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February 2005
A WORLD OF (LINGUISTIC) POSSIBILITY


BRIDGET FENTON

A dissertation submitted in partial fulfilment of the requirements for the degree of Bachelor of Laws with Honours at the University of Otago, New Zealand

October 2007
Language is a part of our organism and no less complicated than it.

Ludwig Wittgenstein

*Notebooks (1914 – 1916)*
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I would also like to acknowledge the comments I received from Professor Eric Barendt (University College London) and His Honour Justice John McGrath.

This dissertation is for my sisters, Virginia and Elizabeth.
## GLOSSARY OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>BORA</td>
<td>New Zealand Bill of Rights Act 1990</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights (1950)</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>HRA</td>
<td>Human Rights Act 1998 (United Kingdom)</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights (1966)</td>
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INTRODUCTION

This dissertation examines the impact of two contemporary bills of rights, the New Zealand Bill of Rights Act 1990 ('BORA') and the United Kingdom Human Rights Act 1998 ('HRA'), on statutory interpretation in the courts of New Zealand and the United Kingdom. Unlike other common law bills of rights, such as the Canadian Charter of Rights and Freedoms 1982, neither the BORA nor the HRA sanctions judicial invalidation of legislation. But, as will be seen, the bill of rights model adopted by New Zealand and the United Kingdom is problematic, since it provides an evaluative and interpretive role for judges, which is occasionally wont to ascend to quasi-judicial invalidation of legislation.

In Chapter I, the problems raised by bills of rights will be discussed, proceeding from the premise that New Zealand and the United Kingdom are both constitutionally committed to the tradition of Parliamentary sovereignty. The concept of Parliamentary sovereignty is elucidated with close reference to Jeremy Waldron's defence of democratic law-making, which, it is suggested, is a particularly elegant explication of the philosophical basis of Parliamentary sovereignty. Then, against this background, the legislative histories and enacted provisions of the BORA and HRA are explained.

Chapter II examines the experience of the BORA and HRA in the courts, and the approaches that New Zealand and United Kingdom judges have taken to their respective interpretive roles in the protection of rights. As will be seen, the BORA and HRA have generated quite distinct lines of precedent, and Chapter II concludes with the observation that in the United Kingdom, statutory interpretation has undergone, since the enactment of the HRA, a fundamental recharacterisation.

Noting that this recharacterisation seems to be at odds with the traditional concept of Parliamentary sovereignty, Chapter III attempts to shed light on the United Kingdom's novel interpretive path, such that it might be rationally
distinguished from that of New Zealand, rather than condemned as judicial
roguery.

Finally, it is proposed that the BORA and HRA, while anatomically
analogous, are the products of two politically, socially – and, increasingly,
constitutionally – divergent countries. Their interpretation and application,
therefore, is conditioned by the particular legal rubric in which each is operating.

But, setting aside for the moment the points of difference between New
Zealand and the United Kingdom, it is with the points of constitutional
convergence between the two jurisdictions that Chapter I begins.
CHAPTER I
THE PROBLEM AND THE CHOSEN SOLUTION

A. The Problem

1. Writ large: protecting the individual in a democratic legal system

The ascendancy of human rights since World War II has illuminated a tension between two values, democracy and individual rights. Rights seem, on one hand, to be essential to the maintenance of democracy. The right to freedom of speech, for example, facilitates participation in the democratic process. But, on the other hand, rights and democracy appear to be at odds.

Usually, it is the courts that protect individual rights, by way of 'judicial review' of legislation, and this role for the judiciary lies at the heart of the tension between rights and democracy. Courts are not democratic institutions; judges are neither representative of, nor accountable to, the citizens whose rights they are called to protect. Members of a legislature, on the other hand, are elected by, and are accountable to, their constituents. A crucial difference between courts and legislatures, therefore, is their respective relationships to citizens. In addition, courts and legislatures differ in their respective competencies. It is traditionally accepted that courts are experts in the law, and that legislatures are experts in policy. This distinction means that for rights to be within the purview of the courts, their subject matter must be within the courts' competency. Ronald Dworkin claims that rights involve questions of principle, not policy, and that they are therefore apt for judicial pronouncement. Jeremy Waldron posits, in opposition, that rights involve questions about which reasonable people disagree, and that they simply cannot be distinguished from questions of so-

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2 Adam Tomkins, Our Republican Constitution, Hart, Portland, p. 23.
called ‘policy’. If this is correct, then ‘rights’ are no more within the competency of courts than of legislatures. For Waldron,

people have a right to participate in the democratic governance of their community, and... this right is quite deeply connected to the values of autonomy and responsibility that are celebrated in our commitment to basic liberties.5

Thus, synthesis between individual rights and democratic participation is a point of contention. There is, of course, value in protecting individual rights. But, if that protection is effected through judicially enforced bills of rights, then it may undermine democracy by making undemocratic institutions responsible for the resolution of important moral questions.

2. Writ small: the particular constitutional circumstances of New Zealand and the United Kingdom

This antagonism between rights and democracy, stated above in the abstract, has a particular piquancy for New Zealand and the United Kingdom. Both countries have a long history of Westminster Parliamentary government, of which Parliamentary sovereignty is a traditional feature.6 The philosophical basis of Parliamentary sovereignty is discussed at length below, but, it is enough to note at this point that the constitutions of both New Zealand and the United Kingdom are *prima facie* rooted in the ‘ideal of political accountability’, fidelity to which seems to preclude the allocation of decision-making power to the courts.7

Further, it is significant that the BORA and HRA were not enacted in response to constitutional shifts or crises. There was no serious loss of confidence in the governments of either New Zealand or the United Kingdom to precipitate

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7 Tomkins, *Our Republican Constitution*, 1-2.
the adoption of a bill of rights. The relative constitutional calm that preceded the BORA and HRA is in contrast to the governmental legitimacy crisis that preceded the adoption of the South African Bill of Rights 1996, and the collapse of government in the Soviet bloc, following which former Soviet states adopted bills of rights that stipulated clear separation of powers and judicially enforceable rights. New Zealand and the United Kingdom, it seems, were captured by, rather than driven to, the moral promise of bills of rights.

Significantly, common law courts have long availed themselves of an overarching principle of ‘legality’ in their interpretation of statutes. This principle is comprised of a cache of ‘fundamental’ rights that courts presume Parliament to respect. It is presumed, for example, that Parliament does not intend to legislate retrospectively or contrary to the right to a fair trial, and these presumptions are invoked to read down legislation that is, prima facie, at odds with citizens’ rights. Since they are couched in terms of Parliamentary intention, common law presumptions avoid the slight of undemocratic decision-making. It is, in fact, dubious as to whether the ascription of ‘legality’ to a particular Parliament’s intention is descriptively accurate, but whatever their source, common law ‘presumptions’ are a substantive check on legislative action.

In light of these fairly benign constitutional circumstances, it may be asked of New Zealand and the United Kingdom, ‘why adopt a bill of rights?’ If, as Tomkins opines, the ‘beauty’ of Parliamentary government lies in its promotion of participatory democracy, and if the courts are already cognizant and protective of fundamental rights, why take up a legal measure that has as its raison d’etre the placing of limitations on popular will?

It is to be expected, then, that there was scepticism in New Zealand and the United Kingdom as to the constitutional shift that a bill of rights might entail. At the root of this scepticism lies a pervasive sense, among New Zealanders and

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8 Ibid, 9.
10 Claudia Geiringer, The Principle of Legality, the Bill of Rights and R v Hansen (draft; 2007).
Britons, that the ‘ideal’ of Parliamentary sovereignty should not lightly be compromised. That ‘ideal’, and the ‘circumstances of politics’ from which it gains its normative traction, are discussed next.

2.1. The heart of the problem for New Zealand and the United Kingdom: commitment to ‘a simple – and beautiful – rule’

Stated in the abstract, rights are appealing. But, problematically, ‘the whole business of thinking about rights... is something on which, with the best will in the world, people of good faith may differ.’ Different – although equally rational – people might disagree over any of the following questions:

(i) Which basic values should (or do) count as ‘rights’? Are rights only ever negative injunctions, or do affirmative guarantees (i.e. social and economic provisions) also count as rights?  
(ii) Who should (or does) count as a bearer of rights? Are rights only properly attached to natural persons, or should corporate bodies also enjoy their protection?  
(iii) Which relationships do rights govern? Are they a buffer only between the individual and the state, or should individual citizens also be legally required to respect one another’s rights?  
(iv) What do particular rights mean? For example, does the criminalisation of abortion protect the right to life, or does it infringe a woman’s right to privacy? Is the right to life even at issue in cases of abortion (i.e. is a fetus a ‘person’)?

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12 Tomkins, Our Republican Constitution, 1.  
13 Waldron, Law and Disagreement, 224.  
14 Compare, for example, the South African Bill of Rights 1996 (which includes social and economic rights) with almost any other common law bill of rights.  
15 This is particularly hard, since there is a disjunction between the legal and moral conceptions of personhood. But, this conceptual hurdle notwithstanding, BORA applies, ‘so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons’ (section 29).  
Empirically, therefore, disagreement over the specification and application of legal rights is ubiquitous. And, unless at least one party to every disagreement is either a ‘simpleton or [a] rogue’, then there is a genuine epistemological difficulty at the heart of questions involving rights.\textsuperscript{17}

This suggests a dilemma. If rights generate moral disputes of their own, and there is no a priori way to resolve such disputes, then questions involving rights seem to be subject to an infinite regress of justifications.\textsuperscript{18} Person X defends her view with Reasons A, B and C, and Person Y defends his view with Reasons D, E and F. The two sets of reasons \{A, B, C\} and \{D, E, F\} are incommensurable, and there is no apparent meta-reason, G, available to decide between them.

What is interesting about the BORA and HRA is that they both express a particular legal response to the fact of moral and political disagreement,\textsuperscript{19} which embodies a commitment to the ultimate value of democratic participation rather than elite adjudication.\textsuperscript{20}

If a commitment to democratic participation is the distinctive common premise of the BORA and HRA, then jurisprudence generated by the two rights instruments must be faithful to that principle.\textsuperscript{21} It is important, therefore, to understand the philosophical basis of Parliamentary sovereignty, such that the propriety of BORA- and HRA-jurisprudence can be properly evaluated. That concept is laid out next.

\textsuperscript{17} Waldron, \textit{Law and Disagreement}, 224.
\textsuperscript{19} Waldron calls the ‘felt need’ among members of a citizenry for a mechanism to decide questions on which those members disagree, the ‘circumstances of politics.’ Disagreement need not preclude collective decision-making if citizens can agree on a mechanism to settle disagreement (Waldron, \textit{Law and Disagreement}, 102).
\textsuperscript{20} Where ‘elite’ here is used to denote a small, specialist body, (e.g. a court), as opposed to a democratically enfranchised citizenry.
\textsuperscript{21} An anatomy of the BORA and HRA is outlined below, in part B, but for the present discussion it is sufficient to note that section 4 BORA and section 3(2) HRA expressly preserve Parliamentary sovereignty.
2.1.2. The Concept and Implications of Parliamentary Sovereignty

Parliamentary sovereignty is the principle that Parliament is supreme, and that judges are bound to interpret its enactments as they were intended to be interpreted.22

‘Parliament’, in this context, denotes:

a large deliberative body [the members of which] think of themselves as representatives... sometimes making the interests and opinions of their constituents key to their participation, sometimes thinking more in terms of virtual representation of interests and opinions throughout the society as a whole.23

The essential elements of a ‘Parliament’ in this sense are that its members are representative,24 elected by democratic means,25 and accountable to their constituents. Further, decisions in Parliament are openly partisan, since its members are representatives of society as a whole, in which partisan disagreement is the norm. As distinct from judicial bodies that make (purportedly) apolitical decisions, the decisions of a representative Parliament are, by definition, substantively contentious.26

2.1.3. Respect and Participation as the Virtues of Parliamentary Sovereignty

If Parliamentary sovereignty means that Parliament is competent to enact any legislation it wishes, and that however objectionable that legislation may be, it nonetheless attains the status of ‘law’, then why would devotees of rights endorse its virtue?

24 ‘The web of modern social life... means that no person can be present... in all the decision-making bodies whose actions affect her life...’ (Iris Marion Young, Inclusion and Democracy, Oxford University Press, Oxford, 1987, 124).
25 The standard meaning of which is universal adult suffrage.
26 Waldron, Law and Disagreement, 24.
The common law principle of legality, as noted above, provides some case-by-case protection for individual liberties, but that ‘principle’ is theoretically and practically problematic. Theoretically, the principle is awkward since it is, in fact, grounded not in Parliament’s intention, but in the common law itself.\(^\text{27}\) Its invocation by judges amounts to a substantive challenge to legislation, whereby the judiciary supplements legislative dictate with its own conception of ‘the good.’ Further, since the principle of legality is presumptive, not absolute, it yields in the face of ‘express [legislative] language or necessary implication to the contrary.’\(^\text{28}\) And, judicial interpretive presumptions have no impact on the legislative process: the iniquities of a statute might be ‘presumed’ away in court, but those iniquities remain on the statute books. Common law presumptions do not engage the legislature, or force it to reconsider its legislation. They are remedial purely \textit{ex post facto}.

