lord Hoffman); *Regina v. Lord Chancellor*, *ex parte Witham*, [1998] Q.B. 475, 586 (U.K.C.A.) (Laws, J.); *Regina v. Pora*, [2001] 2 N.Z.L.R. 37, ¶ 50 (C.A.) (Elias, C.J. & Tipping, J.). See also Lord Cooke of Thorndon, *The Basic Themes*, 2 N.Z.J. PUB. & INT. L. 113, 114 (2004) (suggesting that Parliament may need to use "unrealistically specific language" to override "truly basic human rights").

108. See John Burrows, *The Changing Approach to the Interpretation of Statutes*, 33 VICTORIA U. WELLINGTON L. REV. 561, 567-68 (2002) [hereinafter Burrows, *Changing Approach*].

109. PAUL RISHWORTH ET AL., *THE NEW ZEALAND BILL OF RIGHTS* 123-24 (Tim Fullerton, ed., Ox. U. Press 2003).

110. Claudia Geiringer, *The Principle of Legality and the Bill of Rights Act: A Critical Examination of R v Hansen*, 6 N.Z. J. PUB. & INT'L L. 59, 73 (2008) ("In essence, section 6 of the Bill of Rights Act affirms a value-oriented approach to statutory interpretation. In deducing legislative meaning, courts and other interpreters are to strive to adopt constructions that are consistent with values derived from a source external to the statute itself: those enunciated in Part II of the Bill of Rights Act and affirmed in its Long Title as 'fundamental.'").

111. See NZBORA, 1990 S.N.Z. No. 109, § 6 (using the verb "shall"); HRA § 3 (using the verb "must").

112. See Geiringer, *supra* note 110, at 74.

that point, however, and authorize the courts to adopt an even more explicitly teleological interpretative approach, is a question that each jurisdiction has had to confront. The sections to follow explore how the courts in the United Kingdom and New Zealand have responded to these questions of statutory interpretation in the protection of the individual rights of citizens.

A. Statutory Interpretation Under the NZBORA

The New Zealand courts' primary approach to statutory interpretation is text-centered and purposive in nature: "the words of the legislation are read in their fullest context, and with a view to giving effect to the purpose of the legislation."¹¹³ This general interpretative approach is codified in the Interpretation Act of 1999:¹¹⁴ "The meaning of an enactment must be ascertained from its text and in the light of its purpose."¹¹⁵ A unanimous Supreme Court recently reiterated that an act's text and purpose are the "key drivers of statutory interpretation."¹¹⁶ Consequently, exercises in deriving the appropriate meaning of a statutory provision proceed from the orthodox presumption that the courts should be the "faithful servant[s]" of Parliament's intent,¹¹⁷ in that the judiciary's primary role is to give effect to the policy goals selected by that institution. Of course, where a court considers that the language used to express these policy goals unjustifiably limits or infringes upon one of the individual rights guaranteed by the NZBORA, it will explore whether it "can" give the legislative provision an alternative reading that does not yield such an outcome. That is, after all, what the NZBORA, section 6, by its terms, requires of it.¹¹⁸

However, even when seeking a rights-consistent interpretation, the New Zealand courts still are reluctant to assign a meaning to an enactment's text that it will not readily sustain. For example, ostensibly, section 6 authorizes a rights-consistent reading only where the asserted meaning is a "reasonable"¹¹⁹ and not "strained"¹²⁰ interpretation of the statutory language. The meanings that "can" be given to an enactment must be generated "by a legitimate process of construction,"¹²¹ as judges "may interpret, but we cannot rewrite or legislate."¹²² In

113. John Burrows, *Statutory Interpretation New Style*, [2005] N.Z. L.J. 130, 156-58 [hereinafter Burrows, *Statutory Interpretation New Style*].

114. 1999, S.N.Z. No. 85, § 5(1).

115. *Id.*

116. *Commerce Comm'n v. Fonterra Co-operative Group Ltd*, [2007] 3 N.Z.L.R. 767, 776 (S.C.).

117. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STANFORD L. REV. 321, 325 (1990). See also BURROWS, *supra* note 96, at 130 ("Briefly put, there is an overall desire that legislation should work as Parliament intended it to.").

118. See NZBORA, 1990 S.N.Z. No. 109, § 6 (using the mandatory verb "shall").

119. *Ministry of Transp. v. Noort Police*, [1992] 3 N.Z.L.R. 260, 272 (C.A.) (Cooke, P).

120. *Id.*; See also *Simpson v. Att'y-Gen.*, [1994] 3 N.Z.L.R. 667, 674 (N.Z.C.A.) (Cooke P).

121. *Quilter v. Att'y-Gen.*, [1998] 1 N.Z.L.R. 523, 581 (N.Z.C.A.) (Tipping J).

122. *Id.*

addition to issuing generic warnings about the limits of interpretation, the courts also have demonstrated a marked disinclination to use their section 6 interpretative power in several notable cases involving individual rights. In *Quilter v. Attorney General*,¹²³ a unanimous Court of Appeals refused to give the gender-neutral language used in the Marriage Act¹²⁴ a meaning that would permit same-sex couples to marry, despite their NZBORA, section 19 right to freedom from discrimination.¹²⁵ Claims that the NZBORA, section 24(e) provides a general right to a jury trial for all offenses attracting a potential sentence of more than three months imprisonment were rejected in light of express statutory language indicating this right does not apply for certain specified offenses.¹²⁶ Likewise, the High Court has held that a statutory prohibition on any prisoner voting was clear and unambiguous in its effect,¹²⁷ in spite of the NZBORA, section 12(a) affirmation of the individual right to vote.¹²⁸

This is not to say that the section 6 interpretative mandate has had no impact on judicial reasoning.¹²⁹ For example, it repeatedly has been used to limit general statutory discretions in a rights-consistent fashion.¹³⁰ Thus, *Police v. Beggs*¹³¹ held that a public official could not issue trespass notices against protestors under the Trespass Act 1980,¹³² if doing so unreasonably restricts their NZBORA, sections 14 and 16 rights to free expression and peaceful assembly.¹³³ To realize the NZBORA, section 21 guarantee against “unreasonable” searches and seizures, narrow interpretations of the statutory powers¹³⁴ (and related immunities¹³⁵) of the police and other state actors have been adopted. Several members of the Court of Appeal also have indicated (albeit in obiter comments) that section 6 justified adopting a quite inventive understanding of the relationship between various legislative amendments to avoid the potential application of

123. Burrows, *Changing Approach*, *supra* note 108. See also A.S. Butler, *Same-sex Marriage and Freedom From Discrimination in New Zealand*, [1998] PUB. L. 396.

124. 1955, 1955, S.N.Z. No. 92.

125. See Burrows, *Changing Approach*, *supra* note 108.

126. *Drelizis v. Wellington District Court*, [1994] 2 N.Z.L.R. 198 (H.C.); *Reille v. Police*, [1993] 1 N.Z.L.R. 587 (H.C.); *Tapena v. Police*, [1993] 10 CRNZ 614 (H.C.); *Birch v. Ministry of Transp.*, [1992] 9 C.R.N.Z. 83 (H.C.).

127. *Re Bennett*, [1993] 2 H.R.N.Z. 358 (H.C.).

128. NZBORA, 1990 S.N.Z. No. 109, § 12(a) (“Every New Zealand citizen who is of or over the age of 18 years . . . [h]as the right to vote in genuine periodic elections of members of the House of Representatives . . .”).

129. See generally Burrows, *Changing Approach*, *supra* note 108; RISHWORTH ET AL, *supra* note 53, at 142-55; BUTLER & BUTLER, *supra* note 20, at 157-96.

130. See, e.g., *Newspaper Publishers Ass’n of N.Z. v. Family Court*, [1999] 2 N.Z.L.R. 344, 350-51 (H.C.); See also *Drew v. Att’y-Gen.*, [2002] 1 N.Z.L.R. 58 (C.A.) (holding that a general statutory power to make regulations does not authorize regulations that breach the NZBORA).

131. [1999] 3 N.Z.L.R. 615 (H.C.).

132. 1980, S.N.Z. No. 65.

133. See *Beggs*, 3 N.Z.L.R. at 632.

134. See *Regina v. Laugalis*, [1993] 10 C.R.N.Z. 563 (C.A.); *Choudry v. Att’y-Gen.*, [1999] 2 N.Z.L.R. 582 (C.A.); *Choudry v. Att’y-Gen.*, [1999] 3 N.Z.L.R. 399 (C.A.).

135. *Simpson*, 3 N.Z.L.R. 667.

retrospective criminal penalties in two particular cases.¹³⁶ However, even in cases where the courts have invoked section 6 to justify a particular rights-consistent reading of an enactment, they are quick to stress that the adopted meaning always must be plausible in light of the particular language Parliament has used to express its policy goals.¹³⁷ While the courts may shade or colour the statutory words, they cannot go beyond what those words “reasonably” require.¹³⁸

The textually constrained nature of the section 6 interpretative exercise is emphasized further in the first NZBORA-related decision handed down by New Zealand’s Supreme Court,¹³⁹ *R. v. Hansen*.¹⁴⁰ *Hansen* centered on a “reverse onus” provision contained in the Misuse of Drugs Act,¹⁴¹ which states that a person in possession of more than a specified quantum of a prohibited drug shall, “until the contrary is proved,” be deemed to possess it for the purpose of supply. On its face, this reverse onus breaches an accused’s right to be presumed innocent until proven guilty, as affirmed in the NZBORA, section 25(c).¹⁴² Consequently, the Supreme Court was invited to choose between two alternative readings of the reverse onus provision. Its “natural” or “ordinary” meaning, contended by the Crown, was that the accused faces a *legal* onus to show on the balance of probabilities that he or she did not possess the drugs for the purpose of supply.¹⁴³ However, the majority of the Supreme Court concluded that this reading was inconsistent with the NZBORA, because it limited the section 25(c) right in a manner that could not be demonstrably justified as per section 5.¹⁴⁴ The alternative, rights-consistent reading of the provision, urged on the Court by Mr. Hansen under section 6, was that it imposed only an *evidential* onus on the accused.¹⁴⁵ Adopting this meaning would require an accused person simply to present sufficient evidence to raise a reasonable doubt as to the purpose of possession, with the Crown then having to prove beyond reasonable doubt the existence of intent to supply.¹⁴⁶

Problematically for Mr. Hansen, New Zealand’s Court of Appeal earlier had heard and rejected exactly this argument in *Regina v. Phillips*.¹⁴⁷ The crucial

136. *Regina v. Poumako*, [2000] 2 N.Z.L.R. 695 (C.A.); *Regina v. Pora*, [2001] 2 N.Z.L.R. 37 (C.A.).

137. *See, e.g., Regina v. Phillips*, [1991] 3 N.Z.L.R. 175 (C.A.); *Noort*, 3 N.Z.L.R. 260; *Quilter*, 1 N.Z.L.R. 523.

138. Andrew S. Butler, *Why the New Zealand Bill of Rights is a Bad Model for Britain*, 17 O.J.L.S. 323, 330-35 (1997) (Eng.) [hereinafter Butler, *A Bad Model*]; Michael Taggart, *Tugging on Superman’s Cape: Lessons from the Experience with the New Zealand Bill of Rights Act 1990*, [1998] PUB. L. 266, 282-85 (Eng.); John McGrath, *Purpose, Hansard, Rights and Language*, in THE STATUTE: MAKING AND MEANING, *supra* note 89, at 234.

139. The New Zealand Supreme Court was created in 2004. Before this date, the Privy Council was the nation’s highest judicial authority.

140. [2007] 3 N.Z.L.R. 1 (S.C.).

