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August 2010

THE DECLARATION OF INCONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

A Final LLB (Hons) Research Paper

By Chris Curran

University of Otago

October 2001

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CONTENTS

Introduction 1

Chapter 1 The Significance of the Declaration of Inconsistency 3

1. The Declaration Arrives 3
   A. The declaration announced 3
   B. The current status of the declaration 5
2. Remedial Significance 6
3. The Impact on the NZBORA - the Significant Promotion of Section 5 8
4. Significance for the Constitution 9
5. Significance for New Zealand Jurisprudence 10

Chapter 2 The Development of the Declaration of Inconsistency 12

Introduction 12
1. The New Zealand Pedigree 13
2. The Expanding Scope of NZBORA Remedies 15
   A. Legislative origins 15
   B. Remedial expansion 16
   C. A broad NZBORA remedial jurisdiction 19
   D. A different rationale for the declaration? 21
3. The Influence of the UK Analogue 23
   A. The statutory declaration 23
   B. A receptive judicial culture 25

Chapter 3 The Legitimacy of the Declaration of Inconsistency 27

Introduction 27
1. The NZBORA and the Declaration 28
   A. The legitimacy of the declaration's development 28
      i. Specific legislative intent 28
      ii. The limits of specific legislative intent 28
      iii. The implications of section 5 30
      iv. An obligation to legislate consistently with the NZBORA? 31
   B. The impact of the declaration on the NZBORA 34
      i. Protecting Parliamentary sovereignty 34
      ii. Augmenting NZBORA rights protection 36
2. The Relationship between Parliament and the Courts 38
   A. Parliamentary sovereignty and the declaration 38
   B. A constitutional yardstick - article 9 Bill of Rights 1688 39
   C. The new constitutional dynamic - a dialogue on rights 48

D. Democratic objections to the declaration 51
3. The International Dimension 54
A. The declaration and New Zealand's ICCPR obligations 55
B. The declaration as potential obstacle to the Human Rights Committee 56
C. More dialogue values 60

Chapter 4 The Methodology of the Declaration of Inconsistency 62

1. The Legitimacy of the NZBORA-inconsistency Test 62
A. The *Oakes* test in New Zealand 63
B. The *Oakes* test as an appropriate legal inquiry 64
C. The danger of improper deference 67
D. Illegitimate declarations - the danger of legislative policy 69
2. The Competency of the NZBORA-inconsistency Test 71
A. Proper deference - institutional capacity 72
B. Augmenting judicial competency 74
3. Standing 76
A. Two tests of standing 76
i. The 'victim' test 76
ii. The test of 'sufficient interest' 77
B. Arguments against broader standing 79
i. Arguments of propriety 79
ii. Arguments of practicality 82

Conclusion 85

Bibliography 87

INTRODUCTION

> Section 2(4) of the Criminal Justice Amendment Act (No 2) 1999 is incompatible with the cardinal tenets of a liberal democracy. This Court would be compromising its judicial function if it did not alert Parliament in the strongest possible manner to the constitutional privation of this provision.[1]

The arrival of the declaration of inconsistency in *Moonen v Film and Literature Board of Review* was quite remarkable.[2] There was nothing in the legislative history nor the terms of the New Zealand Bill of Rights Act 1990 (NZBORA) that explicitly furnished the courts with the jurisdiction to declare that certain statutory limitations of rights are inconsistent with the Act. Concerns were immediately raised about the feasibility and constitutional propriety of the new remedy. The Court of Appeal's traditionally liberal approach to the NZBORA appeared to have led it into error. It will be argued in this paper, however, that the declaration is both a legitimate and practical development. The new remedy promises to augment the democratic processes protecting human rights, facilitate transnational and domestic institutional dialogues on the nature of such rights, and promote a climate of rights-based justification and accountability for state action.

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[1] *R v Poumako* [2000] 2 NZLR 695 at para 70 (per Thomas J).

[2] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

Chapter 1 inquires into the significance of the declaration. The nature of the declaration is outlined, and its current legal status considered. The impact of the declaration is then briefly traversed in terms of its implications for the law of remedies, the NZBORA, the constitution, and New Zealand jurisprudence. Chapter 2 then questions whether the declaration is truly a surprising development. In this regard, the legal pedigree of the declaration, the context of expanding NZBORA remedies and the UK statutory analogue are all discussed.