Would not citizens’ rights be more cogently protected by some textual, promulgated and inalienable limits on the law-making powers of a legislature? Such a code of limits would take the form of a supreme law bill of rights, breach of which would be \textit{ultra vires} Parliament.

Clearly, those responsible for adopting the BORA and HRA did not believe in the merits of a supreme law bill of rights. Why? What rationale is there for a bill of rights that seems to give no more protection to rights than was already given by judicial common law presumptions? Rights-guided interpretation is of little use if a statute is clearly and unequivocally rights-infringing. Why enact a bill of rights that leaves courts powerless to do more than declare legislation to be rights-infringing?\(^\text{29}\)

This section will take up these questions, and outline the main objections to Parliamentary sovereignty, followed by the counter-arguments in its defence. In providing a conceptual defence of Parliamentary sovereignty, it is hoped that

\(^{27}\) Geiringer, \textit{The Principle of Legality, the Bill of Rights and R v Hansen} (draft; 2007), 13.
\(^{28}\) \textit{R v Secretary of State for the Home Department, ex parte Simms} [2000] 2 AC 115, per Lord Hoffmann, at 131.
\(^{29}\) See section 4(2) HRA.
the foundations will be laid for a principled evaluation of the jurisprudence generated by the interpretive provisions of the BORA and HRA, to be considered in Chapters II and III.

2.1.3.1. Against Parliamentary Sovereignty: Tyranny and Objectionable Auto-Normativity

There are two central objections to Parliamentary sovereignty, the first of which concerns the substance of the law that might emerge from a sovereign Parliament, and the second of which concerns an apparent paradox inherent in the concept of any law-making body being totally sovereign.

The core of the first objection is that since legislatures are elected on a majority basis, laws are enacted, effectively, by a majority of the population. This means that minorities might suffer oppression at the hands of the majority if their rights are eroded in the name of majority interests. Since a majority cannot be expected to protect the interests of minorities (because such protection would be implausibly altruistic), Parliament must be kept in check by some external body, whose business it is to protect the interests of minorities in the face of a determinedly self-interested majority.

The second objection involves what seems to be an inescapable problem of circularity inherent in the grant of absolute sovereignty to any law-making body. If a sovereign Parliament is legally unbounded, then it can pronounce authoritatively not only on particular legal rules but on the formal procedures for law-making: it can stipulate its own rule of recognition. But how can a body be trusted to formulate the rules to which it is subject with any degree of dispassion? A stark example of this problem is the practice of 'Gerrymandering', where legislatures determine the shapes of their own constituencies and

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30 The phrase 'auto-normativity' is due to Stéphane Perrault (cited in Webber, Democracy and Contemporary Constitutionalism, n29).
31 Waldron, Law and Disagreement, 13.
32 In those jurisdictions that subscribe to the validity of this objection, the role of oversight and protection is typically assigned to the Courts, whose job it is to '[detect] violations [of rights] and overrule any branch [of government] that commits them' (Ibid, 211).
consequently the number and nature of those citizens to whom they are accountable.\textsuperscript{33}

Waldron’s response to these objections forms his defence of the superiority of legislative law-making, and they are considered next.

2.1.3.2. Waldron on Respect

Waldron’s argument in favour of Parliamentary sovereignty, premised on the notion of inter-personal respect, proceeds along two main lines. Waldron claims that:

1. There is nothing inherently tyrannical in majority decision-making; and
2. In fact, only majority decision-making entails the proper degree of respect for the autonomy, intelligence, rationality and equality of each citizen that a rights-adherent would require.

Each proposition is considered in turn.

The idea of the majority tyranny implies that majority-decision and tyranny are co-extensive.\textsuperscript{34} But this co-extensiveness thesis, Waldron notes, is premised on the assumption that people are egoists, such that an individual’s vote or political expression represents ‘nothing more than... [his or her] particular interests or satisfactions.’\textsuperscript{35} But, many – perhaps most – citizens ‘[address] controversial issues about rights in good faith.’\textsuperscript{36} On this view, an individual whose preferences are in a minority is not necessarily imperilled because she is subject to the preferences of a majority. She might be, but there is nothing intrinsically tyrannical about subjecting one citizen to the will of another.

It is possible that a ‘decisional’ majority will unjustly subordinate the interests of a ‘topical’ minority (i.e. a minority whose rights are at issue) in any given case.\textsuperscript{37} This is a risk where the system of legal decision-making accords

\textsuperscript{33}Webber, Democracy and Contemporary Constitutionalism, 427.

\textsuperscript{34}Waldron, The Core of the Case Against Judicial Review, 1395.

\textsuperscript{35}Waldron, Law and Disagreement, 13.

\textsuperscript{36}Ibid.

\textsuperscript{37}Waldron, The Core of the Case Against Judicial Review, 1397.
sovereignty to a majoritarian institution, such as Parliament. But it is a risk of substantive injustice, where a particular law is objectionable to a particular group. It is not a risk inherent in the process of majority decision-making. If, as Waldron urges, we believe that most people are not pathologically anti-rights and anti-minorities, then we should also believe that most people will 'take one another's rights seriously.'

If majority decision-making is not inherently tyrannical, then that counts in its favour. But another, more critical, feature of majority decision-making as a means of government can be proffered in its defence. This might broadly be called 'respect for persons,' and can be distilled into three simpler elements: respect for individual intelligence and rationality, respect for individual autonomy, and respect for the equality of individuals.

According ultimate sovereignty to Parliament puts final decisions in the hands of persons who were elected to Parliament on the basis of the 'sincerely held views' of each adult citizen. This position does not indulge the intuition that some people are better equipped to weigh policy alternatives than others, but rather adheres to the principle that every person should be involved in those decisions that affect him or her.

Second, the sovereignty of majority-decision expresses respect for individual autonomy. If disagreement is pervasive in politics, then according the views of each person weight is respectful, because it does not attempt to gloss over the fact of difference or aggregate autonomous views into one seamless whole.

Finally, majority decision-making is respectful of the equality of individuals. If every person's vote counts equally, then nobody is privileged above anyone else. In a large jurisdiction, no individual vote carries much

38 Ibid, 1400.
39 See Waldron, Law and Disagreement, Chapter 5, especially pp. 108-118
41 Ibid, 114. See also Young, Inclusion and Democracy, 125-6.
42 Waldron, Law and Disagreement, 110.
weight. But neither does one individual vote carry more weight than any other; majority voting gives 'each person the greatest say possible compatible with an equal say for each of the others.'

2.1.3.3. Parliamentary Sovereignty and Participation

The problem of auto-normativity is a problem of circularity, and, because no institution is beyond political disagreement, there seems to be no way to evade it. At some stage in the legal process, one institution must pronounce authoritatively on the law. And, adherence to the rule of law means that that law will apply to the person or body pronouncing upon it.

So, if a sovereign Parliament regulates itself, then provided that an adequate theory of representation can be offered, it is actually society that is regulating itself, and Webber argues that this implies a rich kind of democratic participation. If democratic participation is taken seriously, then society should not require an external regulator to ensure the propriety of its law-making mechanisms. Democratic participation makes politics dynamic, and this dynamism counters the problem of 'auto-normativity' by ensuring perpetual fluidity of discourse.

Since, like moral disagreement itself, reflexivity is a necessary feature of law-making, it seems that the pursuit of maximal participation is the best real-world solution to an inescapable problem. Participation, in the form of representative Parliamentary law-making, is perhaps the best antidote to the fear of objectionably 'auto-normative' legal rules.

\[\text{Ibid, 110.}\]
\[\text{Waldron, The Core of the Case Against Judicial Review, 1388.}\]
\[\text{Webber, Jeremy. Democracy and Contemporary Constitutionalism, 427.}\]
\[\text{For a comprehensive discussion of which, see Young, Inclusion and Democracy, 125.}\]
\[\text{Webber, Democracy and Contemporary Constitutionalism, 427.}\]
\[\text{Ibid.}\]
B. The Chosen Solution: The Genesis of the BORA and HRA

The project of the foregoing discussion was to highlight the pervasiveness of disagreement, and the fact that it is not negated by the introduction of a lexicon of ‘rights.’ Nevertheless, New Zealand and the United Kingdom have enacted bills of rights, albeit fairly weak versions, which expressly retain Parliamentary sovereignty, and stipulate for the judiciary only an interpretive role in rights-protection. With the philosophical basis of Parliamentary sovereignty in mind, the genesis and character of those bills of rights is now examined.

New Zealand and the United Kingdom are increasingly divergent jurisdictions. New Zealand is an isolated state, unencumbered by formal community legal requirements or obligations. The United Kingdom, on the other hand, is a member of the Council of Europe, and thereby committed to the European Convention on Human Rights 1950 (‘ECHR’). New Zealand is not without international legal and political obligations, but they are of a quite different character to those of the United Kingdom. Thus, whereas the legal systems of New Zealand and the United Kingdom remain, formally, rooted in the same basic principles, those principles are borne out idiosyncratically in each jurisdiction.

Human rights adjudication is a striking example of this divergence. The BORA and HRA are structurally analogous enactments, but, whereas the HRA has excited an ‘adventurous’ (or, less flatteringly, ‘aggressive’) mode of

49 The ECHR ‘uniquely creates a court’ (the European Court of Human Rights) which hears human rights complaints from individuals of party states, and has a discretionary remedies jurisdiction: Ewing, Human Rights, 302.

50 By way of illustration, New Zealand is state party to the International Covenant on Civil and Political Rights, which has its own ‘watchman’ body, the Human Rights Committee, which can consider communications from individuals who allege that New Zealand has breached its ICCPR obligations. But whereas the European Court can issue binding judgments (notwithstanding the (classic, at international law) problem of enforcement), the HRC can only make ‘recommendations’.

51 Kris Gledhill, The Interpretative Obligation: The Art of the Possible (Why the Supreme Court’s Failure in Hansen v R [2007] NZSC 7 to Use the Interpretative Tool was Wrong (a paper presented at the New Zealand Bill of Rights Conference, Auckland, July 2007).

statutory interpretation, New Zealand has not seen the sustained development of a comparable interpretive method.

1. The enactment of the BORA

The BORA is emphatically a Parliamentary bill of rights, insofar as it affirms the supremacy of all other legislation, demarcates a limited role for courts in the promotion of legislative consistency with substantive rights, and provides for ex ante rights-protection via oversight of legislation through Parliament by the Attorney-General.

The particular rights contained in the Act are unremarkable. In character, they are civil and political, and they are enforceable only against the legislative, executive or judicial branches of government or, in lieu of the government, persons or bodies performing a public function ‘conferred or imposed on [them] by or pursuant to law.’ In addition to being exclusively ‘civil and political’ in character, BORA rights are broadly expressed, the only generalised limit on their scope being the section 5 injunction that Part II rights can be limited where such limitation is ‘demonstrably justified in a free and democratic society.’

Geoffrey Palmer’s 1985 White Paper was the direct catalyst for the BORA, although its final form is quite different from Palmer’s proposal. The White Paper drew on the Canadian Charter of Rights and Freedoms 1982, and the ICCPR. The draft Bill was a supreme law document that would have empowered judges to declare any law inconsistent with the bill of rights to be invalid.

Clause 3 of the Bill, retained without alteration as section 5 BORA, glossed the categorical inviolability of the protected rights, stating that they were to be

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53 Section 4 BORA.
54 Section 6 BORA.
55 Section 7 BORA.
56 Section 3 BORA.
58 Ibid, clause 1 draft Bill.
'subject only to such reasonable limits prescribed by law as can be demonstrably justifiable in a free and democratic society.' Clause 23 was retained in essentially the same form as section 6 BORA, and was a directive to those involved in statutory interpretation, encouraging preference for interpretations of legislation that would result in the meaning of an enactment being consistent with the bill of rights. Clauses 3 and 23, therefore, were qualifications on the power of constitutional rights to affect the validity of legislation. Whereas clause 3 recognised that rights compete with other rights and with legislative policies, clause 23 expressed a preference for sympathetic statutory interpretation over automatic judicial invalidation of _prima facie_ rights-infringing legislation: there should be a presumption that Parliament would not legislate contrary to rights.

Countering the concern that a supreme law bill of rights would transfer political power to the judiciary, Palmer stated that overseas experience suggested that judges entrusted with the final word on the status of legislation performed their role 'responsibly.' Moreover, Palmer argued, judicial power under current arrangements is not as limited as it might seem, since the judicial role is inescapably value-laden. Citing _Taylor v New Zealand Poultry Board_, Palmer further claimed that there was a 'growing legal opinion' that it is in fact possible to restrain future Parliaments.