141. 1975, S.N.Z. No. 116, § 6(6).

142. NZBORA, 1990 S.N.Z. No. 109.

143. *Hansen*, 3 N.Z.L.R. 1, ¶ 4.

144. *Id.* ¶¶ 43-44 (Elias, C.J.); *id.* ¶ 148 (Tipping, J.); *id.* ¶¶ 233-234 (McGrath, J.); *id.* ¶ 281 (Anderson, J.).

145. *Id.* ¶ 3.

146. *Id.*

147. [1991] 3 N.Z.L.R. 175 (C.A.).

feature of the reverse onus, according to *Phillips*, was the word “proved.”¹⁴⁸ It would be “strained and unnatural” to interpret this term as placing no more than an evidential burden on the accused.¹⁴⁹ This relatively recent decision by New Zealand’s second-highest court might have been thought to dispose of the interpretive question. However, subsequent to *Phillips*, the United Kingdom’s House of Lords had read a similar reverse onus provision just as contended by Mr. Hansen.¹⁵⁰ The House of Lords premised its decision on two propositions. First, the HRA, section 3(1) authorized a Court to depart from the ordinary, natural meaning of the reverse onus provision in favor of a different, rights-friendly meaning.¹⁵¹ Second, the House of Lords accepted the argument made by Glanville Williams that “proof” is a concept with different “shades of meaning.”¹⁵² While the most obvious shade for the concept of “proof” is “beyond reasonable doubt,” it also encompasses a lesser, equally valid “balance of probabilities” standard.¹⁵³ Since the law already accepts that both these standards can constitute “proof,” there is no logical reason for it not to accept a third standard—that of raising a reasonable doubt.¹⁵⁴ Bolstering this thesis is the proposition that reverse legal onuses are an anathema to the principles of the criminal law, which place a high premium on the value of a fair trial.¹⁵⁵

While decisions of the House of Lords have no binding *stare decisis* precedential authority within New Zealand’s judicial hierarchy, the views of this body are accorded a degree of respect and weight due to the lengthy colonial relationship between the two nations. Nevertheless, none of the five members of the Supreme Court bench felt able to adopt the House of Lord’s approach (as urged on them by Mr. Hansen).¹⁵⁶ On the actual interpretive question before the Court, Glanville Williams’ thesis met with little favor. While four of the Court’s five judges agreed that the reverse legal onus unjustifiably infringes upon the presumption of innocence, Justice Tipping argued:

[A] distinction must be drawn between the persuasiveness in policy terms of the proposition that all reverse onuses should be evidential and the persuasiveness of the argument that the word “prove” is capable of signalling an evidential onus.¹⁵⁷

148. *Id.* at 177.

149. *Id.*

150. *Regina v. Lambert*, [2002] 2 A.C. 545 (H.L.) (appeal taken from Eng.) (U.K.).

151. *Id.* ¶ 17 (Lord Slynn); *id.* ¶ 42 (Lord Steyn); *id.* ¶ 84 (Lord Hope); *id.* ¶ 157 (Lord Clyde).

152. Glanville Williams, *The Logic of Exceptions*, 47 *CAMB L.J.* 261, 264 (1988) (Eng.).

153. Hansen, 3 *N.Z.L.R.* 1, ¶ 162-63.

154. *Id.* ¶¶ 264-65.

155. *Id.* ¶¶ 26, 36, 38 (Elias, C.J.); *id.* ¶ 264 (McGrath, J.).

156. *Id.* ¶ 39 (Elias, C.J.); *id.* ¶ 56 (Blanchard, J.); *id.* ¶ 165 (Tipping, J.); *id.* ¶ 256 (McGrath, J.); *id.* ¶ 290 (Anderson, J.).

157. Hansen, 3 *N.Z.L.R.* 1, ¶ 165.

As to the latter point, it is not “reasonably possible” that the relevant statutory provision could mean “until the contrary is tested.”¹⁵⁸ Echoing this view, Justice McGrath stated that “‘to test’ is not an available meaning of ‘prove’ in a legal context[.]”¹⁵⁹ while Justice Anderson pointed out that Mr. Hansen’s contended interpretation rendered the reverse onus provision vacuous, because the prosecution would in practice have to prove every element of the offense beyond a reasonable doubt.¹⁶⁰ Chief Justice Elias was equally clear, albeit reaching with “reluctance,” a conclusion that the wording of the reverse onus provision imposes a legal onus.¹⁶¹ For Justice Blanchard:

[E]ven in a Bill of Rights environment, it would be overstretching the language of the provision . . . to give it a meaning which required . . . no more than the adducing of . . . evidence which made the purpose of possession a live issue. The language used by Parliament . . . could hardly have been clearer.¹⁶²

As for the fact that the House of Lords believed a similar provision could be read as requiring only an evidential onus, Justice Tipping claimed this decision stemmed from a view that the HRA, section 3(1) “mandate[s] a judicial override of Parliament, if Parliament’s meaning is inconsistent with a right or freedom.”¹⁶³ Diplomatically, he added: “Whether [such an approach] is appropriate in England is not for me to say, but I am satisfied that it is not appropriate in New Zealand.”¹⁶⁴

The Supreme Court’s decision in *Hansen* thus emphasizes that New Zealand’s courts should take a more restrained view of the section 6 interpretive provision than that displayed by the United Kingdom’s courts.¹⁶⁵ As expressed by Justice McGrath: “[T]he basic principle of interpretation [is] that the text is the primary reference in ascertaining meaning and there is no authority to adopt meanings which go beyond those which the language being interpreted will bear.”¹⁶⁶ Consequently, in the absence of ambiguity or other indication from the statutory language, there is no justification for giving a legislative provision an artificial and unintended (albeit rights-consistent) meaning.¹⁶⁷ Not only is NZBORA, section 6 interpretation glossed with a general criterion of

158. *Id.* ¶¶ 95, 97, 165, 288.

159. *Id.* ¶ 256.

160. *Id.* ¶ 288.

161. *Id.* ¶ 25. However, Chief [Justice] Elias also stated her view that § 6 entitles the Court to adopt meanings that “linguistically may appear strained.” *Id.* ¶ 13.

162. *Id.* ¶ 56. It should be noted that [Justice] Blanchard was of the opinion that applying a legal onus to Mr Hansen did not unreasonably limit his § 25(c) right. *Id.* ¶ 83.

163. *Hansen*, 3 N.Z.L.R. 1, ¶ 158.

164. *Id.*

165. See Wilberg, *supra* note 21.

166. *Hansen*, 3 N.Z.L.R. 1, ¶ 237. See also *id.* ¶ 25 (Elias, C.J.); *id.* ¶ 61 (Blanchard, J.); *id.* ¶¶ 88-94 (Tipping, J.); *id.* ¶¶ 289-290 (Anderson, J.).

167. See, e.g., *id.* ¶ 61 (McGrath, J.) (claiming that the use of § 6 is confined to meanings that are “available on the language of the text being interpreted[.]” that the text remains the “primary reference in ascertaining meaning”; and that there is no authority to go beyond meanings that “the language being interpreted will bear.”).

“reasonableness,”¹⁶⁸ but the limits of interpretive reasonableness extend only to meanings that are “genuinely open in light of both [the statutory] text and its purpose.”¹⁶⁹ As Claudia Geiringer has noted, this interpretative approach does not go beyond that already evident under the common-law principle of legality:

New Zealand judges, by contrast with some United Kingdom judges, have not understood section 6 of the Bill of Rights Act as inviting a new and distinctive approach to statutory interpretation. Rather, they have treated section 6 as a legislative manifestation of the established common law principle that legislation is, where possible, to be interpreted consistently with fundamental rights recognized by the common law. The *Hansen* decision is consistent with that general orientation.¹⁷⁰

Therefore, the interpretative approach of New Zealand’s Supreme Court continues to display considerable deference to Parliament in its role as sovereign lawmaker, reflecting a traditional understanding of the relationship between, and respective roles of, the elected legislature and the judiciary.

B. Statutory Interpretation Under the HRA

The text and purpose of a statute also are central factors in the process of statutory interpretation in the United Kingdom. One of the leading texts on the topic states the primary rule of interpretation thus: “The judge must give effect to the grammatical and ordinary, or where appropriate, the technical meaning of words in the general context of the statute.”¹⁷¹ A second holds that “the interpreter is required to determine and apply the legal meaning of the enactment; that is, the meaning that correctly conveys the legislative intention. This usually corresponds to the grammatical meaning of the verbal formula that constitutes the enactment.”¹⁷² The House of Lords recently summarized “the familiar tools of statutory interpretation” in the following manner:

The starting point is the language of the Act, from which the court seeks to derive the meaning of what Parliament has enacted. Significance may be attached not only to what Parliament has said but also, on occasion, to what it has not said. Attention may be paid to presumptions applicable to the drafting of statutes, since these are rules which expert professional draftsmen may ordinarily be expected to follow in the absence of reason to

168. Synonyms for which are “intellectually defensible,” “tenable” or “viable.” *See id.* ¶¶ 156, 158, 232.

169. *Id.* ¶ 61 (Blanchard, J.).

170. Geiringer, *supra* note 110, at 62-63 (internal citation omitted).

171. JOHN BELL & GEORGE ENGLE, CROSS ON STATUTORY INTERPRETATION 49 (3d ed. Butterworths 1995).

172. BENNION, *supra* note 96, at 381.

conclude that they may not have done so or an indication in the statute that they have not done so. While the express terms of a statute are always crucial, the courts will eschew an overly literal construction, taking account of the purpose of the statute, the mischief sought to be remedied and other circumstances relevant to interpretation.¹⁷³

Of course, the enactment of the HRA, section 3(1) has created a new “circumstance relevant to interpretation.” As the following discussion illustrates, courts in the United Kingdom have then used this development to adopt a markedly different approach to the role of language and parliamentary purpose where issues of individual rights are at stake.

The House of Lords first signaled it would adopt an expansive understanding of the HRA, section 3(1) in *Regina v. A (No. 2)*.¹⁷⁴ This case involved the Youth Justice and Criminal Evidence Act, 1999,¹⁷⁵ which severely restricted the admission of a rape complainant’s sexual history as evidence at trial. The defendant then claimed that this *prima facie* exclusion of evidence regarding his prior sexual relationship with the complainant would prejudice the fairness of his trial, as guaranteed by the ECHR, Article 6.¹⁷⁶ The House of Lords accepted this argument, and sought to give the section a Convention-compatible interpretation by reading into it an implied judicial discretion to admit prior-relationship evidence where required to ensure a fair trial.¹⁷⁷ Lord Steyn claimed that because the legislature would not have wished to deny the accused’s right to mount “a full and complete defence,” this implied discretion was a “possible” reading of the legislative provision.¹⁷⁸ Further, the HRA, section 3(1), indicated it was the “will of Parliament” that ECHR rights be given full effect, with the courts authorized “to adopt an interpretation which linguistically may appear strained”¹⁷⁹ if necessary to achieve Convention-compatibility.

A similar teleological preparedness to read in or imply terms in order to make a statutory provision Convention-compatible is apparent in a series of decisions relating to reverse onus provisions. In *Regina v. Director of Public Prosecutions, ex parte Kebilene*,¹⁸⁰ Lord Cooke indicated in obiter that a provision requiring persons “reasonably suspected” of possessing articles for the purpose of terrorist activities to prove that they did not have any such purpose could be interpreted using the HRA, section 3(1), to require only an evidential onus.¹⁸¹ The House of Lords unanimously adopted this approach in *R. v. Lambert*,¹⁸² interpreting a reverse onus provision relating to possession of drugs for the purpose of supply as

173. *Regina v. Sec’y of State for Defence*, [2008] 1 A.C. 153, 178 & ¶ 9 (H.L.) (appeal taken from Eng.) (U.K.).