Chapter 3 begins the analysis of the legitimacy of the declaration. The inquiry first assesses the fit between the declaration and the broader NZBORA framework. The constitutional relationship between Parliament and the courts then provides a major yardstick in this legitimacy analysis. Democratic objections to the declaration and the possible benefits of a new constitutional order are discussed. Finally, the ramifications of the declaration for the international human rights system are assessed.

Chapter 4 concludes the paper by considering the methodology of declaration decision-making. It looks to Canada for guidance in appraising the legitimacy and competency of such decisions, and discerns lessons regarding the employment of appropriate legal and procedural methods in this regard. The final procedural issue discussed is the question of standing. The two dominant standing standards are thus evaluated against the requirements of declaration decision-making and the nature of the declaration itself.

CHAPTER 1

The Significance of the Declaration of Inconsistency

1. The Declaration Arrives

A. The declaration announced

The declaration of inconsistency made its legal debut in *Moonen*.[3] In the course of its decision, the Court of Appeal took the opportunity to deliver a textbook-like judgment on the correct application of the operative provisions of the New Zealand Bill of Rights Act 1990 (NZBORA) in respect of statutory interpretation.[4]

The first step in the *Moonen* approach is to identify the different interpretations of the statute in question that are properly open to the Court. The interpretation constituting the least possible limitation on the relevant NZBORA right is then selected, and the extent to which that interpretation limits the right identified. The real significance of the *Moonen* approach lies in its next phase. The extent of the limitation is to be considered in light of section 5 NZBORA. If the limit is found to be unreasonable, in that it cannot be justified in a free and democratic society as required by section 5, an inconsistency with the NZBORA arises. Though section 4 demands that such an inconsistent statutory provision be given effect by the Court,

[3] *Moonen*, supra n2.

[4] *Moonen*, supra n2, at 16-7. The 'operative provisions' of the NZBORA are those governing its interpretive influence, viz. ss 4, 5 and 6.

the Court may declare the inconsistency. Indeed, on occasion, it may have the "duty" to do so.[5]

The potential of the declaration of inconsistency was confirmed in *R v Poumako*.[6] The case concerned an appeal against sentence for a murder involving home invasion. The Criminal Justice Amendment Act (No 2) 1999 (CJAA) provides a mandatory non-parole period for such crimes, and section 2(4) of the CJAA establishes this requirement in relation to any sentencing orders made after the Act's commencement, even if the offence has been committed before this date. The appellant was a victim of the retrospective effect of this provision. Thomas J held that it was fundamentally unconstitutional.[7] The learned judge thus went on to propose and formulate the first declaration of inconsistency in New Zealand legal history.[8] Though the other members of the Court declined to go so far in the absence of both the need to adopt a final interpretation of section 2(4) and full argument from counsel, the declaratory jurisdiction established in *Moonen* was referred to without question.[9]

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[5] *Moonen*, supra n2, at 17.

[6] *Poumako*, supra n1.

[7] *Poumako*, supra n1, at paras 70 and 75-6.

[8] *Poumako*, supra n1, at para 107.

[9] Both the joint judgment of Richardson P, Gault and Keith JJ (*Poumako*, supra n1, at para 43), and the separate judgment of Henry J (*Poumako*, supra n1, at para 68), left open the possibility of a declaration if faced with s 2(4) CJAA again.

B. The current status of the declaration

In *R v Pora*, the Court of Appeal was again confronted by section 2(4) of the CJAA.[10] The bench of seven judges was unable to reach a definitive or even majority interpretation of the section. Of particular interest was the judgment of Thomas J. Without reference to his would-be declaration in *Poumako*, the learned judge supported the conclusion reached in the joint judgment of Elias CJ and Tipping J, which held that section 2(4) was to be read down in favour of the injunction against retrospective legislation contained in section 4(2) of the Criminal Justice Act 1985. The decision in *Pora*, however, is not inconsistent with the power to issue declarations of inconsistency asserted in *Moonen* and *Poumako*. The Court in *Pora* simply avoided recourse to the declaration in the legislative context before it.

Any lingering doubts about the longevity of the declaration of inconsistency may well have been dispelled by recent developments outside of the courtroom. In its review of the protection of human rights in New Zealand, an independent evaluation team for the Ministry of Justice recommended that the declaration remain untouched by the legislature and be left to evolving judicial practice.[11] This tacit endorsement of the declaration has found more explicit expression in the

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[10] *R v Pora*, 20/12/00, CA225/00.