The draft Bill was sent to the Justice and Law Reform Select Committee, which, after hearing submissions, recommended against Palmer's proposal. In lieu of a supreme law document, the Committee recommended that Parliament enact a bill of rights as an ordinary statute, unentrenched and without provision for judicial invalidation of inconsistent legislation.

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59 _A Bill of Rights for New Zealand: A White Paper_, para 6.5.
60 In support of this contention, Palmer invoked, Lord Reid's dictum that 'for better or worse judges do make law' (ibid, para 6.12).
61 [1984] 1 NZLR 394, per Cooke J.
63 Ibid.
1.1. The Late Addition of Section 4

Section 4 was a late addition to the BORA, intended to make clear that judicial invalidation of legislation is excluded by the Parliamentary model. Notwithstanding this addition, however, clauses 3 and 23 (enacted as sections 5 and 6 BORA respectively) were not removed. The result is a confused combination of assertions; Parliamentary sovereignty is affirmed by section 4, but section 6 directs the judiciary to seek rights-consistent meanings where possible. The dilemma, borne out by BORA jurisprudence and commentary, is, when is it appropriate to cease the search for a rights-consistent meaning per section 6 and to invoke section 4?

2. The enactment of HRA

In 1998, Tony Blair’s Labour Government enacted the HRA, stating that Labour was ‘pledged to modernise British politics’. Blair claimed for his Government’s Bill that it 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 [judicial] contribution’ to European human rights jurisprudence.

Like the BORA, the HRA is a Parliamentary bill of rights, and as in New Zealand, there was debate in the United Kingdom over the merits of adopting a supreme law model. Proponents of a supreme law instrument argued that questions of rights should be within the purview of British judges who are well-versed in the nuances of British law and politics, rather than the sole preserve of European judges in Strasbourg.

But, proposals for a supreme law instrument found little favour, possibly because the mooted Bill was a move to incorporate a foreign instrument, and it

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64 Which incorporated the ECHR into domestic law.
67 Ibid. This claim is discussed in Chapter III.
was felt that foreign law should not form the basis of a domestic constitution. Further, British constitutional tradition was generally committed to the principle of Parliamentary sovereignty. Not only would a supreme law document 'Europeanise' domestic law, but it would transfer to the judiciary a large degree of law-making power hitherto fiercely defended as the unqualified domain of Parliament.  

Section 3(1) HRA, like section 6 BORA, mandates rights-guided judicial interpretation of legislation. Unlike the BORA, the HRA expressly provides for judicial declarations of legislative incompatibility with ECHR rights, via section 4(2). Section 4(2) is the extent of judicial remedial discretion under the HRA, and 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. The Parliamentary character of the HRA is manifest in sections 10 and 19, which provide for ex ante and ex post Parliamentary rights-protection respectively. 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-compliant, or that notwithstanding ECHR-inconsistency, he or she wishes the Bill to proceed. Section 10 is engaged if a section 4(2) declaration of incompatibility is made, in case of which section 10(2) permits a Minister to amend the incompatible legislation if he or she considers that there are 'compelling reasons' to do so.

Section 2(1) requires United Kingdom courts to consider European Court of Human Rights decisions when considering HRA cases, although European Court decisions are not binding on United Kingdom judges.

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69 Section 3(1) reads: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights.'

70 Section 4(2) reads: 'If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.'

71 Section 4(6)(a) reads: 'A declaration under this section ('declaration of incompatibility') ... (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.'

72 Section 19(1)(a) and (b) HRA.
Thus, with the exception of some idiosyncratic features (explicable in terms of the European connection), and the availability of judicial declarations of incompatibility and consequent ‘fast-track’ legislative amendment procedures, the HRA is mechanically analogous to the BORA. In terms of interpretation of legislation, the two Acts are formally identical. Section 6 BORA and section 3 HRA (hereafter the ‘interpretive sections’) mandate rights-consistent interpretation of legislation where such interpretation is ‘possible’, or ‘can’ be achieved.\(^{73}\) In terms of legislation, therefore, \textit{ex post} rights-consistency can be achieved if the interpretive process permits a rights-consistent meaning to be given to the legislation in question. Of course, this delineation simply restates the issue: when is a rights-consistent meaning ‘possible’ and when is such a meaning \textit{not} possible?

‘Possibility’, of course, implies ‘impossibility’, and the BORA and HRA seem thereby to leave intellectual space for rights-infringing legislation.\(^{74}\) The experience of the two Acts in the courts, and judicial use of the interpretive sections, is the focus of Chapter II.

\(^{73}\) Although BORA uses the verb ‘can’, where the HRA uses the adjective ‘possible’, there is no material linguistic difference between the two interpretive instructions: see Rishworth et al., \textit{The New Zealand Bill of Rights}, pp. 146-47; Hansen v R [2007] NZSC 7 at para 13, per Elias CJ.

\(^{74}\) This was acknowledged in the New Zealand Supreme Court by Elias CJ in Hansen v R [2007] NZSC 7, at para 25, and in the House of Lords by Lord Nicholls in Ghaidan v Godin-Mendoza [2004] UKHL 30, at para 33.
CHAPTER II
THE IMPLEMENTATION OF THE SOLUTION

A. Waldron on 'unintentional legislation'

For Waldron, the authority of a piece of legislation is, its emergence as a 'unum' out of a plurality of ideas proposals, in circumstances where there is 'the need for one decision, made together, not many decisions, made by each of us alone.' Legislation is a synthesis of diverse understandings and motivations, and a piece of legislation does not reflect the discreet intentions of each legislator, but the unified intention of the whole legislature. What is the difference between these two kinds of intention and what does that difference imply for statutory interpretation?

1. Legislatures are artificial organs of rationality

A legislature is a 'large deliberative body' of individuals, and the idiosyncrasies of each legislator determine the way in which he or she views a particular statutory measure. What unifies and is common to all legislators is a commitment to the enactment of laws, the authority of which each legislator acknowledges as distinct and independent of his or her particular 'preferences.' The ostensible homogenisation of multiple views of legislators does not, Waldron emphasises, 'abolish' or negate the fact of disagreement, but:

[what] the decision is – what [the legislature] has done – is the text of the statute as determined by the institution's procedures... [which] make [the legislators] one in action... there simply is no fact of the matter concerning a legislature's intentions apart from the formal specification of the act it has performed.

75 Waldron, Law and Disagreement, 144.
76 Ibid, 145.
77 Waldron, The Core of the Case Against Judicial Review, 1361.
78 Ibid, 126.
79 Ibid, 145.
2. Statutory text is an interpreter’s pole star

What does this conception of a legislature as a single, artificial entity imply for statutory interpretation? In short, it implies that there is no ascertainable legislative ‘intention’, apart from that which is ‘part of the linguistic meaning of the legislative text itself.’ The only intentionality that survives the artificialisation of individual intentions into a single intention is simply a legislator’s ‘yea’ or ‘nay’ in relation to a given statute, not any hopes, aspirations or understandings that may have accompanied the vote.

For statutory interpretation, this thesis about legislative intention has two consequences. The first is that, since the ‘speech act’ of the legislature is artificial, made in spite of disagreement, any attempt to go behind it to discover an intention not manifest in the text of the statute will engender disagreement. The only wholly common ground among legislators is their shared language. A statute’s text is the only resource available to a person faced with the interpretive question, ‘what did the legislature intend when it enacted this statute?’ And, ambiguities in statutory text can only be resolved with reference to the conventions of, and concepts contained in, language. No cache of conventions – other than those represented by the shared language of the legislators – is properly ascribable to all legislators.

Language, on Waldron’s view, is therefore ‘canonical’ in legislation, and the pole star of statutory interpretation.

B. Section 6 BORA and section 3 HRA in practice

Waldron’s claim that statutory language is the only proper reference point in statutory interpretation is not the view that has prevailed in HRA jurisprudence, although New Zealand’s legal community seems less willing to

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80 Ibid.
81 Ibid, 143.
82 Ibid, 145.
83 Ibid.
84 Ibid, 145.
repudiate the constraining role of language in the construction of statutes. As John Burrows has noted:

[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.


_Hansen v R_ is the current judicial authority on the meaning, role and scope of section 6 BORA, and as such, is discussed in detail later in this chapter. But, section 6 jurisprudence in the New Zealand Courts since 1990 has been neither uniform nor linear. In the discussion that follows, the life of section 6 up until _Hansen_ will be sketched, with reference to those cases that have attempted to define the character and ambit of the section.

1.1. Flexing the Interpretive Muscle: _Flickinger, Poumako and Pora_

The first BORA case to come before the New Zealand Court of Appeal was _Flickinger v Crown Colony of Hong Kong_. The interpretive question before the Court was whether section 66 Judicature Act 1908 contained an appellate jurisdiction for criminal _habeas corpus_ cases. Only a literal reading of section 66, in isolation from its broader textual framework, could yield the interpretation contended by the appellant. The Court of Appeal, stressing the mandatory character of section 6 BORA, held that:

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9 Wilberg, *The Bill of Rights and Other Enactments*, 112.
11 Section 23(1)(c) NZBORA provides that, ‘Everyone who is arrested or detained under any enactment shall have the right to have the validity of the arrest or detention determined without delay by way of _habeas corpus_ and to be released if the arrest or detention is not lawful.’
there is force in the argument that to give full measure to... section 23(1)(c) [BORA], section 66 of the Judicature Act should now receive a wider interpretation than has prevailed hitherto.\footnote{1991} 1 NZLR 439, at 441.

\textit{R v Poumako}\footnote{2000} 6 NZLR 695. and \textit{R v Para}\footnote{2001} 2 NZLR 37. did not emulate Flickinger's hyper-literalist approach to statutory interpretation, but they came close. In \textit{Poumako}, the Court of Appeal, addressing a \textit{prima facie} retrospective provision of the Criminal Justice Act, was availed of a 'fortuitous' legislative timeline, which permitted the Court to hold that because a particular retrospective amendment was vacuous in the absence of an earlier statutory definition, its retrospectivity could apply only as far back as that definition.\footnote{2000} 2 NZLR 695, para 40. The Court recognised the artificiality of this neat interpretive footwork, noting that it limited what was apparently a provision of 'general and unlimited' retrospectivity.\footnote{2000} 2 NZLR 695, para 40. Nevertheless, it stated that since its interpretation was 'arguably a meaning which the provisions [could] be given,' it was mandated by section 6 BORA.\footnote{Ibid.} Dissenting, Thomas J argued that while section 6 may well permit exploitation of linguistic 'equivocal[ity],' it could not save a rights-infringing piece of legislation where the language of that legislation was 'unequivocal.'\footnote{Ibid, para 80.} Despite this dissent, it is significant that although the majority's interpretation may have been inconsistent with the overall legislative scheme, it was still premised upon a particular textual interpretation. That interpretation was strained, but it was not disengaged from the constraining force of legislative text.

\textit{Para} dealt with the same retrospective provisions of the Criminal Justice Act as in \textit{Poumako}, and in a similar interpretive move, the \textit{Para} Court held that the retrospective provision should be read as contingent upon a 1993 amendment

\footnotesize{\begin{itemize}
  \item \footnote{1991} 1 NZLR 439, at 441.
  \item \footnote{2000} 6 NZLR 695.
  \item \footnote{2001} 2 NZLR 37.
  \item \footnote{2000} 2 NZLR 695, para 40.
  \item \footnote{2000} 2 NZLR 695, para 40.
  \item \textit{Ibid.}
  \item \textit{Ibid,} para 80.
\end{itemize}
which permitted the later amendment. Section 6 BORA was not required for this interpretation, and the Court emphasised that its preferred interpretation was in fact mandated by a thoughtful construction of the ‘words’ of the statute, informed by the general principle against retrospectivity contained in the principal Act. But, section 6 provided principled support for the court’s reading of the legislation in question: in this instantiation, section 6 is a legitimating instrument.

1.2. Descending from section 6-centricity: The ‘reasonableness’ criterion
The preceding three cases are language-centric. Flickinger invokes section 6 BORA to sanction its strained interpretation, and Poumako and Pora emphasise its ‘enabling’ character. All three cases remain faithful to the notion of linguistic constraint, albeit that the majority in Poumako repudiates the orthodox interpretive notion of Parliamentary intention.

Conspicuously absent from the judgments in Flickinger, Poumako and Pora is any mention of sections 4 and 5 BORA. Section 4 is the BORA’s ‘rule of statutory primacy’ making plain that the BORA does not mandate judicial invalidation of legislation. Section 5 provides that BORA rights are limitable in some circumstances, and stipulates a ‘justification’ test for such limitation.