174. [2002] 1 A.C. 45 (H.L.) (appeal taken from Eng.) (U.K.).

175. 1999, c. 23, § 41 (U.K.).

176. *Regina v. A*, 1 A.C. at 57 (Lord Steyn).

177. *Id.* at 69

178. *Id.* at 68.

179. *Id.*

180. 2 A.C. 326.

181. *Id.* at 373.

182. *Lambert*, 2 A.C. 545.

placing an evidential burden on the accused. Moreover, in a pair of cases relating to the offense of belonging to a proscribed terrorist organization,¹⁸³ a majority of the House of Lords concluded that a statutory requirement that an accused prove he or she had joined the group before it became proscribed was merely evidential in nature.¹⁸⁴ The Court interpreted the enactment in this fashion despite its express recognition that “there can be no doubt” Parliament intended the onus to be legal, and not evidential, in nature.¹⁸⁵

The leading decision on section 3(1),¹⁸⁶ *Ghaidan v. Godin-Mendoza*,¹⁸⁷ further emphasizes the “unusual and far-reaching character” of the section 3(1) directive.¹⁸⁸ *Ghaidan* involved the Rent Act, 1977,¹⁸⁹ which protected the tenancy arrangements of a deceased tenant’s surviving “spouse.” A “spouse” included a person who had lived with the original tenant “as his or her wife or husband.”¹⁹⁰ The question before the House of Lords was whether the surviving partner in a same-sex relationship met this statutory definition. In a case decided shortly before the HRA came into force, *Fitzpatrick v. Sterling Housing Association*,¹⁹¹ the House of Lords answered this question in the negative. The *Fitzpatrick* court concluded that “spouse” was a gender-specific term, denoting a person of the opposite sex to the original tenant.¹⁹² Whatever the underlying logic of the Rent Act, its construction was “simply a matter of the application of ordinary language to [the] particular statutory provision in the light of current social conditions.”¹⁹³

In *Ghaidan*,¹⁹⁴ however, the House of Lords reversed this recently adopted position and repudiated the constraining influence of statutory text on the section 3(1) interpretative process. Lord Nicholls, in the leading judgment, began by noting that the inclusion of the word “possible” in section 3(1) indicates that Parliament did not envisage that *all* legislation could be made Convention-compatible.¹⁹⁵ But his Lordship then answered the question “what is the standard . . . by which possibility is to be judged,” with a claim that section 3(1) “may require the Court to depart from . . . legislative intention, [and it is therefore] impossible to suppose that Parliament had intended that the operation of section 3 should depend

183. *Sheldrake v. Dir. of Pub. Prosecutions*, [2005] 1 A.C. 264 (H.L.) (appeal taken from Eng.) (U.K.) (combining appeals of two cases).

184. *Id.* at 312 (Lord Bingham).

185. *Id.*

186. HELEN FENWICK, *CIVIL LIBERTIES AND HUMAN RIGHTS* 180 (4th ed. 2007). See also Alison L. Young, *Ghaidan v. Godin-Mendoza: Avoiding the Deference Trap*, [2005] PUB. L. 23 (Eng.); Jan van Zyl Smit, *The New Purposive Interpretation of Statutes: HRA Section 3 After Ghaidan v. Godin-Mendoza*, 70 MOD. L. REV. 294 (2007) (Eng.); Aileen Kavanagh, *Choosing between Sections 3 and 4 Human Rights Act 1998: Judicial Reasoning after Ghaidan v. Mendoza*, in *JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT* 114 (Helen Fenwick, Gavin Phillipson & Roger Masterman eds., 2007).

187. [2004] 2 A.C. 557 (H.L.) (appeal taken from Eng.) (U.K.).

188. *Id.* at 571 & ¶ 30 (Lord Nicholls).

189. 1977, c. 42.

190. *Ghaidan*, 2 A.C. 557.

191. [1999] 3 W.L.R. 1113 (H.L.)

192. *Id.* at 1136 (Lord Clyde).

193. *Id.*

194. 2 A.C. 557.

195. *Id.* at 570 & ¶ 27.

critically on the particular form of words . . . in the statutory provision under consideration.”¹⁹⁶

Because the ECHR’s right to respect for private and family life (article 8) and right to freedom from discrimination (article 14) meant there was “no rationale” for treating same-sex couples differently, the social policy underlying the 1988 amendment—to extend its protection to unmarried heterosexual couples—was “equally applicable” to same-sex couples.¹⁹⁷ His Lordship did not claim that this policy-based extension was manifest in the language of the Rent Act, but concluded: “[the] precise form of words for this purpose is of no significance. It is their substantive effect that matters.”¹⁹⁸ Aware that this line of reasoning could mandate a departure from anything akin to “interpretation” of the enactment, his Lordship stated that the key focus must be on the “fundamental feature” of the legislation in question.¹⁹⁹ Having extracted this concept and reasoned that the “fundamental feature” in the present case was the existence of a “close and stable relationship,” Lord Nicholls concluded that the Rent Act should protect the surviving partner of *any* couple living as *if they were* each other’s wife or husband.²⁰⁰

Crucial to Lord Nicholls’s logic is a particular view of language. Eschewing the constraining influence of legislative text, his Lordship claimed that to refuse to depart from statutory language would make the application of section 3(1) a “semantic lottery.”²⁰¹ Lord Steyn took up Lord Nicholls’s sceptical view of legislative drafting, claiming that the judicial application of section 3(1) hitherto had placed “too much emphasis on linguistic features, [and if] the core remedial purpose of section 3(1) is not to be undermined, a broader approach is required.”²⁰² Of course, their Lordships are correct that legislative drafting is an imperfect process, but their claim that statutory interpretation should not be constrained by a particular linguistic choice (or “semantic lottery”) represents more than a repudiation of undesirable interpretive literalism.²⁰³ Consequently, such interpretation under section 3(1) may result in even apparently unambiguous legislative language being given a meaning different to that which it otherwise would bear. This is because, on their Lordships’ interpretation of the HRA, “the particular form of words used by the draftsman to express the concept of the statute—its underlying policy—should not be allowed to prevent the courts from achieving Convention-compliance.”²⁰⁴

This is not to say that the United Kingdom courts have routinely used section 3(1) to alter the ostensible meaning of enactments. After all, section 3(1)

196. *Id.* at 571 & ¶¶ 30-31. See also *id.* at 573-74 ¶¶ 38-41 (Lord Steyn); *id.* at 585-86 & ¶ 67 (Lord Millett); *id.* at 596 ¶ 110 (Lord Rodger).

197. 2 A.C. at 574 & ¶ 35.

198. *Id.*

199. *Id.* at 572 & ¶ 33.

200. *Id.* at 574 & ¶ 35.

201. *Id.* at 571 & ¶ 31.

202. *Id.* at 577 & ¶ 49. This view of section 3(1) as a ‘remedial’ tool is discussed *infra*, note 221 and accompanying text.

203. See van Zyl Smit, *supra* note 186, at 299 (quoting *Ghaidan*, 2 A.C. 557 (Lord Nicholls)).

204. FENWICK, *supra* note 186, at 181.

only becomes relevant if a court concludes that the “ordinary” or “natural” meaning of an enactment is incompatible with one of the rights contained in the ECHR.²⁰⁵ Most legislation will not have this effect. An enactment may not implicate any of the ECHR rights,²⁰⁶ or the courts may consider a limit imposed on those rights to be justifiable.²⁰⁷ Nor does section 3(1) permit unbridled judicial creativity. Lord Nicholls recognizes this danger in *Ghaidan*, when he notes that Parliament “expressly envisaged that not all legislation would be capable of being made Convention-compliant by the application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats.”²⁰⁸ Lord Woolf earlier expressed the matter this way: “Section 3 does not entitle the court to *legislate* (its task is still one of *interpretation*, but interpretation in accordance with the directive contained in section 3).”²⁰⁹ Locating what Aileen Kavanagh calls the “elusive divide between interpretation and legislation”²¹⁰—or, to use Lord Nichols’ metaphor, the means of separating the interpretative sheep from the legislative goats²¹¹—then becomes the critical issue.

The wealth of existing academic commentary addressing this question,²¹² combined with limited space, means the present discussion will be necessarily incomplete. Helen Fenwick’s summary of the approach of the United Kingdom judiciary also suggests that only the most general and ambiguous answers are available: “When will the courts be prepared to read words into a statute, or to reinterpret an existing word, in order to avoid incompatibility? . . . Their approach appears to be that they will adopt that more radical [interpretative] approach where it appears to them to be proper and desirable to do so.”²¹³ At most, therefore, we

205. CONOR GEARTY, *PRINCIPLES OF HUMAN RIGHTS ADJUDICATION* 51 (Oxford U. Press 2004).

206. *See, e.g., Regina (Countryside Alliance) v. Att’y Gen.*, [2007] 3 W.L.R. 922 (appeal taken from Eng.) (H.L.) (U.K.).

207. *See, e.g., Regina (ProLife Alliance) v. British Broadcasting Corp.*, [2004] 1 A.C. 185 (appeal taken from Eng.) (H.L.); *Regina (Animal Defenders Int’l) v. Sec’y of State For Culture, Media & Sport*, [2008] 2 W.L.R. 781 (appeal taken from Eng.) (H.L.).

208. *Ghaidan*, 2 A.C. at 570 & ¶ 27.

209. *Poplar Housing & Regeneration Cmty. Ass’n Ltd. v. Donoghue*, [2002] Q.B. 48, ¶ 75(c) (U.K.C.A.) (emphasis in the original).

210. Aileen Kavanagh, *The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998*, 24 OX. J. LEG. STUDS. 259 (2004). *See also* Aileen Kavanagh, *Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach*, [2004] PUB. L. 537 [hereinafter Kavanagh, *A More Contextual Approach*]; Aileen Kavanagh, *Unlocking the Human Rights Act: The ‘Radical Approach’ to Section 3(1) Revisited*, 3 EUR. HUM. RTS. L. REV. 259 (2005).

211. *Ghaidan*, 2 A.C. at 570 & ¶ 27.

212. *See* FENWICK, *supra* note 186, at 196. *See also* Lord Lester of Herne Hill, *The Art of the Possible – Interpreting Statutes Under the Human Rights Act*, 6 EUR. HUM. RTS. L. REV. 665 (1998); Bennion, *supra* note 22; C.A. Gearty, *Reconciling Parliamentary Democracy and Human Rights*, 118 L. QUART. REV. 248 (2002); Gavin Phillipson, *(Mis)reading Section 3 of the Human Rights Act*, 119 L. QUART. REV. 183 (2003); Danny Nicol, *Statutory Interpretation and Human Rights After Anderson*, [2004] PUB. L. 274.

213. FENWICK, *supra* note 186, at 184.

can identify a number of factors that feed into the judicial evaluation of what is “proper and desirable” in any given case.