[11] *Re-evaluation of the Human Rights Protections in New Zealand*, Report for the Associate Minister of Justice and Attorney-General Margaret Wilson, Ministry of Justice (2000), at para 53. One member of the team went further than this, adopting the position that the Court of Appeal's development of declarations of inconsistency should be reinforced by an appropriate amendment to s 4 of the NZBORA.

recently drafted Human Rights Amendment Bill 2001. If enacted, the Bill would provide the Human Rights Review Tribunal with a power to make such declarations in relation to legislation inconsistent with the right to freedom from discrimination.[12] The declaratory power announced in *Moonen* thus now appears to be somewhat of a legal *fait accompli.*

2. Remedial Significance

The development of the declaration of inconsistency in *Moonen* highlights the inherent flexibility of the declaratory judgment. It has always possessed this adaptability. Initially available only if the plaintiff established a cause of action, the legal ambit of the declaration was extended to pronounce on situations of non-liability.[13] The practical scope of the declaration also underwent expansion, eventually encompassing the Crown.[14]

The declaration in *Moonen* significantly develops the remedy in both respects. If Parliament is under a legal obligation by virtue of section 3 of the NZBORA to legislate consistently with the NZBORA,[15] a breach of this duty is

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[12]This right is affirmed by s 19 of the NZBORA. Part I, cl 9 of the Human Rights Amendment Bill 2001 would provide the Human Rights Act with s 92J, conferring the statutory declaratory power upon the Human Rights Review Tribunal.

[13]*Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536.

[14]*Dyson v Attorney-General* [1911] 1 KB 410. In New Zealand, the declaration avoided several restrictions of the common law via some early legislative assistance - see the broad terms of ss 2 and 3 Declaratory Judgments Act 1908. Nevertheless, the flexibility of the remedy was confirmed in the New Zealand context in *Peters v Davison* [1999] 2 NZLR 164. The Court of Appeal in that case asserted a common law jurisdiction to declare errors of law made in the report of a Commission of Inquiry, despite the argument that the nature of such a report would make judicial comment legally meaningless.

without legal consequences, as section 4 preserves the legal efficacy of NZBORA-inconsistent legislation. The declaration in *Moonen* is thus not merely preferable to a coercive remedy for reasons of constitutional sensitivity - it is the only remedy available, as no coercive remedy is possible.[16] The declaration of inconsistency thus involves a pronouncement on the breach of a somewhat hypothetical legal duty, expanding the legal ambit of the declaratory judgment.[17] Further, as a matter of practical scope, the *Moonen* declaration is the first made against Parliament in respect of legislation.[18]

The Court in *Moonen* made it clear that the jurisdiction to make declarations of inconsistency derived from the NZBORA itself.[19] The declaration of inconsistency may well be a *sui generis* statutory remedy within a *sui generis* remedial category.[20] As such, it may avoid the application of the discretionary

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[15]The joint judgment of Elias CJ and Tipping J indicated that Parliament is under such an obligation in *Pora*, supra n10, at para 35. The problems facing such an interpretation are considered below in Chapter 3(1)(A)(iv).

[16]It has been observed that the declaration, due to its non-coercive nature, is often the only remedy Courts are willing to grant in the "sometimes indistinct boundary between the respective jurisdictions of the courts and Parliament". Zamir and Woolf, *The Declaratory Judgment* (1993) at 90.

[17]Cooke P thus worried that the declaration of inconsistency would involve "intruding an advisory opinion" in *Temese v Police* (1992) 9 CRNZ 425 at 427. Compare the statement of Lord Diplock against granting declarations where the "the questions were purely abstract questions the answers to which were incapable of affecting any existing or future rights" in *Rediffusion (Hong Kong) Ltd v Attorney-General* [1970] AC 1136, 1158.

[18]Section 3 of the Declaratory Judgments Act 1908 allows for declarations to be made regarding the proper construction of legislation, but such a declaration cannot truly be said to be made *against Parliament*.

[19]It was the "useful purpose" ascribed to s 5 of the NZBORA that furnished the courts with their new declaratory "power" in *Moonen*, supra n2, at 17.