The interplay between sections 4, 5 and 6 was discussed at length in Ministry of Transport v Noort, where Cooke P in stated that section 6 is a kind of quid pro quo for the rule of statutory primacy in s4. Thus, section 6 softens the section 4 injunction, but its ambit is defined in terms of ‘reasonableness.’ A ‘strained interpretation,’ Cooke P opined, ‘would not be enough.’

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98 Ibid.
102 Ibid, 272.
1.3. The Shortcomings of Linguistic Possibility: Quilter v Attorney General

Quilter v Attorney General exemplifies the idea of interpretive ‘reasonableness,’ and is an interesting precedent since its facts are quasi-analogous to those of Ghaidan v Godin Mendoza in which the House of Lords expressly held that statutory interpretation pursuant to section 3(1) HRA should not proceed from the premise that section 3(1) requires a ‘reasonable’ interpretation.

Quilter involved an appeal by same-sex couples who had been refused marriage licences, and who claimed that such refusal was discriminatory per section 19 BORA. As it happened, a non-discriminatory reading of the Marriage Act was linguistically possible, insofar as the statutory language was gender-neutral. But, at the outset, the Court noted that the wider statutory scheme clearly conceived of marriage as between two persons of the opposite sex. Only an artificial, Flickinger-esque reading of the Marriage Act could yield a rights-consistent meaning, and the Court was not prepared to engage in such interpretive literalism. In addition, as recently as 1995, Parliament had expressly distinguished same-sex relationships from ‘marriages’, indicating that it ‘still viewed marriage in traditional terms.’ In short, the Court felt that no ‘legitimate process of statutory construction’ could yield the meaning contended by the appellants. The Marriage Act may or may not be discriminatory, but its meaning is clear. It was improper to use section 6 BORA to contradict that clear meaning.

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104 Rishworth et al., The New Zealand Bill of Rights, 146.
106 Ibid, para 44, per Lord Steyn. His Lordship erroneously claims ‘imposes a requirement that the interpretation to be adopted must be reasonable.’ Section 6 contains no such requirement, albeit that New Zealand case law has glossed the section with a ‘reasonableness’ criterion.
108 Ibid, at 578.
109 Ibid, at 580.
110 Ibid.
111 Ibid, at 573.
These various threads of section 6 BORA jurisprudence were discussed and tied up by the Supreme Court, in its first consideration of the operative provisions of the BORA, *Hansen v R*. That case is discussed next.

2. *Hansen v R*: the limits of language in statutory interpretation

*Hansen* concerned section 6(6) Misuse of Drugs Act 1975, which provides that a person caught with more than a specified quantum of a prohibited drug shall ‘until the contrary is proved’ be deemed to possess that quantum for the purpose of supply. On its face, this provision is inconsistent with the right to be presumed innocent until proven guilty, which is protected by section 25(c) BORA. Since section 6(6) *prima facie* breached a provision of the BORA, section 6 BORA was engaged, and the Supreme Court was required to address the possibility of an alternative, rights-consistent meaning.

*Hansen* saw the Supreme Court face an interpretive fork in the road, at which it was required to elect either to stay New Zealand’s hitherto reasonableness-driven course, or to pursue the path being forged by the House of Lords in its use of the HRA. In favour of staying the course was an earlier New Zealand case,112 and a pervading sense among the Supreme Court judges in *Hansen* that the contended rights-consistent meaning was simply not ‘genuinely open in light of [the] text and purpose [of section 6(6) Misuse of Drugs Act].’113 In favour of joining the House of Lords was a case factually analogous to *Hansen*, in which the House of Lords held that section 3(1) HRA mandated a rights-consistent reading of a reverse onus provision.114 In the result, none of the five members of the *Hansen* Court concluded that a rights-consistent reading of section 6(6) was possible, even in light of section 6 BORA and the authority from the House of Lords.115

113 Per Blanchard J at para 61.
114 R v Lambert [2002] 2 AC 545.
115 Per Elias CJ at para 39; per Blanchard J at para 56; per Tipping J at paras 149 and 166; per McGrath J at para 256 and 257; per Anderson J at 288.
With the exception of Elias CJ, all Supreme Court judges in *Hansen* concurred on the approach to be taken in the application of sections 4, 5 and 6 BORA. Most methodically laid out in the judgment of Tipping J, the *Hansen* approach involves addressing section 5, 6 and 4 in that order.\(^{116}\) First, the 'natural' meaning of the provision in question must be ascertained, and if that meaning *prima facie* limits a right, then it must be evaluated in terms of section 5.\(^{117}\) If the *prima facie* limit is not justified in terms of section 5, then section 6 mandates a re-examination of the words of the provision. It is only if the section 6 inquiry does not yield a 'reasonably possible'\(^ {118}\) rights-consistent meaning that the *prima facie* meaning must be adopted, per section 4.\(^ {119}\) To this general methodological outline, other members of the majority added, variously, that Parliament clearly intended that a section 6 interpretive inquiry be conducted in light of section 5 BORA;\(^ {120}\) that the scope of the BORA is in part defined by section 5,\(^ {121}\) and that the invocation of section 5 prior to section 6 gives the right measure of recognition to 'the role of section 5 in the interpretive process.'\(^ {122}\)

The majority approach to sections 5 and 6 was rejected by Elias CJ, who argued that whereas section 6 is 'expressly' a rule of statutory interpretation, section 5 is directed at legislators.\(^ {123}\) For Elias CJ, it is unnecessary, when interpreting legislation, to go beyond the terms of section 6. Doing so risks missing a meaning consistent with a right in unabridged form, since a section 5 analysis might justify the *prima facie* limit, albeit that a non-limiting meaning is in fact available. Stating that section 6 is the 'key to the policy of the New Zealand

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\(^{116}\) [2007] NZSC 7, para 92.

\(^{117}\) The section 5 inquiry, not discussed here, is complex. It involves a judicial balancing exercise in which the end sought to be achieved (i.e. legislative policy) is weighed against the means used to achieve it (i.e. the actual provisions of the legislation).

\(^{118}\) Ibid.

\(^{119}\) Ibid, at para 92.

\(^{120}\) Ibid, per McGrath J at para 189.

\(^{121}\) Ibid, per Anderson J at para 263.

\(^{122}\) Ibid, per Blanchard J at para 58.

\(^{123}\) Ibid, per Elias CJ at para 15.
Bill of Rights Act,' Elias CJ echoed the views of Cooke P and Gault J in Noort, that section 6 is the primary judicial tool in the BORA.  

2.1. Misuse of Drugs Act 1985 under the interpretive microscope

The interpretive dilemma in Hansen was between two readings of the reverse onus provided for in section 6(6) Misuse of Drugs Act. The section’s *prima facie* meaning, and that contended by the Crown, was that it imposed a legal onus on the accused. The alternative meaning, contended by Mr Hansen, was that it imposed only an evidential onus.

Problematically for Mr Hansen, in the case of R v Phillips the Court of Appeal had heard and rejected exactly his argument. The crucial feature of section 6(6), according to the Phillips court, was the word ‘proved’. It would be, Cooke P held, ‘strained and unnatural’ to interpret section 6(6) as placing no more than an evidential burden on the accused.

The Phillips precedent might have disposed of the interpretive question. But, the House of Lords in R v Lambere had interpreted a similar reverse onus provision, in light of section 3(1) HRA, in just the manner contended by Mr Hansen. The House of Lords premised its decision on two propositions. The first, is that section 3(1) HRA may require that a Court depart from an unambiguous meaning in favour of a different, rights-consistent meaning. The second, was that of Professor Glanville Williams who posited that ‘proof’ is a concept with different ‘shades of meaning.’ While the most obvious ‘shade’ is the traditional concept of proof beyond reasonable doubt, the law recognises a lesser, equally valid concept of ‘proof’, namely proof on the balance of probabilities. Since proof

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125 A legal onus is an onus to prove the case to the required legal standard and it does not shift over the course of a trial.
126 An evidential onus is an onus to raise an issue, the proving or disproving of which then shifts to the party that bears the legal onus.
127 [1991] 3 NZLR 175.
128 [2002] 2 AC 545.
130 Ibid, per Tipping J at para 162.
beyond reasonable doubt and proof on the balance of probabilities entail different standards, there is no reason why the law should not accept a third standard, \textit{viz.} that of raising a reasonable doubt.\(^{131}\) Professor Williams bolstered his thesis with 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.

Such was the authority from the House of Lords, ripe for the picking by the New Zealand Supreme Court. And, additional to Professor Williams' thesis was a cache of dicta from the House of Lords to the effect that the interpretive obligation under section 3(1) HRA required an approach different to that ordinarily employed in statutory interpretation.\(^{132}\) However, no member of the \textit{Hansen} Court was persuaded that the House of Lords' approach was correct.

On the actual interpretive question before the Court, there was little favour for Professor Williams' thesis. Tipping J (along with Elias CJ and McGrath and Anderson JJ) accepted the Professor's argument that reverse legal onuses are a blight on the landscape of criminal procedure. But, Tipping argued,

\begin{quote}
\begin{itemize}
  \item 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.\(^{133}\)
\end{itemize}
\end{quote}

As to the latter point, it is not 'reasonably possible' that the words of section 6(6), could mean 'until the contrary is tested.'\(^{134}\) Echoing this view, McGrath stated simply that, "'to test" is not an available meaning of prove in a legal context,'\(^{135}\) and Anderson J pointed out that Mr Hansen's contended interpretation would

\(^{131}\) \textit{Ibid}, at para 163.
\(^{132}\) Tipping J notes that 3(1) HRA looks, in the use to which it is put by the House of Lords, like a 'concealed legislative tool' (\textit{ibid}, para 158).
\(^{133}\) \textit{Ibid}, at para 164.
\(^{134}\) \textit{Ibid}, at para 165.
\(^{135}\) \textit{Ibid}, at para 256.
render section 6(6) vacuous, since on that interpretation, the prosecution would still have to prove every element of the offence beyond reasonable doubt. Elias CJ was equally clear, reaching with ‘reluctance’ her conclusion that section 6(6) imposes a legal onus. For Blanchard J,

even in a Bill of Rights environment, it would be overstretched 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.}

2.2. The Ambit of Section 6 Interpretation Generally

The tenor of the Hansen Court is plain. In the absence of ambiguity or indication from statutory language, there is no justification for adopting an artificial and unintended (albeit BORA-consistent) meaning for a legislative provision.

Post-Hansen it can be said that section 6 BORA interpretation is glossed with a criterion of ‘reasonableness’ (as in earlier cases), and that the limits of interpretive reasonableness should be ascertained from the text and the purpose of the legislation in question. These two propositions, articulated by all members of the Court, are at odds with the House of Lords’ approach to section 3(1) HRA, and therefore constitute an express rejection by the New Zealand Supreme Court of the United Kingdom’s rights-centric, atextual mode of HRA adjudication.

The House of Lords’ view of its interpretive section, per Tipping J, seems to be that it:

\[\text{136 Ibid, at para 288.}\]

\[\text{137 Ibid, at para 56.}\]

\[\text{138 Synonyms for which might be ‘tenable’ (ibid, per Tipping J at para 158) or ‘intellectually defensible’ (per Lord Millet, dissenting, in Ghaidan v Godin Mendoza [2004] UKHL 30).}\]

\[\text{139 Geiringer, The Principle of Legality, the Bill of Rights and R v Hansen (draft; 2007), 12.}\]
mandat[es] a judicial override of Parliament, if Parliament’s meaning is inconsistent with a right or freedom.\textsuperscript{140}

Diplomatically, Tipping J added that:

[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.\textsuperscript{141}

In terms of the interpretive obligation mandated by section 6 BORA, \textit{Hansen} is not a radical judicial statement. The view of the Supreme Court, neatly expressed by McGrath J, is that:

the 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.\textsuperscript{142}

3. Section 3 HRA, the House of Lords and the Dispensability of Interpretive Norms

In \textit{Ghaidan v Godin-Mendoza},\textsuperscript{143} the House of Lords overturned one of its own precedents under the aegis of section 3(1) HRA. In doing so, it held that its revised interpretation was required by the ‘unusual and far-reaching character’ of the section 3(1) directive.\textsuperscript{144}

The facts of \textit{Ghaidan} are straight-forward. The United Kingdom’s Rent Act 1977 provided assured tenancies for the surviving ‘spouse’ of a deceased tenant. By way of a 1988 amendment to the principal Act, ‘spouse’ was expressly stipulated to include a person who had lived with the original tenant ‘as his or

\textsuperscript{140} [2007] NZSC 7, para 158.
\textsuperscript{141} Ibid.
\textsuperscript{142} Ibid, at para 237.
\textsuperscript{143} [2004] UKHL 30.
\textsuperscript{144} Per Lord Nicholls at para 30.
her wife or husband. The surviving tenant in this case was one partner of a same-sex relationship, and the question before the House of Lords was whether the appellant was properly described as a ‘spouse’ for the purposes of the Act. As in Hansen, the House of Lords was faced with conflicting earlier authority on the same point, Fitzpatrick v Sterling Housing Association, which had held that ‘spouse’ in the context of the Rent Act was a gender-specific term, denoting a person of the opposite sex to the original tenant.