One factor already apparent from *Ghaidan* is a requirement that a proposed interpretation be consistent with the enactment’s “fundamental features,”²¹⁴ or “go with the grain of the legislation.”²¹⁵ A purported interpretation that fails to do so is not a “possible” one, but rather represents an unwarranted judicial rewriting of Parliament’s Act.²¹⁶ It then follows that a court should not use section 3(1) “as a way of radically reforming a whole statute or writing a quasi-legislative code granting new powers and setting out new procedures to replace that statute.”²¹⁷ Similarly, the subject matter of the statute at hand appears important to the section 3(1) interpretative task. The courts have shown greater willingness to strain to find Convention-compliant interpretations of legislation dealing with criminal justice or evidential matters,²¹⁸ as opposed to matters requiring complex social policy judgments or extensive resource allocation decisions.²¹⁹ Where the latter issues are before the courts, they have indicated that a measure of deference to Parliament’s superior institutional capacity and basic lawmaking legitimacy is appropriate.²²⁰

Finally, Aileen Kavanagh has argued that the overall remedial nature of the HRA is important when deciding whether or not to adopt a given Convention-compliant interpretation.²²¹ She suggests that the judiciary will be more disposed to adopt a teleological, Convention-compatible interpretative approach if it believes that there is no immediate legislative cure in prospect. However, where a court sees that legislative moves already are underway to remove the Convention-incompatibility, it will be less ready to engage in a teleological reinterpretation of the existing legislation.

This multi-factored approach “allows the senior judiciary a great deal of leeway to allow their own values to have an influence on legislation, under the cloak of deploying neutral factors and using interpretative techniques.”²²² The introduction of this increased judicial say over the application of statutes then represents a change in the respective roles of Parliament and the Courts.²²³ It does not completely invert those roles; the United Kingdom’s judiciary continues to acknowledge Parliament’s theoretically sovereign lawmaking status while engaging

214. *Ghaidan*, 2 A.C. at 572 & ¶ 33.

215. *Id.* at 601 & ¶ 121 (Lord Rodger).

216. *In re S*, [2002] 2 A.C. 291, 313 & ¶ 40 (H.L.) (Lord Nicholls); *Regina (Anderson) v. Sec’y of State for the Home Dep’t*, [2003] 1 A.C. 837.

217. Kavanagh, *A More Contextual Approach*, *supra* note 210, at 540. *See, e.g., In re S*, 2 A.C. 291; *Anderson*, 1 A.C. 837; *A and Others v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 (H.L. 2004).

218. *See, e.g., Regina v. Offen*, [2001] 1 W.L.R. 253 (U.K.); *Lambert*, 2 A.C. 545; *Regina v. A*, 1 A.C. 45.

219. *See, e.g., Re S*, 2 A.C. 291; *Bellinger v. Bellinger*, [2003] 2 A.C. 467 (H.L. 2003); *Regina (Wilkinson) v. Inland Revenue Comm’rs*, [2005] 1 W.L.R. 1718 (H.L. 2005).

220. *See Young*, *supra* note 186 at 31-32.

221. Kavanagh, *A More Contextual Approach*, *supra* note 210, at 542-43.

222. FENWICK, *supra* note 186, at 189.

223. *See infra* Part IV(B).

in the section 3(1) interpretative process.²²⁴ However, as a practical matter, the extent of the legislature's ability to make law now seemingly depends upon a subsequent judicial assessment of whether or not to add to or alter the statutory language in order to produce what it believes is a Convention-complaint outcome. The question then arises: once the judiciary asserts its basic mastery over the words of an enactment, does it pay much more than mere lip service to Parliament's sovereignty?

C. The Differing Interpretations of Interpretation

Although the plain wording of the NZBORA and HRA's interpretative sections appears to require the same thing from judges in New Zealand and the United Kingdom, they have understood and applied these provisions in quite different ways. John Burrows sums up the difference thusly: "[in] New Zealand, the whole point of interpretation is to find out what a text means, [whereas in the United Kingdom] the intention of Parliament, and even the meaning of the statutory words, are of subsidiary importance."²²⁵ Nevertheless, this difference may be more a matter of degree than kind. We do not claim anything so crude as that New Zealand judges unquestioningly do whatever Parliament appears to want, while judges in the United Kingdom can now decide for themselves what an enactment ought to say. Yet, even after making appropriate allowance for the issue's subtleties and nuances, the judiciary in the United Kingdom have proved more willing than their New Zealand counterparts to apply teleological, rights-based reasoning when deciding how an enactment should apply in a particular case. We are by no means the first to note this phenomenon;²²⁶ indeed, members of the judiciary in each country have remarked upon it.²²⁷ The remainder of this article provides an explanation for why it has occurred by drawing out and expanding upon themes already touched upon in the discussion thus far.

IV. EXPLAINING THE DIFFERENCE IN INTERPRETATIVE METHODOLOGY

As noted in its introduction, the purpose of this article is not to judge which interpretative approach is correct or more normatively justified. Instead, the issue is why two nations with broadly similar constitutional practices, commitments, and institutional structures have adopted differing approaches to the rights friendly interpretative task prescribed by their respective rights instruments.

224. See, e.g., *Regina v. A*, 1 A.C. 45.

225. Burrows, *Statutory Interpretation New Style*, *supra* note 113, at 156-58.

226. See *id.*; See also Petra Butler, *Human Rights and Parliamentary Sovereignty in New Zealand*, 35 VICTORIA U. OF WELLINGTON L. REV. 341, 358-60 (2004); RISHWORTH ET AL., *supra* note 53, at 146-52; BUTLER & BUTLER, *supra* note 20, at 169-71; FENWICK, *supra* note 186, at 173; Wilberg, *supra* note 21, at 115.

227. See *Kebilene*, 2 A.C. at 373 (Lord Cooke); *Regina v. A (No. 2)*, 1 A.C. at 68 (Lord Steyn); *Hansen*, 3 N.Z.L.R. 1.

Three factors are particularly relevant to this issue. First, the historical background to the NZBORA and HRA's adoption continues to resonate in contemporary debates about how best to understand each instrument.²²⁸ Second, each country's international obligations provide a very important setting for the application of each domestic rights instrument.²²⁹ Third, the general constitutional culture in each nation has ramifications for how the judiciary, as well as other constitutional actors, view their interpretative role.²³⁰ While this section discusses each of these factors separately, these are not autonomous elements, and, actually, a degree of overlap exists between them. For example, the very existence of international obligations is an important part of the legislative history of each rights instrument. Similarly, the current constitutional culture of each nation, in part, encompasses a particular understanding of the legislative history of each rights instrument, as well as reflects the impact of international obligations on that constitutional order. Consequently, these three factors operate in tandem, rather than being completely independent variables.

A. The Importance of Legislative History

We have traversed the background to the adoption of the NZBORA and HRA above.²³¹ Drawing on that discussion, we argue here that judicial understandings of this historical context are an important factor in the interpretative approach adopted in each jurisdiction. In particular, judges in both nations have invoked arguments regarding what may be called the "framers' intent" when considering how they should understand and apply the relevant interpretative section.²³² There are at least two reasons why this issue has particular importance. First, the fact that the NZBORA and HRA are relatively recent innovations undermines any claim that the judiciary must rework them to keep pace with changing societal conditions.²³³ Second, neither of these rights instruments purports to be a higher law instrument that specifically empowers the courts to exercise independent judgment over the validity of "ordinary" legislation.²³⁴ Their status as ordinary parliamentary enactments, then, requires the courts to interpret and apply them as with any other legislative measure.²³⁵ This process of interpretation and application, in a constitutional system formally predicated upon

228. See, e.g., *infra* Part IV(A).

229. See *infra* Part IV(B).

230. See *infra* Part IV(C).

231. See *supra* Parts II(A), (B).

232. See, e.g., *Hansen*, 3 N.Z.L.R. 1, ¶¶ 238-39, 246; *Ghaidan*, 2 A.C. at 575 & ¶ 46.

233. As opposed, for example, to claims the United States' Bill of Rights should be interpreted as a "Living Constitution." See, e.g., HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* (MacMillan Co. 1948) (1927); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

234. See NZBORA, 1990 S.N.Z. No. 109, § 4; HRA, 1988 c. 42, §§ 3, 4.

235. See *Regina (Al-Skeini) v. Sec'y of State for Defence*, [2008] 1 A.C. 153, 178 & ¶ 8 ("The HRA is a statute enacted by Parliament. Where an issue arises as to its meaning, it must be construed.").

parliamentary sovereignty, centers on giving full effect to the legislature's intent.²³⁶ Therefore, when the judiciary comes to consider how it should approach the interpretative sections in these rights instruments, it is required to ask just what Parliament meant to do by enacting this mandate.²³⁷ The differing circumstances surrounding the adoption of the NZBORA and HRA then lead the courts in each country to quite different answers to this issue.

In the case of the NZBORA, the public and parliamentary reaction to the initial White Paper proposal for a higher law rights instrument is important. The generally hostile response to this measure demonstrated that little support existed for giving courts the final word on the validity of rights-infringing legislation.²³⁸ Simply put, there was no evidence that the New Zealand public believed the existing doctrine of parliamentary sovereignty was so broken as to need replacing, while their elected representatives specifically decided not to pass into law a measure that would have this effect.²³⁹ Given this background, it then seems difficult to justify an approach to interpreting statutes that replaces traditional respect for Parliament's preferred text with teleological interpretative techniques. To do so risks introducing through the back door a constitutional innovation that both the people and their elected parliamentary representatives have rejected explicitly. Justice McGrath's judgment in *Hansen* explicitly reflects this line of reasoning.²⁴⁰ Not only does he acknowledge the importance of the background to the NZBORA's adoption to the question of how section 6 is to be understood, he emphasizes that:

The constitutional debate which preceded the rejection of the proposal to give the Bill of Rights the status of supreme law also appears to be unique to New Zealand. It is an important contextual feature which New Zealand judges must bear in mind when considering how the courts of overseas jurisdictions with similarly structured legislation, in particular those of England and Wales, have seen their authority to look for meanings other than the natural meaning of a statutory provision, which potentially affect protected rights.²⁴¹

As this passage demonstrates, the background to the introduction of the HRA provides greater support for the teleological interpretative approach subsequently adopted by the United Kingdom's judiciary. For one thing, the debate over the introduction of the HRA into the United Kingdom did not involve the same explicit public rejection of a complete transfer of decision-making power over issues of individual rights from Parliament to the courts.²⁴² Rather than

236. See *supra* Part III(A).

237. See, e.g., *Ghaidan*, 2 A.C. at 571 & ¶ 30.

238. See FINAL REPORT, *supra* note 51.

239. See NZBORA, 1990 S.N.Z. No. 109, long title & § 2.

240. *Hansen*, 3 N.Z.L.R. 1, ¶¶ 238-239, 246.

241. *Id.* ¶ 239.