[20]The declaratory judgment was observed by Younger LJ in *Gray v Spyer* [1921] 2 Ch

factors which usually constrain the grant of declaratory relief.[21] If not, or if such discretionary principles also apply to the declaration of inconsistency, the latter clearly involves a development of the requirement of utility. The courts have traditionally been reluctant to issue a declaration where it would serve no useful purpose.[22] The decision in *Moonen* effectively recognises that the political or lobbying effect of the declaration of inconsistency is sufficient to meet the utility requirement,[23] despite the fact that there be may no immediate (nor even ultimate) effect on the plaintiff's rights, as Parliament need not respond to the declaration.[24]

3. The Impact on the NZBORA - the Significant Promotion of Section 5

Prior to *Moonen*, there was little incentive for judges to undertake the section 5 reasonableness inquiry in the context of statutory interpretation, as section 4 ensures the legal validity of both reasonable and unreasonable legislative limits on NZBORA rights. As Butler observed, a judge set on upholding

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549, 557 to be neither legal nor equitable in origin, and hence "*sui generis*".

[21]D M Paciocco, "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in *Essays on the New Zealand Bill of Rights Act 1990* (1992) 40 at 67, 74.

[22]Zamir and Woolf, supra n16, at 141.

[23]There is a somewhat analogous precedent on the point. In *R v Governor of Winchester Prison, ex p Roddie* [1991] 1 WLR 303, the applicant's earlier unlawful detention was rendered legally irrelevant after he was subsequently lawfully committed for trial. Nevertheless, the Divisional Court provided a declaration as to the earlier illegality, as it was held that the applicant could make use of the declaration to seek compensation.

[24]See Chapter 3 below for discussion of possible Parliamentary responses to the declaration.

the Crown's interpretation of a statute would thus do so by the straightforward application of section 4.[25] The result was a lack of judicial recourse to section 5, avoiding any need for the Crown to justify statutory limits on NZBORA rights.

The *Moonen* approach to NZBORA-based statutory interpretation, however, does not begin and end with section 4, but necessarily involves such section 5 justification. This represents a significant rehabilitation of section 5 after the uncertainty following *Ministry of Transport v Noort; Police v Curran.*[26] In that case, influenced by the apparent legal futility of section 5 in the statutory context, Cooke P and Gault J indicated that its application should be confined to the exercise of the Attorney-General's reporting power under section 7 and the interface between the NZBORA and the common law.[27] This position is clearly rejected in *Moonen.*[28] With the arrival of the declaration, s 5 is thus no longer "largely redundant".[29]

4. Significance for the Constitution

The declaration of inconsistency has already been recognised as involving a "recalibration of the separation of powers."[30] The declaration does not elevate the

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[25]A Butler, "Strengthening the Bill of Rights" (2000) 31 VUWLR 129 at 135.

[26][1992] 3 NZLR 260.

[27]Ibid, at 271 (per Cooke P) and 295 (per Gault J).

[28]The clear role of s 5 within the five-step *Moonen* process is also considerably more certain than the amorphous "abridging inquiry" (ibid, at 284, per Richardson J) or "bridging role" (ibid, at 287, per Hardie Boys J) it was held to perform in statutory interpretation by Richardson, McKay and Hardie Boys JJ in *Noort.*

[29]*Poumako*, supra n1, at para 97 (per Thomas J).

[30]A Butler, "Judicial Indications of Inconsistency - A New Weapon in the Bill of Rights

NZBORA to the status of a substantive legal limit on the legislative power of Parliament. Nevertheless, it does involve the Courts in an adjudication on the NZBORA-consistency of legislation. By establishing the NZBORA as the authoritative evaluative yardstick for all New Zealand legislation, the declaration has thus invested it with a constitutional significance that belies its formal subordination to other ordinary statutes in section 4.

5. Significance for New Zealand Jurisprudence

The declaration of inconsistency promises to engage New Zealand more fully in the "brisk international traffic in ideas about rights".[31] The declaration increases the relevance of Canadian decisions under section 1 of the Canadian Charter of Rights and Freedoms,[32] a provision allowing reasonable limits on rights in near-identical terms to section 5 NZBORA. Indeed, the Court of Appeal's exposition of the requirements of the section 5 reasonableness inquiry in *Moonen* borrowed heavily from the governing Canadian authority on section 1 of the Charter, *R v Oakes*.[33] Rishworth has noted that the formulation of these 'reasonableness' tests also reflects European jurisprudence.[34] Further, the

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Armoury?" [2000] NZLR 43 at 55. The legitimacy of this constitutional adjustment is considered in Chapter 3 below.

[31]The phrase is Glendon's in M A Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991) at 158.

[32]The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c. 11.

[33][1986] 1 SCR 103. See Chapter 4 below.