The decision in Fitzpatrick was reached before the HRA came into force, and the House of Lords did not rule on whether or not its reading of the Rent Act was discriminatory. It was enough (pre-HRA, at least), to conclude that whatever the logic of the 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.

From this fairly orthodox decision the House of Lords leapt, in 2004, to an altogether parallel plane of statutory interpretation. In Ghaidan, the constraining influence of both statutory text and statutory purpose were repudiated. Two years prior to Ghaidan, however, the House of Lords tested its novel approach to statutory interpretation, in the case of R v A. That case is discussed next.

3.1. ‘Reading in’ Rights in R v A

The United Kingdom’s Youth Justice and Criminal Evidence Act 1999 limited the circumstances in which evidence of a rape complainant’s sexual history was admissible. The defence to the charge of rape in R v A was consent, and it was therefore contended for the defence that exclusion of evidence relevant to the fact

146 [1999] 4 All ER 705.
147 Ibid, at 722.
149 Section 41 Youth Justice and Criminal Evidence Act 1999 (United Kingdom).
of consent might prejudice the fairness of the trial. Since Article 6 of the ECHR guarantees the right to a fair trial, the HRA was relevant, and the House of Lords sought to read the Youth Justice and Criminal Evidence Act consistent with the ECHR, per section 3(1) HRA. It did so by reading into the Act an implied provision that evidence required to ensure a fair trial should be admissible. Justifying the insertion of this ‘implied provision,’ Lord Steyn claimed that the legislature would not have wished to deny the right to the accused to put forward ‘a full and complete defence.’ Further, section 3(1) HRA reflected the ‘will of Parliament’ that ECHR rights be given effect. It is perhaps no surprise then, that the House of Lords in Ghaidan was prepared to say that:

section 3(1) is apt to require a Court to read in words that change the meaning of the enacted legislation, so as to make it Convention-compliant.

3.2. Judicial Intuitionism? Ghaidan and a new mode of statutory interpretation

Two features of the Ghaidan judgments are worthy of comment in the context of the interpretive obligation mandated by section 3(1) HRA. First, the four Law Lords and Baroness Hale discuss at length the nature of the right to be free from discrimination, and the moral defensibility of the Rent Act. The judgment of Baroness Hale is most interesting in this regard, since she concludes that the Rent Act is discriminatory, and, ipso facto, should be read to include same-sex couples. Second, the terms in which the House of Lords characterises section 3(1) are, conceptually, unorthodox.

151 Ibid, per Lord Steyn at para 45.
152 Ibid. When stated in these terms, Lord Steyn’s argument is compelling. But, as Lord Slynn of Hadley observed, the provisions of the Youth Justice and Criminal Evidence Act are a recognition of the tension between an accused’s right to a fair trial and a complainant’s interest in being protected from indignity (ibid, para 5).
153 Ibid, at para 45.
3.2.1. Value-Driven Interpretation Guarantees ECHR-Compliance

It was necessary to the appellant's claim in Ghaidan that he establish that the Rent Act was discriminatory and by necessity, therefore, the House of Lords considered the right to be free from discrimination. Lord Nicholls concluded that there was 'no rationale' for excluding same-sex couples from the Rent Act, and that the social policy underlying the 1988 amendment to include unmarried heterosexual couples was 'equally applicable' to same-sex couples.155 His Lordship did not claim that this policy-based extension was grounded in the legislation itself, but concluded that:

[the] precise form of words for this purpose is of no significance. It is their substantive effect that matters.156

Baroness Hale engaged in a lengthly discussion of the 'wrong[ness]' of sex-based discrimination, arguing that same-sex relationships share the same qualities of intimacy as heterosexual relationships, and should therefore be accorded equal privileges.157 From this premise, The Baroness concluded that the statutory expression 'as husband and wife' could easily be applied to same-sex couples.158 Baroness Hale did not discuss the nexus between her conclusion on the policy of the Rent Act and her interpretive methodology. She simply stated that there was 'no difficulty' in the linguistic extension of the expression 'as husband and wife' to same-sex couples, and that she agreed with the majority on the scope and application of section 3(1) HRA.159

The somewhat tortured logic of the other members of the majority suggests that there is not, in fact, 'no difficulty' in its right-consistent interpretation. The Baroness dodged the tricky issue to which the other members

156 Ibid.
157 Ibid, at para 139.
158 Ibid, at para 144.
159 Ibid.
of the Court devoted most time: the character of the interpretive obligation under section 3(1).

3.2.2. The House of Lords' Characterisation of Orthodox Interpretation as Anachronistic Pedantry

In the leading judgment, Lord Nicholls begins his analysis of the scope of section 3(1) in an apparently reasonable tone. The inclusion of the word ‘possible’ in that section, he notes, indicates that Parliament did not envisage that all legislation could be made Convention-compliant.\(^160\) Inquiring, ‘what is the standard... by which possibility is to be judged,’ Lord Nicholls answers his own question with the claim that section 3(1) HRA,

\[
\text{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 critically on the particular form of words... in the statutory provision under consideration.}\(^163\)
\]

Apparently cognizant of the potential for this line of reasoning to mandate departures from anything akin to ‘interpretation’, His Lordship states that the interpretive Rubicon is the ‘fundamental feature’ of the legislation in question.\(^162\) Having extracted this concept, and reasoned that the ‘fundamental feature’ in the present case is a ‘close and stable relationship,’ Lord Nicholls concludes easily that the Rent Act can be read to include same-sex couples.\(^163\)

Crucial to Lord Nicholls’ logic is a particular view of language. Eschewing the constraining influence of legislative text, His Lordship claims that to refuse to depart from statutory language, would make the application of section 3(1) a

\(^{160}\) \textit{Ibid}, at para 27.  
\(^{161}\) \textit{Ibid}, at paras 30-1.  
\(^{162}\) \textit{Ibid}, at para 33.  
\(^{163}\) \textit{Ibid}, at para 35.
'semantic lottery.' Of course, Lord Nicholls is correct that legislative drafting is imperfect, but his claim that statutory interpretation should not be constrained by a particular drafting 'choice' suggests more than a repudiation of undesirable interpretive literalism. Lord Steyn takes up Lord Nicholls' sceptical view of legislative drafting, positing that there has hitherto been, in the judicial application of section 3(1):

too much emphasis on linguistic features [and that if] the core remedial purpose of section 3(1) is not to be undermined, a broader approach is required.

Lord Millet’s dissent is perhaps the most complex of the five judgments. Despite his caution that the court must ‘take the language of the statute as it finds it’, His Lordship agrees with the majority that a court is entitled to ‘do considerable violence to the language and stretch it almost... to breaking point.’ Like the majority, the only injunction Lord Millet places on the scope of a court to ascribe a meaning to legislation different to that which would be garnered by ordinary methods of statutory interpretation, is that the interpretation must be consistent with ‘the fundamental features of the legislative scheme.’

Since Lord Millet does not agree with the majority that section 3(1) could render the Rent Act ECHR-compliant, he discusses the operation of section 3(1), as he sees it. Words, His Lordship notes, are expressions of concepts. No word can, therefore, be taken to ‘mean’ its conceptual opposite. But words can include their opposite. Thus, it might be possible to read a legislative provision that deals

165 Jan van Zyl Smit suggests that Lord Nicholls overstated his case on this point. While semantic ‘opportunism’ is undesirable as a method of statutory interpretation, it is not the case that by paying attention to statutory language an interpreter indulges an earlier, legislative, ‘semantic lottery.’ This is to view language as distinct from, and at odds with, conceptual coherence (see Jan van Zyl Smit, The New Purposive Interpretation of Statutes: HRA Section 3 After Ghaidan v Godin-Mendoza, 2007 70(2) MLR 294-317).
166 Ibid, at para 49. This view of section 3(1), as a ‘remedial’ tool, is discussed in Chapter III.
168 Ibid.
with ‘cats’, as meaning ‘cats or dogs’. This seems odd. It is difficult to imagine a legislative provision which, if it was intended to include dogs, would not have said so. On Lord Millet’s principle, why should a provision that deals with cats not also include goldfish? Or salamanders? His Lordship’s point, of course, is that cats and dogs are both ‘domestic pets’, and that if the legislation in question was fundamentally characterised by a concern with domestic pets, then anything within that concept could properly be read into the more limited concept of ‘cat.’

Applying his logic to the question before the Court, Lord Millet’s interpretive scheme seems to run aground. According to His Lordship, it is analytically true that a husband and wife partnership is one between a man and a woman. So, is Lord Millet prepared to say that heterosexuality is essential to the concept of ‘husband and wife’, but that ‘felineness’ is not essential to the concept of a cat? Perhaps not, since he notes the importance of the legislative scheme and a proper understanding of the policy behind the Act in question. And, having concluded that the legislative history does not support the majority’s reading of the Rent Act, he has reason to suppose that heterosexuality is in fact a crucial feature of the concept of ‘husband and wife’ for the purposes of the Act.

All this is an attempt by Lord Millet to elucidate the concept of a statutory ‘fundamental feature,’ the validity of which he endorses as an interpretive signpost. What it demonstrates is a problem with the majority approach to section 3(1), a problem that Lord Millet encounters a fortiori since he does not join the majority in repudiating statutory language as an interpretive constraint.

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170 That is, the expression ‘husband and wife’ is definitionally limited to a heterosexual partnership.
171 Ibid, at para 77.
172 While all members of the Court speak in terms of the ‘fundamental feature’ of the legislation, Lord Nicholls provides synonyms: the ‘underlying thrust’ and the ‘grain of the legislation’ (ibid, at para 33).
173 Which suggests that adherence to linguistic norms is incommensurable with what Jan van Zyl Smit terms the majority’s ‘abstract purposive’ approach to statutory interpretation (van Zyl Smit, The New Purposive Interpretation of Statutes: HRA Section 3 After Ghaidan v Godin-Mendoza, 301).
Determined to accord at least some weight to statutory language, Lord Millet is driven to draw a distinction between ‘words’ on one hand, and the ‘concept’ contained in those words on the other. But, this distinction is artificial, because words are expressions of concepts. Lord Millet’s actual distinction, it seems, is between two kinds of concept: the *prima facie* concept expressed in a statute’s language, and a more abstract, meta-concept that is judicially inferred after considering legislative policy, social conditions and the importance of rights.\(^\text{174}\)

By drawing the distinction as one between ‘language’ and the ‘concepts’ contained in that language, Lord Millet is attempting an impossible task. His dissent suggests that it is difficult – if not impossible – to remain faithful to the conventions of language, while endorsing an interpretation methodology as abstract as that of the *Ghaidan* majority.

At the heart of the House of Lords’ characterisation of section 3(1) is that orthodox statutory interpretation techniques are simply anachronistic when dealing with the HRA.\(^\text{175}\) To emphasise their inalienability is to misunderstand the purpose of the HRA, that:

> people should be afforded the benefit of their Convention rights so far as it is possible without the need for further intervention by Parliament.\(^\text{176}\)

### 3.3. *R (Wilkinson) v IRC: Ghaidan explained*

In *R (Wilkinson) v IRC*,\(^\text{177}\) the House of Lords revisited *Ghaidan*, and offered insight into the logic of that decision. In *Wilkinson*, the House of Lords was asked to construe a provision that stipulated privileges for ‘widows’ to include ‘widowers’. The widower argued that, in light of *Ghaidan*, section 3(1) HRA could be used to generate an ECHR-compliant meaning, even if that meaning

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\(^\text{175}\) *Ibid*, per Lord Steyn at paras 40-2; per Lord Millet at paras 59-60; per Lord Rodger at para 106.

\(^\text{176}\) *Ibid*, per Lord Rodger, at para 106.

\(^\text{177}\) [2005] UKHL 30.
strained the words of the Act. But, the court unanimously rejected the widower’s contended interpretation. While Wilkinson repudiates neither the logic nor the substance of Ghaidan, it does seek to couch the Ghaidan majority’s characterisation of section 3(1) in more recognisably orthodox terms. Delivering the leading judgment, Lord Hoffmann stated that section 3(1),

was [not] intended to have the effect of requiring the courts to give the language of statutes acontextual meanings... [although it] goes far beyond the old-fashioned notion of using background to ‘resolve ambiguities in a text’...

And, elucidating the proposition from Ghaidan that section 3(1) HRA requires adherence only to the ‘fundamental feature’ of a statute, Lord Hoffmann emphasised that it is occasionally possible to find, within a statutory provision, some ‘general concept’ that is implied, albeit not ‘expressly mentioned’. In Ghaidan, His Lordship explains, the ‘general concept’ was a relationship of social and sexual intimacy, and since this captured same-sex as well as heterosexual relationships, the Rent Act could be read to include same-sex couples. Lord Hoffmann acknowledges that sometimes a ‘general concept’ will be contrary to Parliament’s intention, but that since the HRA now qualifies that intention, a broader understanding of legislative meaning is required.