242. Compare, e.g., FINAL REPORT, *supra*, note 51 with RIGHTS BROUGHT HOME, *supra* note 70, LORD SCARMAN, *supra* note 73, LORD HAILSHAM, *supra* note 73; ZANDER, *supra* note 73, Dworkin, *supra* note 73, at 352-372, and U.K. Labour Party, *supra* note 74.

representing a weakened, second-best alternative to a higher-law rights instrument, the HRA's express purpose was to involve the courts directly in interpreting and applying the ECHR's rights in a domestic context.²⁴³ The parliamentary actors responsible for the HRA also appeared both cognizant and accepting of the increased judicial role that this move may entail.²⁴⁴ Lord Steyn's judgment in *Ghaidan*²⁴⁵ quotes the Home Secretary's statements during the parliamentary debates on the HRA: "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention."²⁴⁶ The Lord Chancellor, Lord Irvine, echoed this general expectation: "In 99 percent of the cases that will arise, there will be no need for judicial declarations of incompatibility."²⁴⁷ In an article written shortly before the HRA was debated in Parliament, one of its architects, Lord Lester, summed up his understanding of the effect of the HRA as follows: "Would [the courts use section 3(1)] to go much further beyond the traditional position in which the courts seek to interpret ambiguous legislation so as to be in accordance with rather than breach treaty obligations undertaken by the UK? I hope and believe that they would indeed do so."²⁴⁸ Given these statements by parliamentary actors, it is unsurprising that the judiciary characterizes section 3(1) as an "emphatic adjuration by the legislature"²⁴⁹ to adopt an interpretative approach "quite unlike any previous rule of statutory interpretation."²⁵⁰

Consequently, the contrasting legislative backgrounds to the NZBORA and HRA have led the judiciary in each country to assign a different legislative intent to each instrument. In New Zealand, as discussed in Part 3(i), above, the courts have understood the NZBORA's authors as intending that their instrument should have no more standing or legal weight than any other enactment. Parliament's purpose when passing the NZBORA into law in 1990 was not to traduce the ability of other Parliaments, whether earlier or later in time, to legislate as they see fit.²⁵¹ It then follows that section 6 was not meant to authorize anything more than a textualist interpretative approach that continues to respect the words Parliament uses to achieve its goals in other legislation.²⁵²

For the United Kingdom's judges, however, the HRA is interpreted to embody a specific, special purpose that all other legislation should be Convention-

243. Jonathan Lewis, *The European Ceiling on Human Rights*, [2007] PUB. L. 720, 725-26.

244. Francesca Klug, *The Human Rights Act 1988*, *Pepper v. Hart and All That*, [1999] PUB. L. 246.

245. *Ghaidan*, 2 A.C. at 575 & ¶ 46.

246. 306 PARL. DEB., H.C. (6th Ser.) (1998) 778.

247. 585 PARL. DEB., H.L. (5th Ser.) (1998) 840.

248. Lord Lester, *First Steps Towards a Constitutional Bill of Rights*, 2 EUR. HUM. RIGHTS REV. 124, 127 (1997).

249. *Regina v. A (No. 2)*, 1 A.C. at 68 (Lord Steyn) (citing *Kebilene*, 2 A.C. at 373 (appeal taken from Eng.) (U.K.) (Lord Cooke)).

250. *Id.* at 87 (Lord Hope).

251. See NZBORA, 1990 S.N.Z. No. 109, § 4.

252. See *Hansen*, 3 N.Z.L.R. 1, ¶ 237. See also *id.* ¶ 25 (Elias, C.J.); *id.* ¶ 61 (Blanchard, J.); *id.* ¶¶ 88-94 (Tipping, J.); *id.* ¶¶ 289-90 (Anderson, J.).

compatible.²⁵³ This view leads Lord Steyn in *Ghaidan* to speak of the “countervailing will” of the United Kingdom Parliament that enacted the HRA in 1998, which trumps the “will of Parliament as expressed in the statute under examination.”²⁵⁴ The HRA, therefore, is understood to encompass a sort of parliamentary meta-intent that all of its enactments will be compatible with the ECHR, with the courts empowered to take a teleological interpretative approach under section 3(1) to ensure that this is the case.²⁵⁵

B. The Importance of International Obligations

Historic domestic factors are not the sole reason for the diverging judicial understandings of the intended effect of the NZBORA and HRA’s interpretative sections. These also reflect the contemporary international legal context in which each instrument operates. We have discussed already a basic distinction between New Zealand and the United Kingdom in this regard.²⁵⁶ To recap, the NZBORA “affirm[s] New Zealand’s commitment to the International Covenant on Civil and Political Rights [ICCPR],”²⁵⁷ while the HRA is intended “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.”²⁵⁸ The particular nature of each of these multilateral instruments, as well as the strength of its influence over the internal legal order of each nation, is thus important to judicial understanding of both the NZBORA and HRA’s interpretative sections.²⁵⁹ To summarize the general argument in this section, the ICCPR’s lack of any binding enforcement mechanism undermines the case for adopting a novel, teleological interpretative approach in New Zealand; whereas the ECtHR’s power to issue rulings that are de facto binding on party States lends support to such an approach in the United Kingdom.

New Zealand ratified the ICCPR in 1978. The particular rights recognized in this instrument provide the basis for the rights guarantees included in Part Two of the NZBORA, in keeping with that legislation’s general purpose of affirming its progenitor international instrument.²⁶⁰ Nevertheless, this affirmation does not exhaust New Zealand’s obligations under the ICCPR. In particular, an individual who believes a public authority has infringed his or her rights under the ICCPR and is unable to gain a remedy for that infringement from New Zealand’s courts can lodge an “individual communication” with the HRC.²⁶¹ If the HRC finds that a breach of the complainant’s ICCPR rights has occurred, it may express its “final

253. Danny Nicol, *Are Convention Rights A No-Go Zone For Parliament?*, [2002] PUB. L. 438.

254. 2 A.C. at 573 & ¶ 40.

255. *Id.* at 577 & ¶ 50.

256. See ECHR, *supra* note 39; ICCPR, *supra* note 40, *Tangiora*, 1 N.Z.L.R. 17, 1999 N.Z.L.R. LEXIS 72; Davidson, *supra* note 42.

257. NZBORA, 1990 S.N.Z. No. 109, long title.

258. HRA, 1998 c. 42, preamble.

259. *Hansen*, 3 N.Z.L.R. 1, ¶¶ 244-45.

260. See NZBORA, 1990 S.N.Z. No. 109, long title.

261. See ECHR, *supra* note 39; ICCPR, *supra* note 40, *Tangiora*, 1 N.Z.L.R. 17, 1999 N.Z.L.R. LEXIS 72; Davidson, *supra* note 42.

view” to the New Zealand government.²⁶² However, the only sanction the government faces for failing to follow this recommendation is naming and shaming in subsequent HRC reports.²⁶³ This is not to claim that the HRC is toothless or that its recommendations are worthless. It simply means that the force of any recommendation is contingent upon the extent to which a nation’s government wishes to avoid the domestic embarrassment of being tarred as “anti-rights,” or to escape international opprobrium for failing to live up to generally agreed moral norms. In practice, these costs have not always been substantial enough to persuade even a good global citizen, such as New Zealand, to accept and comply with the expressed views of an international human rights body.²⁶⁴

The authors of this article suggest that the non-binding nature of the HRC’s recommendations, both as a matter of formal legal theory and actual political or governmental practice, means that New Zealand’s domestic courts are unlikely to feel compelled to go beyond a textualist interpretative approach under the NZBORA. Where the HRC finds New Zealand is in breach of the ICCPR, its government—and, if the breach is the result of legislation, its Parliament—remains relatively free, ostensibly, to accept or reject that recommendation. New Zealand’s national sovereignty remains intact in both a formal and practical sense, even if it faces a measure of moral suasion to take action. In a similar fashion, where a domestic court considers Parliament has adopted statutory language that unreasonably limits an individual’s rights, it continues to recognize the right of this body to do so. The court may seek to exert a measure of influence over the legislature’s choice of action, as Justice McGrath notes in *Hansen*:

[A] New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being

262. See ICCPR, *supra* note 40.

263. See *Tangiara*, 1 N.Z.L.R. 17, 1999 N.Z.L.R. LEXIS 72; Elizabeth Evatt, *The Impact of International Human Rights on Domestic Law*, in *LITIGATING RIGHTS*, *supra* note 42, at 300-01.

264. The example of the Foreshore and Seabed Act 2004, 2004 S.N.Z. No. 93, is instructive in this regard. Following this enactment’s passage, the United Nations Committee on Elimination of Racial Discrimination criticized New Zealand for adopting legislation that appeared “to contain discriminatory aspects against the Māori [people] . . . notwithstanding the State party’s obligations under articles 5 and 6 of the Convention.” U.N. Comm. on the Elimination of Racial Discrimination [UNCERD], *Decision 1(66): New Zealand Foreshore and Seabed Act*, ¶ 6, U.N. Doc. CERD/C/66/NZL/Dec.1 (Mar. 11, 2005). The Committee then appointed a Special Rapporteur to visit New Zealand and further examine the issue. His subsequent report recommended “The Foreshore and Seabed Act should be repealed or amended by Parliament . . .” U.N. Comm’n on Hum. Rts., *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Addendum, Mission to New Zealand*, ¶ 92, U.N. Doc. E/CN.4/2006/78/Add.3 (Mar. 13, 2006). However, the New Zealand Government has rejected the Special Rapporteur’s report, because “His raft of recommendations is an attempt to tell us how to manage our political system. This may be fine in countries without a proud democratic tradition, but not in New Zealand where we prefer to debate and find solutions to these issues ourselves.” Press Release, Michael Cullen, Response to UN Special Rapporteur report (Apr. 4, 2006), available at <http://www.beehive.govt.nz/node/25366>. Consequently, the legislation remains in force today.

considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights consistent interpretation, that none could be found, and that it has been necessary for the court to revert to s[ection] 4 of the Bill of Rights Act and uphold the ordinary meaning of the other statute. . . . Articulating that reasoning serves the important function of bringing to the attention of the executive branch of government that the court is of the view that there is a measure on the statute book which infringes protected rights and freedoms, which the court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the court's finding. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.²⁶⁵

In other words, the judiciary may implicitly (or even explicitly²⁶⁶) call Parliament to task for authoring a law they believe to be inconsistent with the rights contained in the NZBORA, much as the HRC may scold a signatory to the ICCPR for actions that breach that instrument by issuing its "final view" on the matter. Parliament then may, or may not,²⁶⁷ choose to respond to that criticism (insofar as it accepts it is justified, or experiences sufficient political pressure). However, neither the HRC nor the domestic courts are able to supplant the legislature's decision about the understanding and application of individual rights, as expressed through the wording of its enactment.

The United Kingdom's position under the ECHR is markedly different. Consideration of the ECHR's effect on the United Kingdom's domestic law first must take into account that country's general shift, as a member of the European Union (EU), towards greater European integration.²⁶⁸ The two processes are not completely synonymous: the ECHR is not an EU treaty; and the HRA does not expressly provide for the same sort of direct incorporation into domestic law of ECHR jurisprudence as the United Kingdom's European Communities Act

265. Hansen, 3 N.Z.L.R. 1, ¶¶ 253-254.

266. See *Moonen v. Film & Lit. Bd. of Rev.*, [2000] 2 N.Z.L.R. 9, ¶ 20 (C.A.) (Tipping, J.) ("[The interpretative process] necessarily involves the Court having the power, and occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum.").

267. See BUTLER & BUTLER, *supra* note 20, at 206.

268. See Paul Craig, *Britain in the European Union*, in THE CHANGING CONSTITUTION 84, 97-99 (Jeffrey Jowell & Dawn Oliver eds., 6th ed. 2007).

prescribes for EU directives and regulations.²⁶⁹ Such direct domestic application of EU law means that, since the European Communities Act came into force, there effectively have been two legal systems operating in the United Kingdom, not one.²⁷⁰ In contrast, neither the rights contained in the ECHR nor decisions of the ECtHR have formal, binding status within the United Kingdom's domestic law (except insofar as they specifically have been incorporated through the HRA and are applied by its domestic courts). Nevertheless, while it is important to recognize this formal distinction, the difference between the two integrative processes is much less clear-cut as a practical matter.

In particular, as a matter of practice, the inevitable outcome of any ruling by the ECtHR that the United Kingdom has acted in breach of the ECHR is that the relevant law will be changed.²⁷¹ It is not that such a ruling immediately invalidates or renders void the domestic law of the United Kingdom. A ruling by the ECtHR instead "impose[s] an obligation . . . in international law to amend [the United Kingdom's] domestic law to bring it into line with the Convention, to compensate the victim if ordered to do so, and to take such other steps as may be required of it by the Court."²⁷² The Committee of Ministers of the Council of Europe oversees this international law obligation,²⁷³ and may enforce it through a range of actions up to and including the expulsion of a member state from the Council. In practice, however, such sanctions are not needed to ensure the United Kingdom's compliance with the ECtHR's judgments. Although not bound by the ECtHR's rulings in formal constitutional theory, the United Kingdom's Parliament invariably has proved willing to accept that body's conclusions as a matter of political reality, amending its domestic law in response to its interpretation of the ECHR's requirements. This *de facto* binding effect of an ECtHR judgment has important consequences for the United Kingdom's domestic courts, as Lord Slynn recognizes:

[I]n the absence of some special circumstances . . . the [domestic] court should follow any clear and constant jurisprudence of the [ECtHR]. . . . [I]f it does not do so there is at least a possibility

269. See European Communities Act 1972, c. 68, § 2(1) (U.K.) (providing that "without further enactment" all European Union treaties in Schedule 1 "shall be recognised and available in law"). See also *R. v. Sec'y of State for Transp., ex parte Factortame Ltd.*, [1991] 1 A.C. 603 (H.L.); GORDON ANTHONY, U.K. PUBLIC LAW AND EUROPEAN LAW: THE DYNAMICS OF LEGAL INTEGRATION 169-170 (Hart 2002).

270. ADAM TOMKINS, PUBLIC LAW 108 (Ox. U. Press 2003). See Craig, *supra* note 268, at 97-99.

271. See Anthony Bradley, *The Sovereignty of Parliament – Form or Substance?*, in THE CHANGING CONSTITUTION *supra* note 268, at 25, 55-56; U.K. PARLIAMENT, JOINT COMM. ON HUM. RTS., SIXTEENTH REPORT: MONITORING THE GOVERNMENT'S RESPONSE TO COURT JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS, 2006-7, H.L. 128, H.C. 728, at 40 (2007) ("The Ministry of Justice reports that between the Human Rights Act coming into force on 2 October 2000 and 23 May 2007 a total of 24 declarations of incompatibility have been made by domestic courts under the Human Rights Act. Of these, 6 were overturned on appeal; 1 remains subject to appeal; 10 have been addressed by new primary legislation; 1 is being addressed by a Bill currently before Parliament; 1 was addressed by remedial order; leaving a total of 5 in which the Government is considering how to remedy the incompatibility.").

272. FELDMAN, *supra* note 66, at 49.

273. See ECHR, *supra* note 39, at art. 46(2).

that the case will go to [the ECtHR], which is likely in the ordinary case to follow its own jurisprudence.²⁷⁴

The pragmatic concern expressed here is that British courts should not only interpret and apply the ECHR rights in keeping with the ECtHR's understanding of them;²⁷⁵ it also should behave, remedially, akin to the ECtHR. For if the United Kingdom's domestic courts fail to provide an applicant with a satisfactory remedy under the HRA, he or she can always pursue the matter to Strasbourg and obtain a judgment from the ECtHR that will require the United Kingdom to alter its law in any case. To avoid such an outcome, "[domestic] courts should . . . treat the HRA as the nexus to a new legal order of European human rights law, so that every [domestic] court is now a European human rights court."²⁷⁶

Therefore, factoring the continuing role of the ECtHR into the analysis, the HRA appears to require the "active assimilation"²⁷⁷ of ECHR norms into domestic law. If this is the ascendant view among the United Kingdom's legal community, or at least amongst its senior judiciary, then the domestic courts will seek to effect the "perfect transmission"²⁷⁸ of Strasbourg jurisprudence through their application of the HRA. Since section 4(2) HRA declarations of incompatibility do not *necessitate* parliamentary amendment of ECHR-infringing legislation, an assimilationist view of the HRA encourages teleological interpretation under section 3(1) to achieve immediate and certain Convention-compatibility.²⁷⁹ Furthermore, the practical consequences, should a domestic court issue a section 4(2) declaration of incompatibility, reinforce this interpretative approach.²⁸⁰ Such declarations, after all, only issue where a court concludes a legislative provision is *irredeemably* Convention-incompatible. This conclusion will incorporate ECtHR precedents (as per section 2(1)), and reflect a decision that it is not "possible" to interpret the provision in a Convention-compatible manner (as per section 3(1)).²⁸¹ At that point, an aggrieved litigant could have further recourse to the ECtHR to vindicate her Convention rights.²⁸² And, as the Home Secretary noted in parliamentary debate: "One of the questions that will always be before government [where a section 4(2) declaration of incompatibility has been

274. *Regina (Alconbury) v. Sec'y of State for the Env't*, [2001] 2 A.C. 295, 313 & ¶ 26 (H.L.); *See also Regina (S) v. Chief Constable of the S. Yorkshire Police*, [2004] 1 W.L.R. 2196, 2219 & ¶ 78 (H.L.) (Baroness Hale); *Regina (Ullah) v. Special Adjudicator*, [2004] 2 A.C. 323, 350 & ¶ 20 (H.L.) (Lord Bingham) ("The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."); *Animal Defenders Int'l*, 2 W.L.R. 781, at ¶¶ 37, 53; Lewis, *supra* note 243, at 725-26.

275. *See* Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 *MOD. L. REV.* 183, 202-206 (2008).

276. Nicol, *supra* note 253, at 438.

277. ANTHONY, *supra* note 269, at 179.

278. Nicol, *supra* note 253, at 438.

279. *Ghaidan*, 2 A.C. at 573 & 39 (Lord Steyn) (indicating that a section 4 declaration should be "a measure of last resort" for the courts).

280. *See* 306 *PARL. DEB.*, H.C. (6th Ser.) (1998) 772.

281. *See Ghaidan*, 2 A.C. at 570 & ¶ 26.

282. Bradley, *supra* note 271, at 55.

made] . . . will be, ‘Is it sensible to wait for a further challenge to Strasbourg, when the British courts have declared the provision to be outwith the Convention?’”²⁸³

The practical outcome is that section 4(2) declarations of incompatibility almost invariably result in the repeal or amendment of the offending statutory provision before the matter proceeds to the ECtHR.²⁸⁴ As Anthony Bradley points out, this uniform legislative response to a section 4(2) declaration means:

While . . . the [HRA] does not entrust to the courts the power to strike down an Act of Parliament . . . , the courts are empowered to deliver a wound to Parliament’s handiwork that will often prove mortal, even though life-support for the [legislation] must be switched off only by the government or by Parliament, not the courts.²⁸⁵

The judiciary thus can be relatively confident that their view on the Convention-compatibility of a legislative provision ultimately will prevail. This politico-legal reality means that, once a court has decided a legislative provision is Convention-incompatible, its remedial response boils down to a simple choice. It may use section 3(1) to interpret the legislative provision in a manner that removes the incompatibility, thereby vindicating the rights of the individual complainant before it.²⁸⁶ Alternatively, it may issue a section 4(2) declaration and allow Parliament to take the action necessary to cure the incompatibility, but at the cost of failing to uphold the rights of the complainant in the immediate case.²⁸⁷ In the final analysis, the practical result of either course of action is that the law eventually will come to reflect the court’s view on what the ECHR requires. The only real question is whether the judiciary or the legislature should have responsibility for effecting that change.

Therefore, the presence of the ECtHR as a *de facto* court of final appeal casts a long shadow over the UK Parliament’s sovereign power to enact legislation. Although the HRA’s status as an “ordinary” parliamentary enactment preserves that body’s sovereignty in a formal—or “ultimate”—sense, the contemporary politico-legal matrix of the United Kingdom means its lawmaking authority is subject to “an important measure of judicial control.”²⁸⁸ Any continued assertion of parliamentary sovereignty in this context, as Mark Elliott puts it, “evidences a rather myopic view, which unhelpfully dislocates legislative power from the wider political environment within which it subsists, and which the HRA has changed radically.”²⁸⁹ In comparison, the HRC has had a much weaker impact upon New Zealand’s domestic legal framework, acting at most as a prick to the government’s

283. 306 PARL. DEB., H.C. (6th Ser.) (1998) 772.

284. U.K. PARLIAMENT, *supra* note 271, at 40.

285. Bradley, *supra* note 271, at 55-56.

286. Where an ECHR-compliant interpretation is “possible.”

287. HRA, 1998 c. 42, § 3(1).

288. Bradley, *supra* note 271, at 56.

289. Mark Elliott, *United Kingdom: Parliamentary Sovereignty Under Pressure*, 2 INT’L J. CONST. L. 545, 552 (2004) [hereinafter Elliott, *Parliamentary Sovereignty Under Pressure*]. See also Mark Elliott, *Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention*, 22 LEGAL STUDS. 340 (2002).

conscience. Without any effective external check, New Zealand's courts apparently do not face the same practical pressure to ensure the nation's legal framework is consistent with individual rights norms. Consequently, there is no incentive or felt need for the judiciary to expand its role beyond giving effect to Parliament's decision on how individual rights are to be balanced against public policy objectives, as this is expressed through the words of its enactment.

C. The Importance of Background Constitutional Culture

A third factor in the differing judicial approaches to the interpretative sections is the background constitutional cultures of New Zealand and the United Kingdom; in particular, each nation's current attitude towards the concept of parliamentary sovereignty. As noted above, Parliament's status as sovereign or supreme lawmaker historically has underpinned the constitutional ordering of each nation. Furthermore, at a formal or theoretical level, each nation remains committed to it as a fundamental constitutional *grundnorm* or rule of recognition.²⁹⁰ However, the actual, lived constitutions of each nation—the practices and beliefs of constitutional actors and the shared understandings underpinning those practices and beliefs—are beginning to exhibit diverging views of Parliament's sovereign status. To summarize this claim, New Zealand's constitutional culture remains more deeply wedded to the orthodox idea of absolute parliamentary sovereignty than does the United Kingdom; with the latter being more receptive to the idea that “rule of law”²⁹¹ values ought to limit, in both theory and practice, Parliament's power to legislate.²⁹² Furthermore, these diverging constitutional cultures are an

290. Richard Ekins, *Acts of Parliament and the Parliament Acts*, 123 L. QUART. REV. 91 (2007).

291. See T.R.S. ALLAN, *LAW, LIBERTY AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* (1993). T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (Ox. U. Press 2001) [hereinafter ALLAN, *CONSTITUTIONAL JUSTICE*]; T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics and Revolution*, 113 L.Q.R. 443 (1997); T.R.S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism* 115 L.Q.R. 221 (1999) [hereinafter Allan, *Rule of Law*]; FRANCIS G. JACOBS, *THE SOVEREIGNTY OF LAW: THE EUROPEAN WAY* 5-6 (Cambridge U. Press 2007); Jeffrey Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, (1999) PUB. L. 448; Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review*, (2000) PUB. L. 671; Jeffrey Jowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION*, *supra* note 268, at 3; John Laws, *Law and Democracy*, (1995) PUB. L. 72; Sir John Laws, *The Constitution: Morals and Rights*, (1996) PUB. L. 622; John Laws, *The Limitations of Human Rights*, (1998) PUB. L. 254; Dawn Oliver, *The Underlying Values of Public and Private Law*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 215 (Michael Taggart ed., Hart 1997); IAN WARD, *THE ENGLISH CONSTITUTION: MYTHS AND REALITIES* 190-93 (Hart 2004). See also Paul Craig, *Competing Models of Judicial Review*, (1999) PUB. L. 428; Paul Craig, *Constitutional Foundations, the Rule of Law and Supremacy*, (2003) PUB. L. 92; Stephen Sedley, *Human Rights: a Twenty-First Century Agenda*, (1995) PUB. L. 386. [hereinafter sources collectively referred to as U.K. “Rule of Law” values].