Jan van Zyl Smit argues that Lord Hoffmann thereby introduced the idea of ‘evaluative’ words, which can signal to an interpreter that evaluation and comparison is required. These words that ‘call for evaluation and comparison’, and the standard of comparison is to be judged against the ECHR rights. So, whereas the Rent Act provided for persons living as a wife or husband, the Act in Wilkinson provided simply for ‘widows’. There was no textual signal in

179 Ibid, at para 17.
180 Ibid, at para 18.
Wilkinson, therefore, that would permit the court to evaluate the concept of a 'widow' and extract its 'fundamental feature', so as to render the Act Convention-compliant.

Despite Lord Hoffmann’s retreat from the Ghaidan court’s explicit repudiation of text as even relevant to HRA-interpretation, His Lordship’s idea of ‘general concepts’ and ‘evaluative words’ seem to be in the spirit of Ghaidan. Statutory language might, Wilkinson suggests, exclude a particular interpretation. But this is little different from the majority’s assurance in Ghaidan 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.\(^{182}\)

What is common to both Ghaidan and Wilkinson, and left undisturbed by Lord Hoffmann’s explication of Ghaidan, is the possibility of a kind of judicial intuitionism. Whether it is termed a ‘fundamental feature’ of a statute or a ‘general concept’ implied in a statute, in both cases, the House of Lords envisages the possibility of judicial extrapolation of an Act’s content, whether or not the bounds of that content are expressed in the text of the itself.\(^{183}\)

One of the critical problems with the House of Lords’ approach to section 3(1) is that it attempts to synthesise two incommensurable propositions; the first that the search for a rights-consistent meaning under 3(1) is not contingent upon textual ambiguity, and the second, that it is open to Parliament to make its rights-infringing meaning unequivocally clear, in which case it will be ‘impossible’ to rescue the legislation with section 3(1). As Geoffrey Marshall observes, it is hard to conceive of a circumstance in which legislation is properly

\(^{182}\) [2004] UKHL 30 per Lord Nicholls at para 27.

termed 'unambiguous', but not so unambiguous that a rights-consistent meaning is 'impossible'.

3.4. Has the House of Lords exceeded its interpretive role?

Recalling Waldron's claim, that statutory text is the primary source of insight into statutory meaning, and the further claim that the United Kingdom is philosophically committed to the fact and virtue of Parliamentary sovereignty, the House of Lords' approach to section 3(1) HRA is problematic. If Waldron is correct that a proper respect for the authority of the legislature and legislation enjoins interpreters from departing from statutory text, then the House of Lords' characterisation of statutory interpretation, in the cases reviewed above, seems to be antagonistic towards the principles of Parliamentary sovereignty.

Perhaps, however, this is too hasty a condemnation. Perhaps Their Lordships' methodology is entirely appropriate for human rights adjudication. Rescuing the House of Lords from the slight of improper interpretive technique is the project of Chapter III.

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CHAPTER III
PARLIAMENTARY SOVEREIGNTY REVISITED

Introduction
In Chapter I, it was argued that the shared pedigree of the BORA and HRA is the concept of Parliamentary sovereignty, which is instrumentally valuable insofar as it secures particular ‘goods.’ Those goods can broadly be termed ‘respect for persons’ and ‘citizen participation.’

In the following discussion, the value of those goods will not be impugned. But, in an attempt to avoid the conclusion that the House of Lords’ interpretive method is inconsistent with the premises of the HRA, three issues will be discussed, each of which raises unique jurisprudential questions for the United Kingdom.

This final chapter is divided into two parts. Part A will address the constitutional circumstances of the United Kingdom, which may explain its unorthodox judicial approach to HRA interpretation. Part B will address the concept of Parliamentary sovereignty itself, and the argument that it is a contingent instantiation of a wider concept, the rule of law. On this view, Parliamentary sovereignty finds its roots in constitutional propriety, and is ‘interdependent’ with the interpretive sovereignty of the judiciary.\(^{185}\)

A. Avoiding the slight of impropriety: two preliminary routes
In this part, Waldron’s claim, that the ordinary enactments of a sovereign legislature require a particular approach to statutory interpretation, will not be questioned. Rather, it will be suggested that the United Kingdom’s unique circumstances mean that Waldron’s picture of a sovereign legislature issuing authoritative legislation is not an appropriate premise from which to examine the HRA.

1. Is Westminster truly sovereign in human rights matters?

The United Kingdom's membership in the European Union ('EU') has, especially since the passage of the European Communities Act 1972, prompted reflection on the status of Westminster's sovereignty. The ECHR is not an EU treaty, and the HRA does not provide for the same kind of incorporation of ECHR jurisprudence into domestic law as the European Communities Act does for EU regulations. Indeed,

the historic objective of the European Communities Act has been... to ensure that the courts give effect to EU law insofar as it is required to discharge the UK's obligations to the wider process of integration [into the European Union]. This point of focus can easily be contrasted with that of the Human Rights Act as, to the extent that the European Communities Act pursues an 'external' objective, the Human Rights Act... pursues an 'internal' one. That is, the HRA seeks to integrate human rights norms into the fabric of domestic law, whereas the project of the European Communities Act was to provide a mechanism for the reconciliation of domestic legal stipulations with European legal obligations. However, while this is a neat distinction to draw between the European Communities Act and the HRA, is it perhaps not borne out by the legislative history. The White Paper that preceded the HRA stated that the interpretive role of the judiciary:

[means that] the courts will be required to interpret legislation so as to uphold the Convention unless the legislation is so incompatible with the Convention, that it is impossible to do so.

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187 Section 2(1) European Communities Act 1972 provides that ‘without further enactment’, all European Union treaties in Schedule 1 to the Act ‘shall be recognised and available in law’.
At first glance, this looks strikingly similar to the injunction that EU law must prevail over domestic law unless the latter states that it is to apply notwithstanding inconsistency with EU law. Perhaps, then, the HRA presents a similar problem of 'dualism' as the European Communities Act, and the fact that it does not stipulate the superiority of European legal precedents over domestic legislation is evidence only of its drafters' knowledge of the tendency for human rights legislation to engender fears of 'juristocracy.'

The difficulties inherent in the 'legal dualism' resultant upon the United Kingdom's place in Europe were cast in harsh light in *R v Secretary of State for Transport, ex parte Factoriame Ltd (No 2)*. The *Factoriame* litigation involved a conflict between European treaty provisions and an Act of the United Kingdom Parliament. Whereas European law prohibited member states from excluding other member states from their waters on the basis of nationality, the Merchant Shipping Act 1988 purported to impose nationality conditions on fishing companies that sought to register as British. Reconciling this conflict of laws, the European Court of Justice held that in the case of such a conflict, European law must prevail. The sovereignty of Westminster is, to this extent, curtailed. Of course, the European Communities Act could be repealed at any time, and so its diminution of domestic sovereignty is a 'contemporary' rather than an 'ultimate' fact. Nevertheless, if the political future of the United Kingdom involves greater, and not diminished, European integration, then the formal distinction between 'contemporary' and 'ultimate' sovereignty may be cold comfort to proponents of domestic Parliamentary sovereignty.

Unlike the European Communities Act, the HRA does not require the incorporation of European human rights jurisprudence into domestic law,

194 Ibid.
196 Ibid.
although section 2(1) HRA requires Courts to ‘take into account’ judgments of the European Court of Human Rights when adjudicating domestic cases.

But, the relative mildness of the section 2(1) directive to ‘take into account’ ECHR jurisprudence does not seem to have engendered a correspondingly mild approach to the incorporation of that jurisprudence in the courts. In R (on the application of Alconbury Ltd.) v Secretary of State for the Environment, Transport and the Regions, Lord Slynn stated that:

in the absence of some special circumstances... the court should follow any clear and constant jurisprudence of the European Court... if it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own jurisprudence.197

This expresses a pragmatic concern that British courts should behave, remedially, akin to the Strasbourg court so as to avoid extra-jurisdictional litigation and legal precedents. The pith of this view, Nicol notes, is that:

the courts should... treat the HRA as the nexus to a new legal order of European human rights law, so that every U.K. court is now a European human rights court.198

The HRA, then, may mandate not only integration, but ‘active assimilation’ of European norms into domestic law.199 If this is the ascendant view among the United Kingdom’s legal community, or at least among the judiciary, then courts will perhaps effect ‘perfect transmission’ of Strasbourg jurisprudence by invoking the terms of the HRA itself.200 Since section 4 HRA declarations of incompatibility do not necessitate Parliamentary amendment of ECHR-infringing

199 Anthony, UK Public Law and European Law, 179.
200 Nicol, Are Convention rights a no-go zone for Parliament?, 438.
legislation, the assimilationist view of the HRA would seem to encourage teleological use of section 3(1) to achieve rights-consistency.

What does this conception of the HRA mean for Parliamentary sovereignty? At first glance, it seems to imply that European human rights norms will dictate the application of the HRA, and that notwithstanding section 3(2) HRA, the effect of domestic legislation that infringes rights will be 'read' consistently with Strasbourg precedents.

Further, Westminster's sovereignty may fare little better if domestic courts prefer section 4 declarations of incompatibility over section 3(1) 'interpretations'. A court will, presumably, make a section 4 declaration only if it has analysed the allegedly rights-infringing legislation and concluded that it is inconsistent with rights (with reference, probably, to Strasbourg precedents per section 2(1)), and unable to be 'interpreted' in a rights-consistent manner. At that point, an aggrieved litigant would, in all likelihood, have recourse to Strasbourg to vindicate her Convention rights.201 And, as the Home Secretary noted, in the debates preceding the enactment of the HRA,

One of the questions that will always be before government, in practice, will be, 'Is it sensible to wait for a further challenge to Strasbourg, when the British courts have declared the provision to be outwith [sic] the Convention?'202

Whether by judicial 'interpretation', therefore, or by practical pressure on Westminster from an inevitable ruling in Strasbourg, the import of European human rights norms via the HRA seems to be almost inescapable. As Jowell and Oliver note:

202 Home Secretary, speaking in the House of Commons (House of Commons Debates, Col. 773, 16/02/98); ibid.
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.\(^{203}\)

It is perhaps true to say, in light of these propositions, that the presence of Strasbourg, as a court of final appeal, is a shadow that looms over, and limits, Westminster's sovereign power to enact legislation.

What, then, of the terms of the HRA? Section 3(2) expressly retains for Parliament the sovereignty to legislate without that legislation being rendered a nullity. At this point, the distinction between 'contemporary' and 'ultimate' sovereignty reappears, and seems to be the only assurance that Westminster is a sovereign law-maker. Section 3(2) means that Parliamentary sovereignty continues formally – and 'ultimately' – but, substantively, in the contemporary politico-legal matrix, the doctrine of Parliamentary sovereignty is subject to 'an important measure of judicial control.'\(^{204}\)

The foregoing discussion does not necessarily legitimate the House of Lords' express repudiation of Parliamentary intention or textual meaning. It remains that insofar as Westminster has retained, in express terms, its sovereignty to legislate contrary to ECHR rights, United Kingdom courts are not justified in invoking those same terms to rationalise the repudiation of Parliamentary intention. What the European dynamic illustrates, however, is that the United Kingdom's legal system is wholly different to that of New Zealand, for which it was arguably easier to proceed along a course of interpretive 'reasonableness'. Navigating the dividing line between European integration by interpretation, and European assimilation by judicial override in the guise of interpretation, is a challenge for the United Kingdom's judiciary.

\(^{203}\) Jowell and Oliver (eds.), The Changing Constitution, 55-6.
\(^{204}\) Ibid, 56.
It is not possible in this space to do justice to the subtleties of European legal integration, but it is perhaps adequate to suggest that although the HRA's self-retention of Parliamentary sovereignty eased its passage to enactment, it is facile to assume that the mere inclusion of section 3(2) in the HRA in fact assures the unaffected continuation of Westminster's sovereignty in human rights matters.  

2. The HRA as a constitutional elevation of rights

The claim that the interpretive sections of the HRA and BORA 'go far beyond' the orthodox rules of statutory interpretation is familiar from the decisions of the House of Lords, and it conceives of the interpretive sections as constitutionally expansive. On this view, the HRA (and possibly the BORA) expresses a specific, special intention that ordinary legislation be rendered rights-consistent via statutory interpretation, since 'rights' are of particular constitutional significance.  