292. See TOMKINS, *supra* note 31, at 9; U.K. “Rule of Law” values, *supra* note 291; ALLAN, *CONSTITUTIONAL JUSTICE*, *supra* note 291, at 12-13, 20; Allan, *Rule of Law*, *supra* note 291, at 238.

important reason for the approach chosen by each nation's judiciary when applying the interpretative sections in the NZBORA and HRA.

Of course, constitutional culture does not exist in a vacuum. The actions of the courts when applying a rights instrument like the NZBORA or HRA obviously affect the constitutional culture of each nation, and vice versa. In particular, how the judiciary applies these instruments when interpreting legislation will influence shared understandings of the relationship between the courts and the legislature, as will other constitutional actors' reaction to this practice. This effect is particularly pronounced in two nations with "unwritten," or largely customary, constitutions.²⁹³ As John Griffith has claimed, rather provocatively, for the United Kingdom (although the point is equally apposite for New Zealand): "The constitution . . . lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened, that would be constitutional also."²⁹⁴ One need not adopt Griffith's complete conflation of "the constitution" with day-to-day politics to recognize how important the behavior of constitutional actors is in shaping underlying understandings about each nation's largely customary, unwritten constitutional order. Consequently, this section does not propose a simple, one-way causal relationship between each nation's conception of the doctrine of parliamentary sovereignty and the interpretative approach adopted by the judiciary under the relevant rights instrument. There is instead an interweaving of cause and effect, in which the judiciary's chosen interpretative approach both shapes and is shaped by the background constitutional culture in which it takes place.

The basic claim, then, is that New Zealand's constitutional culture now exhibits the stronger commitment to the fundamental premise that Parliament may enact into law any measure it sees fit, with all other constitutional actors then required to respect and apply that enactment. In a recent, extremely thorough discussion of this issue, Matthew Palmer concludes that this traditional doctrine of parliamentary sovereignty is "still an ultimate principle of New Zealand's constitution."²⁹⁵ It meshes with "a marked ethos of social equality or *egalitarianism*"²⁹⁶ running through society, a trait that means "[s]uspicion of judges' ability to frustrate the will of a democratically elected government taps into a deep root in the New Zealand national constitutional culture."²⁹⁷ Consequently:

as a unitary state with no supreme law, no federalism, no written constitution and no membership of a supra-national body that binds domestic law as does the EU, New Zealand now manifests this doctrine [of parliamentary sovereignty] in an even purer form than the United Kingdom. It is one of the internationally distinctive aspects of our constitution.²⁹⁸

293. See Matthew S.R. Palmer, *New Zealand Constitutional Culture*, 22 N.Z. U. L. REV. 565 (2007).

294. J.A.G. Griffith, *The Political Constitution*, 42 M.L.R. 1, 19 (1979).

295. Palmer, *supra* note 293, at 586.

296. *Id.* at 576 (emphasis in original).

297. *Id.* at 586.

298. *Id.* at 582.

The point sought to be made here is that not only does the doctrine of parliamentary sovereignty provide a (if not the) *formal* foundation for New Zealand's constitutional ordering, it is a commitment seemingly internalized by constitutional actors and the public alike, and manifested in the understood roles of all those engaged in government.

This is not to say that Parliament's absolute lawmaking authority is beyond any form of question in the New Zealand context.²⁹⁹ Members of the judiciary, in both obiter³⁰⁰ and extra-judicial³⁰¹ comments, have raised the possibility that in some (strictly hypothetical) circumstances the courts might refuse to recognize an Act of Parliament as valid law. However, not only have such musings never translated into actual practice, they have attracted a strong political rebuttal. In 2004, New Zealand's Deputy Prime Minister, Dr. Michael Cullen, responded to the suggestion the courts might one day invalidate an Act of Parliament with a sharp reminder of constitutional orthodoxy:³⁰² "Parliament proposes, debates and enacts laws The role of the courts is to apply the law to individual cases It remains the prerogative of Parliament to make new law or to amend existing law[.]"³⁰³ Furthermore, through its lawmaking actions, Parliament has continued to assert its role as the final arbiter of the scope and meaning of individual rights. It has on a number of occasions enacted legislation certified by the Attorney General as inconsistent with the NZBORA.³⁰⁴ Only months after the release of the *Hansen* decision, for example, Parliament chose to create a new reverse onus provision covering the drug BZP³⁰⁵—despite the Attorney General specifically advising Parliament through a section 7 notice that the Supreme Court recently had declared such measures to be in breach of the NZBORA.³⁰⁶ Parliament has even passed legislation that expressly empowers local government authorities to formulate bylaws that are inconsistent with the

299. See, e.g., Joseph, *supra* note 3.

300. *Fraser*, 1 N.Z.L.R. at 121 (C.A.); *Taylor*, 1 N.Z.L.R. 394, 1984 N.Z.L.R. LEXIS 581; DEP'T OF JUSTICE, *supra* note 33, at 56, ¶¶ 7.16-7.17.

301. Robin Cooke, *Fundamentals*, [1988] N.Z.L.J. 158, 164; E.W. Thomas, *The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium*, 31 VICTORIA U. OF WELLINGTON L. REV. 5 (2000); Sian Elias, *Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round*, 14 PUB. L. REV. 148, 162 (2003); Lord Cooke of Thorndon, *The Myth of Sovereignty*, 11 OTAGO L. REV. 377, 378 (2007).

302. See, e.g., *Hoani Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.*, [1941] A.C. 308 (P.C.); *Rothmans of Pall Mall (NZ) Ltd. v. Att'y-Gen.*, [1991] 2 N.Z.L.R. 323, 330, 1990 N.Z.L.R. LEXIS 976, at *22-23 (H.C.); *Berkett v. Tauranga Dist. Ct.*, [1992] 3 N.Z.L.R. 206, 211-12, 1992 N.Z.L.R. LEXIS 650, at *17-19 (H.C.); *Shaw*, 3 N.Z.L.R. 154, at ¶ 16.

303. Michael Cullen, *Parliamentary Sovereignty and the Courts*, [2004] N.Z.L.J. 243, 243. See also Hon. Michael Cullen, *Parliament: Supremacy over Fundamental Norms?*, 3 N.Z. J. PUB. & INT'L L. 1, 3 (2005).

304. BUTLER & BUTLER, *supra* note 20, at 206.

305. Misuse of Drugs (Classification of BZP) Amendment Act, 2008, 2008 S.N.Z. No. 5, § 5.

306. N.Z. H.R., REPORT OF THE ATTORNEY GENERAL UNDER THE NEW ZEALAND BILL OF RIGHTS ACT 1990 ON THE MISUSE OF DRUGS (BZP CLASSIFICATION) AMENDMENT BILL 2007 (2007).

NZBORA.³⁰⁷ These examples not only demonstrate “that legislators do not see themselves as necessarily constrained by judicial interpretations of rights,”³⁰⁸ but the lack of any real outcry regarding Parliament’s actions suggests a broad public acceptance of its basic authority to act in this fashion.

The deeply entrenched commitment to parliamentary sovereignty in New Zealand’s constitutional culture hinders any development of novel, rights-friendly interpretative approaches to legislation, even under the aegis of a rights instrument such as the NZBORA. Instead, it leaves the judiciary especially sensitive to accusations of “activism,” or unwarranted “meddling” with Parliament’s goals.³⁰⁹ This is not to claim New Zealand’s judges lack independence, or fear retribution should they try to expand their interpretative role. Nor is it to claim that there is any danger of a judge being removed from office or otherwise punished personally for daring to interpret a parliamentary enactment other than as written. Rather, the way in which New Zealand’s constitutional actors—as well as its general populace—think about and understand Parliament as a lawmaking institution undercuts the basic legitimacy of any judicial attempt to adopt an expanded, teleological interpretative approach.³¹⁰ Simply put, such a step does not mesh with contemporary, generally held understandings about the appropriate relationship between the judiciary and Parliament, in particular the respective role each should play in resolving contested issues of individual rights. It is, of course, always possible that these understandings could change over time. Given the right case, or the right bench, the higher courts in New Zealand may one day feel moved to adopt the teleological interpretative approach of their counterparts in the United Kingdom. How the nation’s constitutional actors and general populace would react to such a step remains a moot point, as does the question of whether it would alter New Zealand’s constitutional culture. For the present, however, the judiciary’s reluctance to follow the United Kingdom’s lead in this area reflects a basic belief that it simply is not appropriate for it to try to find out.

In contrast, the United Kingdom judiciary’s adoption of a teleological interpretative approach under the HRA presents broader challenges to the doctrine of parliamentary sovereignty within the United Kingdom’s constitutional culture. These challenges stem from a number of sources.³¹¹ One is the ongoing process of integration with the European Union and the effective transfer of lawmaking power to European institutions that this entails.³¹² A second is the devolution of a measure of legislative power from the United Kingdom’s Parliament to regional assemblies in Scotland and Wales.³¹³ Parliament’s enactment of the HRA has itself raised questions about the practical extent of that body’s lawmaking authority, for reasons

307. Prostitution Reform Act 2003, 2003 S.N.Z. No. 28, § 13(2).

308. Jackson, *supra* note 4, at 99.

309. See, e.g., D.F. Dugdale, *Framing Statutes in an Age of Judicial Supremacism*, 9 OTAGO L. REV. 603, 608 (2000); Tom Campbell, *Judicial Activism – Justice or Treason?*, 10 OTAGO L. REV. 307, 312 (2003).

310. Butler, *supra* note 226, at 365-66.

311. See generally Bradley, *supra* note 271.

312. See Elliott, *supra* note 289, at 547-51.

313. See Scotland Act 1998, 1998 c.46 (U.K.); Government of Wales Act 1998, 1998 c. 38 (U.K.).

touched on in the previous section.³¹⁴ At a doctrinal level, however, the recent rise of theories of “legal constitutionalism” provide a more fundamental challenge to Parliament’s purported legislative sovereignty.³¹⁵ Such theories claim that Parliament’s lawmaking authority is, and ought to be, subject to a range of “rule of law” values, imposing substantive constraints on the legislative process.³¹⁶ One of the most prominent advocates of legal constitutionalism, T.R.S. Allan, summarizes the consequence of this approach for orthodox notions of Parliament’s supreme status as lawmaker thus:

[W]hile . . . moral discourse will be partly reflected in legislation, duly enacted, it constitutes a higher, more fundamental source of legal values: in some circumstances, it may be necessary for courts to repudiate statutes in defence of legal rights or interests that, though officially acknowledged and widely accepted in theory, have been largely overlooked or even consciously and inexcusably denied in practice.³¹⁷

Therefore, according to legal constitutionalist thinking, what is truly sovereign within the United Kingdom’s constitutional order is not Parliament and its enactments, but rather a cache of substantive moral norms—an integrated vision of constitutional justice³¹⁸—that cannot legitimately be abrogated by any institution of government.

This is not to say that this legal constitutionalist vision has achieved the status of unchallenged orthodoxy within the United Kingdom’s constitutional culture. Most obviously, no court in the United Kingdom has yet presumed to declare a parliamentary enactment invalid because of perceived inconsistency with “rule of law” values. The tenants of legal constitutionalism also have been subject to quite trenchant academic criticism, both of its accuracy as a description of the constitutional order and its desirability as a normative theory.³¹⁹ Moreover, repeated, express affirmations of Parliament’s continued sovereign status accompanied the enactment of the HRA,³²⁰ while the judiciary likewise has

314. See *supra* Part IV(B).

315. We have borrowed this term from Adam Tomkins. See TOMKINS, *supra* note 31, at vii.

316. See U.K. “Rule of Law” Values, *supra* note 291.

317. ALLAN, CONSTITUTIONAL JUSTICE, *supra* note 291, at 12-13. See also Allan, *The Rule of Law*, *supra* note 291, at 238.

318. ALLAN, CONSTITUTIONAL JUSTICE, *supra* note 291, at 12-13.

319. For sustained critiques, see TOMKINS, *supra* note 31; RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (Cambridge U. Press 2007). See also J.A.G Griffiths, *The Brave New World of Sir John Laws*, 63 M.L.R. 159 (2000); J.A.G. Griffiths, *The Common Law and the Political Constitution*, 117 L.Q.R. 42 (2001); Thomas Poole, *Dogmatic Liberalism? TRS Allan and the Common Law Constitution*, 65 M.L.R. 463 (2002); Richard Ekins, *Judicial Supremacy and the Rule of Law*, 119 L.Q.R. 127 (2003); Richard Ekins, *The Authority of Parliament: A Reply to Professor Joseph*, 16 K.C.L.J. 51 (2005); James Allan, *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, 17 K.C.L.J. 1 (2006).

320. RIGHTS BROUGHT HOME, *supra* note 70, at ¶ 2.14. See also Lord Lester of Herne

acknowledged that this legislation “preserves the principle of parliamentary sovereignty.”³²¹ There is reason nevertheless to think that the tenets of legal constitutionalism have gained a greater sway within the constitutional culture of the United Kingdom than in New Zealand. For one thing, Parliament itself has proved unwilling (or politically unable, due to the European dimension) to challenge or override judicial interpretations of rights under the HRA.³²² Its failure to legislatively undo rights-friendly readings under section 3(1), as well as its preparedness to amend legislation in response to section 4 declarations,³²³ effectively gives the judiciary the final word on what the ECHR requires for society as a whole. Furthermore, there is evidence that at least some members of the United Kingdom’s judiciary look favorably upon the claims of legal constitutionalism. For example, in *Jackson v. Attorney-General*,³²⁴ three members of the House of Lords delivered obiter statements questioning whether they are bound to recognize the legal validity of every Act of Parliament.³²⁵ The strongest such statement came from Lord Steyn. While he allowed that “the supremacy of Parliament is still the *general* principle of our constitution[.]”³²⁶ he immediately qualified this acknowledgment as follows: “It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.”³²⁷ As Jeffrey Jowell notes, the consequence of fully embracing this “different hypothesis of constitutionalism” is that “‘the last word’ would pass from the legislature to the courts”³²⁸ regarding the validity of legislation that infringes upon individual rights.

In the final analysis, any difference between the two nations’ constitutional cultures may be once again more a matter of degree rather than kind.

Hill, *First Steps Towards a Constitutional Bill of Rights*, 2 EUR. HUM. RTS L. REV. 124 (1997).

321. *Kebilene*, 2 A.C. at 367 (Lord Steyn). See also *Lambert*, 2 A.C. at 585 & ¶ 79 (Lord Hope); *In re S*, 2 A.C. 291, at 313 & ¶ 39 (Lord Nicholls).

322. See Bradley, *supra* note 271, at 56.

323. See U.K. PARLIAMENT, *supra* note 271, at 40.

324. [2006] 1 A.C. 262.

325. *Id.* ¶¶ 102, 104, 159.

326. *Id.* ¶ [102] (emphasis in original).

327. *Id.* See also *id.* ¶ [104] (Lord Hope) (“But Parliamentary sovereignty is no longer, if it ever was, absolute It is no longer right to say that its freedom to legislate admits of no qualification whatever.”); *id.* ¶ 159 (Baroness Hale) (“The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers.”). But see Lord Bingham, *The Rule of Law and the Sovereignty of Parliament*, 19 KINGS COLL. L.J. 223, 232-234 (2008). See also *Jackson*, 1 A.C. at 320 & ¶ 168 (position taken by Lord Carswell).

328. Jeffrey Jowell, *Parliamentary Sovereignty under the New Constitutional Hypothesis*, [2006] PUB. L. 562, 579. See also James Allan, *The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition?*, 18 KINGS COLL. L.J. 1, 2 (2007) (“I think there is evident support emanating from some existing House of Lords judges for a move away from (or a further or continuing move away from) raw parliamentary sovereignty under which the United Kingdom’s Parliament is *legally* unconstrained and can *legally* enact any statute it wishes, whatever its content.” (emphasis in original)).

There is, after all, a range of opinions within each country regarding the extent to which its Parliament is, and should remain, a fully sovereign lawmaker.³²⁹ However, despite some obiter and extra-judicial speculation, in neither country has the judiciary actually crossed the constitutional Rubicon by declaring a parliamentary enactment invalid. It is not the case, therefore, that the United Kingdom's courts are inexorably moving toward mounting the equivalent of a constitutional *coup d'état* in the name of the "rule of law," while New Zealand's courts are content to remain docilely submissive to Parliament's will in all circumstances. However, the current climate of constitutional discussion and debate within the United Kingdom provides more fertile ground for the practice of rights-friendly judicial interpretations of statutory language than is the case in New Zealand. Simply put, uncertainties about parliamentary sovereignty in the contemporary constitutional culture of the United Kingdom gives its judges greater room to engage in teleological interpretative techniques than their New Zealand colleagues, who operate in a constitutional culture more firmly committed to orthodox notions of Parliament's supreme lawmaking status.

V. THE TENSION BETWEEN MAJORITY RULE AND INDIVIDUAL RIGHTS REVISITED

In the introduction to this article, we described the NZBORA and HRA as "bridging measures" between the principles of majoritarian decision-making and respect for individual rights.³³⁰ That is to say, the weak-form judicial review of legislation they authorize would enable a "dialogue" to take place between the courts' views on the nature and application of individual rights and Parliament as sovereign lawmaker. In this way, these rights instruments can reconcile the tension between a commitment to majority rule and respect for individual rights. Parliament, as the directly elected representatives of the people, retains formal power to legislate as it best sees fit. The courts either will apply Parliament's enactments to individual cases in a rights-friendly manner—providing that the statute permits such an interpretation—or else give notice to Parliament that its legislation is in breach of individual rights. The ball then returns to Parliament's court in terms of how to respond, if at all, to the judiciary's interpretation and application of individual rights. Consequently, the claim is that a general systemic respect for individual rights may be seamlessly combined with the elected legislature's continuing right to have the final word on how those rights are understood and applied.³³¹

329. Bradley, *supra* note 271, at 55-56; See, e.g., Joseph, *supra* note 3; ALLAN, CONSTITUTIONAL JUSTICE, *supra* note 291, at 12-13. See also Allan, *The Rule of Law*, *supra* note 291, at 238.

330. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

331. See, e.g., Francesca Klug, *The Human Rights Act—A "Third Way" or "Third Wave" Bill of Rights*, 4 EUR. HUM. RTS L. REV. 361 (2001); Clayton, *supra* note 4, at 46-47; Butler, *supra* note 226, at 365-66.

This article demonstrates that matters are not quite as straightforward as the above synopsis suggests. In particular, the judicial application of the interpretative provisions in the NZBORA and HRA inevitably reproduces the original tension between the protection of individual rights by the courts and an elected legislature's right to make law.³³² This tension emerges because there is no one self-evidently correct or appropriate judicial approach to adopt under these provisions. It is this article's thesis that measures such as section 6 of the NZBORA and section 3 of the HRA instead require the courts to choose between "teleological" and "textualist" interpretative methods. As this article demonstrates, different courts operating in different national contexts may then choose between these two methods differently. Also, the result of this judicial choice has important ramifications for the constitutional role that the courts will play *vis-à-vis* Parliament. Simply put, the United Kingdom judiciary's adoption of a "teleological" interpretative approach gives that country's courts greater scope to determine what the law should say than does the "textualist" approach preferred in New Zealand. The assumed ability to effectively rewrite legislation to render it compatible with the ECHR—or, the assertion of judicial mastery over the words chosen by Parliament in its enactment—involves an inflation of the courts' lawmaking power with a corresponding reduction in the lawmaking powers of Parliament. This fact returns us to the normative question that the article opened with: to what extent *should* the judiciary be empowered to ensure the laws chosen by elected representatives are consistent with individual rights (at least, consistent with these rights as understood by the judiciary as an institution)?

Of course, the issue is not immediately resolvable. Indeed, one of the key aims of this article is to demonstrate that this normative question is open to different answers under different conditions. For one thing, the preferred interpretative approach will depend in large part upon core commitments to one or another of the intellectual traditions, or camps of thought, outlined in the article's introduction. As Andrew Butler has commented in the New Zealand context,

Those judges who believe in the goals of fundamental rights protection will be more likely to give great weight to s[ection] 6. Those who believe that the people's rights and freedoms are adequately protected under existing law, who distrust rights talk, or who believe that the words of the other enactment should be departed from only in the case of clear ambiguity, will be more likely to see s[ection] 4 as the key. The Bill of Rights itself provides no criteria by which one can judge which approach is the correct one Thus, in many cases, a decision as to whether the Bill of Rights has any application to a case hangs on subjective judicial evaluation.³³³

However, this article demonstrates that while such judicial commitments are important, they are not simply a matter of individual inclination. They at least partly reflect a range of factors relating to the perceived intent behind each rights

332. See Waldron, *supra* note 14.

333. Butler, *A Bad Model*, *supra* note 138, at 327.

instrument, the international context in which each domestic instrument is applied, and the background constitutional culture of each nation. Therefore, it is not the case that judges in the United Kingdom simply “like” the idea of judicial enforcement of individual rights more than do judges in New Zealand. Their differing perceptions of what their role should be are shaped instead by the differing national circumstances in which they undertake their interpretative task.

This insight leads the authors to make two final remarks. First, the existence of this judicial choice regarding the appropriate interpretative approach under the NZBORA or HRA makes it difficult to predict exactly what consequences adopting these sorts of instruments will have for any given society. Certainly, claims that such instruments will not undermine the majority’s right to set society’s rules as they “only” permit the judiciary to interpret Parliament’s statutes in a rights-friendly manner somewhat miss the point. The real impact of such an interpretative provision will become clear only after the judiciary has decided how to apply it in the particular national circumstances at hand. Second, the differing judicial practice of rights-friendly interpretation in New Zealand and the United Kingdom complicates any neat “weak-form”/“strong-form” dichotomy of judicial review. Mark Tushnet has speculated that rights instruments authorizing weak-form judicial review of legislative measures may develop over time in the direction of strong-form review or else revert to parliamentary sovereignty *simpliciter*.³³⁴ This article provides some support for this thesis. Although the review function of the courts in each country may still be weak in comparison with jurisdictions such as the United States, the teleological interpretative approach adopted in the United Kingdom gives its judges far greater say over the content of the law than does New Zealand’s textualist approach. The usefulness of describing both systems as having “weak-form” judicial review is thus debatable; it may be more fruitful to acknowledge that New Zealand remains wedded to a traditional commitment to parliamentary sovereignty, while the United Kingdom has started down the road toward judicial enforcement of higher law constitutional norms.



334. See MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 43-76 (Princeton U. Press 2008); Mark Tushnet, *Weak-form Judicial Review: Its Implications for Legislatures*, 2 N.Z. J. PUB. & INT’L L. 7, 17-23 (2004); Tushnet, *supra* note 12, at 824 (noting that weak-form judicial review “may well be transformed in either direction--reducing [its] scope so that weak-form systems are actually systems of parliamentary supremacy (and thereby reproducing the worry about inadequate protection of liberal rights), or expanding [its] scope so that weak-form systems are actually strong-form systems (and thereby reproducing the worry about interfering with democratic self-governance).”). See also Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963 (2004).