In New Zealand this argument appeared in R v Poumako, where Gault J contended that BORA was 'clear' that rights must be given effect, and that it is 'not a matter of what the legislature [that enacted the primary legislation] might have intended.' Kris Gledhill endorses this view, claiming that:

the effect [of the BORA] was to incorporate an interpretive obligation which was capable, at a stroke, of changing the meaning of every existing statute and which

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205 Ibid.
207 Or, as Danny Nicol puts it, this view holds that 'the object of the exercise was to place fundamental rights beyond the reach of a... majority' (Nicol, Are Convention rights A no-go zone for Parliament?, 438).
208 Ibid.
also provided a regime pursuant to which all future statutes would be interpreted.\textsuperscript{210}

Lord Steyn in \textit{Ghaidan} speaks of the ‘countervailing will’ of the United Kingdom Parliament that enacted the HRA, and that it trumps the ‘will as expressed in the statute under consideration.’\textsuperscript{211}

The ‘intention’ of the Parliament that enacted the HRA, and the implications of that putative intention for the constitutional status of ECHR rights, are at issue because of the ‘deeply mysterious’ wording of section 3(1).\textsuperscript{212} As noted in Chapter I, section 6 BORA and section 3(1) HRA are interpretive puzzles of their own, and the view that one takes of the general constitutional tenor of the Acts will, therefore, affect the role that one ascribes to those sections. Put simply, if the interpretive sections are themselves ambiguous, and courts impute a special significance to ‘rights’, then the ambiguity of the interpretive sections may be resolved in favour of constitutional ‘upgrade.’\textsuperscript{213} On this view, the fact that the interpretive sections are couched in terms of ‘interpretation’ does not preclude judges from eschewing statutory text, since to adhere strictly to orthodox interpretive norms would mean that:

the [Acts] would achieve nothing more than to place the courts under an obligation where previously courts had a discretionary power [emphasis added].\textsuperscript{214}

That is, the Acts would simply affirm the propriety of judicial presumptions of ‘legality,’ and that would render the interpretive sections vacuous; they would add nothing new to the scope of rights-protection.

\textsuperscript{210} Gledhill, \textit{The Interpretive Obligation: The Art of the Possible (Why the Failure in Hansen v R to Use the Interpretive Tool was Wrong)}, 10.

\textsuperscript{211} [2004] UKHL 30, at para 40.


\textsuperscript{213} Nicol, \textit{Are Convention rights a no-go zone for Parliament?}, 441.

The foregoing argument takes as read, however, that the judicial principle of legality, imputed to the legislature, was always properly within the constitutional armoury of judges. This assumes that judicial interpretation legitimately involves the imposition of constitutional principles – however defined – on to Acts of Parliament, so as to bring those Acts within the rule of law. But, it is perfectly plausible that the interpretive sections are little more than statutory recognition (and endorsement) of the judicial principle of legality, in which case the purpose of the interpretive sections was to codify an aspect of the common law, rather than create a new interpretive regime. Claudia Geiringer conjectures, in the case of the BORA, that section 6 might:

affirm a value oriented approach to statutory interpretation... which has long been a feature of the common law method.

This is, as Geiringer notes, certainly true of the use to which section 6 was put by the Supreme Court in Hansen, but it is simply not the pervasive view of section 3(1) HRA. It seems, therefore, that rather than condemn the House of Lords to have ‘misunderstood’ its interpretive role under section 3(1), it is possible that section 3(1) is simply different to section 6 BORA. Section 3(1) is not in terms a different interpretive directive, but it is being applied within a particular context, which is constitutionally dissimilar to New Zealand in important respects.

An interesting proposition is that the HRA, via sections 2(1) and 3(1), read together, imports a new – European – method of statutory interpretation for human rights matters. If this is correct, then judges faced with an HRA case may temporarily be excused from orthodox interpretive constraints, and free to

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216 Compare the Contractual Remedies Act 1979 and the Evidence Act 2006 (New Zealand), both of which are statutory codifications of common law rules and principles of contract law and the law of evidence, respectively.
pursue the European 'teleological' approach to interpretation, the aim of which is to:

give effect to what [the court] conceives to be the spirit rather than the letter of [the law]; sometimes indeed, to an English judge, it may seem to the exclusion of the letter.218

Francis Bennion terms the use of the European 'teleological' approach in United Kingdom courts a 'Developmental' method, because while statutory text is used as a starting point, the interpretive goal is to bring British human rights norms into line with those of Europe.219

This 'expansive' conception of the interpretive sections is more plausible in the case of the United Kingdom than New Zealand. Whereas the political debate that preceded the BORA was one of scepticism, starting from a political push for strong judicial review in rights cases and ending with a 'compromise' Parliamentary bill of rights, the political debate that preceded the HRA was less imbued with rights-scepticism. There is a recurrent strand, in pre-HRA Parliamentary debates and extra-Parliamentary statements, that the threshold for interpretive 'possibility' in section 3(1) HRA should not be ambiguity. Endorsing the White Paper's proposals, Lord Irvine, in 1997, stated that:

[it] will not be necessary to find an ambiguity. On the contrary, the Courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation is so clearly incompatible with the Convention that it is impossible to do so.220

219 Ibid, 91.
On its face, this expresses the spirit of the House of Lords approach in Ghaidan. But, even if it is an approach that is politically sanctioned, it is not one that is sanctioned by the terms of the HRA. For, if the words of a statute are unambiguously Convention-non compliant, then is that not ‘clear’ Convention-incompatibility? What would it look like for a statute to have only one tenable meaning, and yet not preclude an alternative (Convention-compliant) ‘interpretation’? Perhaps Parliament is required to stipulate the intention that its legislation stand, notwithstanding Convention non-compliance? But, if that is so, why is section 3(1) expressed in terms of ‘possibility’? Why does the HRA not state that legislation is to be rendered Convention-compliant unless Parliament stipulates otherwise in express terms? The answer, it seems, is that such a rule would make the meaning of all pre-1998 legislation uncertain, and that would be unacceptable.

Perhaps, however, this is too generous a concession, and on Waldron’s premises – whatever the politico-legal idiosyncrasies of the United Kingdom – the House of Lords was not justified in departing so radically from statutory text. In the final part of this chapter, an alternative to Waldron’s view that participation is the ‘right of rights’, will be offered. This alternative view holds that the a priori of defensible legal action is not participation, but adherence to the ‘rule of law’.

B. Against Waldron: constitutional legalism

At this point, it is helpful to return to first principles. Having noted that the (apparent) philosophical premise of both the BORA and HRA is a commitment to the fact, and value, of Parliamentary sovereignty, two questions might be asked:

1. What is the foundation of Parliamentary sovereignty? Majority-decision may theoretically be the best procedure for deciding legal questions, but what happens if Parliament issues a repugnant law? Is there ever a good
reason to reject that law, or must it be accepted as 'collateral damage' in the pursuit of a 'meta'-good (namely, participation), as Waldron argues?

2. Is Parliament in fact the best institution to make decisions regarding those issues about which citizens care most deeply? Or, are there some substantive values that have a normative import distinct from their endorsement by a democratic majority, with which Parliament-issued law must – in order to be valid – comply?

These questions are pertinent to issues involving rights. As discussed in Chapter II, the BORA and HRA are engaged, interpretively, when a person’s rights are judged by a court to have been infringed. It may be asked, therefore, notwithstanding section 4 BORA and section 3(2) HRA, do New Zealand and United Kingdom courts ever have good reason to set aside a rights-infringing law, even if to do so would flout the intention of Parliament?

T R S Allan argues that courts are absolutely entitled – indeed, duty-bound – not to apply statutes that are contrary to fundamental rights. Allan further contends that Parliament is not uniquely competent to decide legal matters, and that it is in fact the courts that most often protect and promote fundamental rights.221

In this part, Allan’s version of ‘constitutional legalism’222 will be put forward as a response to the two questions posed above. Allan’s constitutional legalism is factually and normatively at odds with Waldron’s ‘republicanism’, and therefore provides an alternative basis from which to analyse the application of section 3 HRA. For Allan, the concept of a sovereign Parliament, to whose dictates all citizens and institutions of government must adhere, is ‘seriously confused as a matter of constitutional theory.’223 That is because, according to


222 I have borrowed this term from Adam Tomkins. See Tomkins, Our Republican Constitution, vii.

223 Allan, Constitutional Justice, 201.
Allan, there is no institutional locus of absolute sovereign power; the only truly sovereign norm is the 'rule of law'.

1. A higher source of legal values? The 'rule of law'

Hitherto, it has been assumed without sustained conceptual probing, that Parliamentary sovereignty is a constitutional feature of New Zealand and the United Kingdom. If this is correct, then all branches of government, including the courts, are constitutionally responsible to Parliament.

The factual accuracy of describing the United Kingdom’s Parliament as 'sovereign' was called into question in the preceding part of this chapter. In the case of New Zealand, there are no obvious political circumstances that might limit – as Europe might for the United Kingdom – the sovereign power of its Parliament. But, perhaps there are deeper, philosophical limits on the sovereignty of Parliament that are not unique to the United Kingdom, but pervade the very notion of Parliamentary sovereignty itself?

The 'rule of law' is a familiar organising principle, used to separate purported from genuine legal actions. There are two basic conceptions of the rule of law, the first, procedural and the second, substantive. The procedural version, expounded by Dicey, is concerned with the law’s application, not its quality. Dicey’s rule of law requires that laws be certain and fairly applied, and that there be provision for citizens to call lawmakers to account. On this view, a law’s substantive iniquity does not make it any less of a ‘law’, because the rule of law is concerned with the law’s form, not its substance. An alternative vision of the rule of law conceives of Dicey’s version as impoverished. It holds that:

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224 Ibid.
225 Although, as noted in Part A above, the United Kingdom seems to be a 'special case', due to its embeddedness in Europe.
226 Tomkins, Our Republican Constitution, 1.
227 Jowell and Oliver, The Changing Constitution, 6-11.
It is not sufficient for laws or government policies to be accurately applied to particular persons, in accordance with their true meaning or proper interpretation; the associated distinctions made between persons, or groups of persons, must also be capable of justification... Legislation, even when enacted by established democratic procedures, must conform to certain standards of justice, treated as essential features of the common good... these standards are themselves intrinsic to the idea of law... the basic liberties of thought, speech, conscience and association are... necessary constituents of the rule of law.  

This vision of the rule of law conceives of a higher order 'good' than democratic participation. It is not enough that a particular law has the support of a majority of citizens, each of whom participated in the law-making process; it is essential that any valid 'law' conform to certain substantive 'features of the common good.' Those 'features' are moral norms, and Allan claims that since laws oblige citizens to behave in particular ways, the quid pro quo of that obligation is that a citizen is morally capable of assenting to the law:

An assertion of obligation or authority entails an implicit appeal to the citizen's moral assent; but a measure that... [lacks] any plausible basis in justice or the common good can make no such appeal: it contradicts... its purported claim to obedience.

The implications of Allan's account of the rule of law are foreign to Waldron's concept of Parliamentary sovereignty, where democratic participation is the 'right of rights.' Allan attaches no meta-value to any formal procedure. What is truly sovereign is a cache of substantive moral norms that are not legitimately alienable by any institution of government.

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228 Allan, Constitutional Justice, 13.
2. The courts and Parliament as 'interdependent sovereignties'

Allan's version of the rule of law is, for all its moral appeal, problematic. If moral norms, and not a particular institution, are legally 'sovereign', then who decides authoritatively what those norms are? At this point, Waldron's claim, that moral disagreement is an inescapable 'circumstance' of politics, reappears. If moral disagreement is pervasive, then how could a particular set of substantive moral norms - the so-called rule of law - hope to gain the 'assent' of all citizens? Allan does not address this point, claiming that the rule of law is comprised of 'transcendent constitutional values.' If these norms are 'transcendent', one assumes, inquiry into their moral basis may be missing the point.

Whatever the genus of the moral norms that constitute the rule of law, Allan's version of the doctrine generates another question, which is particularly pertinent to a consideration of the BORA and HRA: what is the role of judges in a jurisdiction that subscribes to the sovereignty of neither the courts nor Parliament, but the 'internal morality of law'?

The role of judges, in a constitutional legalist vision of the rule of law, is one of 'principled' interpretation. This has two aspects. First, Allan claims that statutory interpretation is a necessarily evaluative exercise, such that:

The meaning of a statute... depends partly on its necessary integration into its normative surroundings... The procedural principles of law-making... form only part of a more complex web of deeply-rooted moral values and assumptions that will rightly affect a statute's meaning in any particular case.

Statutory interpretation, therefore, is not an exercise in deference to the 'will of a ruler or a hostile majority.' Statutory interpretation, on the contrary, is a moral

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230 Ibid, 203.
232 Ibid, 204.
exercise, in which dispassion and objectivity are inimical to the divination and application of the rule of law.

The second implication of Allan's concept of 'principled interpretation' is that judges are competent to adjudicate upon moral issues, and that their views will sometimes be superior to those of Parliament:

... while moral discourse will be partly reflected in legislation, duly enacted, [there is] a higher... 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... in theory, have been largely overlooked or even consciously an inexcusably denied in practice.\textsuperscript{234}

And so one arrives at the lynchpin of the legal constitutionalist vision of the institutional hierarchy: the legislature is sovereign only until it is considered by the courts to have abrogated the rule of law. Allan calls this dynamic a relationship between 'interdependent sovereignties',\textsuperscript{235} but since the last word is in the courtroom, it would be more accurate to call it judicial sovereignty. As Tomkins notes:

For [Allan], there is no constitutional problem that is incapable of being solved by the courts.\textsuperscript{236}

The courts, in other words, are loci of robust moral principle, and a good forum – perhaps the best forum – in which to decide questions of fundamental 'rights.'

\textsuperscript{234} Ibid, 12-13.
\textsuperscript{235} Ibid, 201.
\textsuperscript{236} Tomkins, Our Republican Constitution, 20.
2.1. Constitutional legalism and human rights

This conception of the rule of law has particular resonance in the United Kingdom, and in intellectual consideration of the HRA. According to the logic of legal constitutionalism, section 3(1) HRA means that:

Parliament's ability to resist judicial rulings of which it disapproves is pre-empted, to a significant degree, by an interpretive freedom enjoyed by the courts, whose legitimacy the Human Rights Act affirms... in substance... the Human Rights Act has been entrenched by a rule of interpretation [and] its effectiveness depends largely on the strength of judicial adherence to the rights and liberties concerned [emphasis added].

If this is correct, then the House of Lords was not only entitled, but obliged, to set aside the text of the Rent Act in Ghaidan, and to read in a 'fairness' provision in R v A so as to bring those statutes within the rule of law. Far from being wayward, the House of Lords' approach was faithful to the sovereign function of the judiciary.

There is a strong thread of legal constitutionalism among the United Kingdom's political and legal elite. Whether British Parliamentarians have acquiesced to the persistent assertions of judicial sovereignty in the realm of 'fundamental rights', or actively participated in the promotion of 'constitutional' fetters on Parliament's sovereignty, it is accurate to say that legal constitutionalism is not a rogue strand of intellectual thought in the United Kingdom.

The same cannot be said of New Zealand. Allan's conception of the rule of law was proffered, in 2003, by Rt Hon Sian Elias, who claimed that:

237 Allan, Constitutional Justice, 228-9.
238 Tomkins, Our Republican Constitution, 7.
239 Currently the Chief Justice of New Zealand.
Parliament is supreme as legislator. But it legislates under the law of the constitution... Does [this] mean that Parliament is not sovereign? Yes. But it never was... An untrammelled freedom of Parliament does not exist.

This assertion was rebuked by New Zealand’s Deputy Prime Minister, Dr Michael Cullen, who responded that:

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.

Legal constitutionalist ideas may have a foothold in New Zealand, therefore, but they are far from mainstream. Additional to the circumstantial differences between New Zealand and the United Kingdom, it seems that fundamental theory about role of the courts in a rights-conscious jurisdiction, is a point of intellectual divergence.

CONCLUSION

New Zealand and the United Kingdom may be historically, and even formally, rooted in the same constitutional consciousness, but their respective contemporary intellectual and politico-legal directions are quite different.

Since the enactment of the BORA, New Zealand courts have waxed and waned over the extent to which section 6 BORA can, or should, be used to remedy rights-infringing legislation. In its latest statement on the operative provisions of the BORA, Hansen v R, the New Zealand Supreme court expressed the unqualified view that section 6 might legitimate a meaning for legislation that is other than the most obvious meaning available, but that all ‘meanings’ must be reasonable and recognisably derived from statutory text and purpose.

To this extent, the New Zealand Supreme Court echoed the principle, if not the logic, of Lord Millet in Ghaidan, who sought to avoid the repudiation of statutory text as an interpretive signpost, while still joining the Ghaidan majority in their endorsement of highly abstract ‘interpretation’. As noted in Chapter II, Lord Millet’s dissent is conceptually awkward, which suggests that once text is rejected as a constraining feature of statutory interpretation, few tangible markers remain with which to peg out an interpretive course. It was suggested, at the end of Chapter II, that the interpretive methodology of the House of Lords is at odds with traditional ideas of Parliamentary sovereignty, and therefore in need of explication.

In Chapter III, the United Kingdom’s rapidly changing constitutional matrix was discussed, with particular emphasis on the influence of the European ‘teleological’ approach to statutory interpretation. Finally, at the end of Chapter III, discussion returned to first principles, and it was suggested that an alternative to Waldron’s conception of democratic governance might be ascendant in the United Kingdom, to an extent that it is not in New Zealand. T R S Allan’s vision of the rule of law was used as a template for the legal constitutionalist strand of thought, which coheres with the House of Lords’
interpretive methodology, and seems to have a distinct intellectual resonance in the United Kingdom’s legal community.

So, what of this apparent constitutional and philosophical divide between New Zealand and the United Kingdom? In the end, it may simply reflect emerging commitments to different ideals; New Zealand, to the essential virtue of participation, and the United Kingdom to the sovereignty of a particular, substantive set of constitutional norms.

Human rights, it seems, generate disagreement not only over their moral status, but also over the merit of particular forms of governance.
New Zealand Bill of Rights Act 1990

An Act—
(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
(b) To affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights

[28 August 1990]

BE IT ENACTED by the Parliament of New Zealand as follows:

1 Short Title and commencement
(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.
(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

Part 1
General provisions

2 Rights affirmed
The rights and freedoms contained in this Bill of Rights are affirmed.

3 Application
This Bill of Rights applies only to acts done—
(a) By the legislative, executive, or judicial branches of the government of New Zealand; or
(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4 Other enactments not affected
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations
Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—
(a) In the case of a Government Bill, on the introduction of that Bill; or
(b) In any other case, as soon as practicable after the introduction of the Bill,—
bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

Part 2
Civil and political rights

Life and security of the person

8 Right not to be deprived of life

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9 Right not to be subjected to torture or cruel treatment

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10 Right not to be subjected to medical or scientific experimentation

Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11 Right to refuse to undergo medical treatment

Everyone has the right to refuse to undergo any medical treatment.

Democratic and civil rights

12 Electoral rights

Every New Zealand citizen who is of or over the age of 18 years—
(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
(b) Is qualified for membership of the House of Representatives.
13 Freedom of thought, conscience, and religion
Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14 Freedom of expression
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.

15 Manifestation of religion and belief
Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16 Freedom of peaceful assembly
Everyone has the right to freedom of peaceful assembly.

17 Freedom of association
Everyone has the right to freedom of association.

18 Freedom of movement
(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
(2) Every New Zealand citizen has the right to enter New Zealand.
(3) Everyone has the right to leave New Zealand.
(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-discrimination and minority rights

19 Freedom from discrimination
(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

20 Rights of minorities
A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Search, arrest, and detention
21 Unreasonable search and seizure

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22 Liberty of the person

Everyone has the right not to be arbitrarily arrested or detained.

23 Rights of persons arrested or detained

(1) Everyone who is arrested or who is detained under any enactment—
   (a) Shall be informed at the time of the arrest or detention of the reason for it; and
   (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
   (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—
   (a) Arrested; or
   (b) Detained under any enactment—
for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24 Rights of persons charged

Everyone who is charged with an offence—
   (a) Shall be informed promptly and in detail of the nature and cause of the charge; and
   (b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
   (c) Shall have the right to consult and instruct a lawyer; and
   (d) Shall have the right to adequate time and facilities to prepare a defence; and
   (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and
   (f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
   (g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.
Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:
(b) The right to be tried without undue delay:
(c) The right to be presumed innocent until proved guilty according to law:
(d) The right not to be compelled to be a witness or to confess guilt:
(e) The right to be present at the trial and to present a defence:
(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

Retroactive penalties and double jeopardy

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

Right to justice

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Part 3
Miscellaneous provisions

Other rights and freedoms not affected

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.
Application to legal persons
Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.
APPENDIX 2

Human Rights Act 1998 (United Kingdom)

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

[9th November 1998]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Introduction

1 The Convention Rights

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention—

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

2 Interpretation of Convention rights

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

Legislation

3 Interpretation of legislation

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

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4 Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and
(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means—
   (a) the House of Lords;
   (b) the Judicial Committee of the Privy Council;
   (c) the Courts-Martial Appeal Court;
   (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
   (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility")—
   (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
   (b) is not binding on the parties to the proceedings in which it is made.

5 Right of Crown to intervene

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—
   (a) a Minister of the Crown (or a person nominated by him),
   (b) a member of the Scottish Executive,
   (c) a Northern Ireland Minister,
   (d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the House of Lords against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—
   "criminal proceedings" includes all proceedings before the Courts-Martial Appeal Court; and
   "leave" means leave granted by the court making the declaration of incompatibility or by the House of Lords.

Public authorities

6 Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—
(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—
   (a) a court or tribunal, and
   (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to—
   (a) introduce in, or lay before, Parliament a proposal for legislation; or
   (b) make any primary legislation or remedial order.

7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
   (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
   (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—
   (a) the period of one year beginning with the date on which the act complained of took place; or
   (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.
(6) In subsection (1)(b) “legal proceedings” includes—
(a) proceedings brought by or at the instigation of a public authority; and
(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section “rules” means—
(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,
(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,
(c) in relation to proceedings before a tribunal in Northern Ireland—
   (i) which deals with transferred matters; and
   (ii) for which no rules made under paragraph (a) are in force,
   rules made by a Northern Ireland department for those purposes,
and includes provision made by order under section 1 of the [1990 c. 41.] Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—
(a) the relief or remedies which the tribunal may grant; or
(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) “The Minister” includes the Northern Ireland department concerned.

8 Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—
(a) whether to award damages, or
(b) the amount of an award,
the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated—
(a) in Scotland, for the purposes of section 3 of the [1940 c. 42.] Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;
(b) for the purposes of the [1978 c. 47.] Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section—
"court" includes a tribunal;
"damages" means damages for an unlawful act of a public authority; and
"unlawful" means unlawful under section 6(1).

9 Judicial acts

(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—
(a) by exercising a right of appeal;
(b) on an application (in Scotland a petition) for judicial review; or
(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section—
"appropriate person" means the Minister responsible for the court concerned, or a person or government department nominated by him;
"court" includes a tribunal;
"judge" includes a member of a tribunal, a justice of the peace and a clerk or other officer entitled to exercise the jurisdiction of a court;
"judicial act" means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and "rules" has the same meaning as in section 7(9).

Remedial action

10 Power to take remedial action

(1) This section applies if—

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section "legislation" does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

Other rights and proceedings

11 Safeguard for existing human rights

A person's reliance on a Convention right does not restrict—
(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or
(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

12 Freedom of expression

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
   (a) that the applicant has taken all practicable steps to notify the respondent; or
   (b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
   (a) the extent to which—
      (i) the material has, or is about to, become available to the public; or
      (ii) it is, or would be, in the public interest for the material to be published;
   (b) any relevant privacy code.

(5) In this section—
   "court" includes a tribunal; and
   "relief" includes any remedy or order (other than in criminal proceedings).

13 Freedom of thought, conscience and religion

(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section "court" includes a tribunal.

Derogations and reservations

14 Derogations

(1) In this Act "designated derogation" means—
   (a) the United Kingdom's derogation from Article 5(3) of the Convention; and
   (b) any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.
(2) The derogation referred to in subsection (1)(a) is set out in Part I of Schedule 3.

(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to Schedule 3 as he considers appropriate to reflect—
   (a) any designation order; or
   (b) the effect of subsection (3).

(6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

15 Reservations

(1) In this Act “designated reservation” means—
   (a) the United Kingdom’s reservation to Article 2 of the First Protocol to the Convention; and
   (b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.

(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to this Act as he considers appropriate to reflect—
   (a) any designation order; or
   (b) the effect of subsection (3).

16 Period for which designated derogations have effect

(1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act—
   (a) in the case of the derogation referred to in section 14(1)(a), at the end of the period of five years beginning with the date on which section 1(2) came into force;
   (b) in the case of any other derogation, at the end of the period of five years beginning with the date on which the order designating it was made.

(2) At any time before the period—
   (a) fixed by subsection (1)(a) or (b), or
   (b) extended by an order under this subsection,
comes to an end, the Secretary of State may by order extend it by a further period of five years.

(3) An order under section 14(1)(b) ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.

(4) Subsection (3) does not affect—
   (a) anything done in reliance on the order; or
   (b) the power to make a fresh order under section 14(1)(b).

(5) In subsection (3) "period for consideration" means the period of forty days beginning with the day on which the order was made.

(6) In calculating the period for consideration, no account is to be taken of any time during which—
   (a) Parliament is dissolved or prorogued; or
   (b) both Houses are adjourned for more than four days.

(7) If a designated derogation is withdrawn by the United Kingdom, the Secretary of State must by order make such amendments to this Act as he considers are required to reflect that withdrawal.
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Books


**Articles**


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**Miscellaneous**