[34]P Rishworth, "Human Rights" [1999] NZ Law Review 457 at 470.

statutory mechanism for declarations of incompatibility in the UK provides an obvious analogue for New Zealand courts.[35]

The significance of the declaration extends beyond promoting cross-fertilisation between national legal jurisdictions. As explicitly acknowledged in *Moonen* itself, declarations of inconsistency will be relevant to any appraisal of the protection of human rights in New Zealand conducted by the Human Rights Committee.[36] It is thus likely that the declaration will involve the New Zealand courts in a truly global judicial discourse on rights.

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[35]The statutory declaration is established by the Human Rights Act 1998 (UK). See Chapter 2(3) below.

[36]*Moonen*, supra n2, at 17. See Chapter 3(3) below for further discussion.

CHAPTER 2

The Development of the Declaration of Inconsistency

Introduction

At first glance, the transition of the declaration of inconsistency from legal non-entity to a natural incident of the proper NZBORA interpretative process in *Moonen* seems extraordinarily sudden. On closer inspection, however, the declaration can be seen as the product of at least three driving influences. Firstly, the declaration had been the subject of an ongoing debate between judges and legal academics, which explored the legal basis of the declaration and its ramifications for the NZBORA rights landscape. Within such a framework of discussion, *Moonen* appears less like judicial heresy and more like the final link in an incremental chain of development. Secondly, robust judicial approaches to the NZBORA had considerably enlarged its remedial ambit. In terms of the extension of novel remedies for breaches of the NZBORA, the case for judicial activism had already emerged victorious from *Simpson v Attorney-General [Baigent's Case]*.[37] Finally, the declaration of inconsistency was not entirely new to the common law world. The Human Rights Act 1998 (UK), at that stage not yet in force, provided the Court in *Moonen* with a ready blueprint for the New Zealand declaration. The judicial recognition of a declaration of inconsistency in New Zealand may have

[37] [1994] 3 NZLR 667.

been swift, but it was not entirely unexpected.

1. The New Zealand Pedigree

The ability of judges to formally declare a statutory inconsistency with the NZBORA was first posited in academic circles in the early 1990s. David Paciocco, a visiting Canadian academic, argued that as the legislature was bound by the NZBORA by virtue of section 3,[38] NZBORA-inconsistent legislation could legitimately be declared a violation of the Act. Further support for the declaration was provided by Brookfield, who argued that the "very precise wording" of section 4 left it open as a remedial possibility.[39]

A judicial response to these academic suggestions was quickly forthcoming. Indeed, an early decision of the Indecent Publications Tribunal, pre-dating Paciocco and Brookfield, had already indicated that a court or tribunal could "make a finding that...a provision is inconsistent [with the NZBORA], but then go on to apply it."[40] The Court of Appeal soon found the nascent debate too enticing to resist. In *Temese v Police*,[41] Cooke P responded to Brookfield's suggestion, warning that a judicial appraisal of the NZBORA-consistency of legislation "could

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[38]Paciocco, supra n21, at 68.

[39]Brookfield's analysis clearly implies that if s 4 specifically prohibits a range of judicial responses to legislation inconsistent with the NZBORA, others (including a declaration of inconsistency) may be permitted by the Act. Indeed, Brookfield argues that the "Bill as a whole requires" such declarations. See F M Brookfield, "Constitutional Law" [1992] NZ Recent Law Review 231 at 239.

[40]*Re "Penthouse (US)" vol 19, No 5* [1991] NZAR 289 at 320.

[41]*Temese*, supra n17.

be seen by some to be gratuitously criticising Parliament by intruding an advisory opinion".[42] Nevertheless, it was possible that such a "price ought to be paid".[43] Despite its equivocal treatment in *Temese*, the declaration had entered the law reports.

The declaration debate lay dormant until it was rekindled by Thomas J's judgment in *Quilter v Attorney-General*.[44] In examining the effect of the Marriage Act 1955, Thomas J found that its statutory exclusion of same-sex couples from the status of marriage constituted a breach "as a matter of law" of the section 19 right to freedom from discrimination.[45] This legal finding, made despite the obvious validity of the impugned legislation, was justified on the basis that "it would be a serious error not to proclaim a violation [of the NZBORA]...when a violation is found to exist in the law, whether it be the common law, statutory law or the administration of the law."[46] Thomas J's decision prompted an immediate response from Rishworth, who perceived its significance in reviving the declaration discussion.[47] Rishworth argued that the structure of the NZBORA demands judicial analysis of the NZBORA-consistency of legislation under section 5. A declaration would be merely a vigorous expression of the conclusion reached.[48]

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[42] *Temese*, supra n17, at 427.

[43] Idem.

[44] [1998] 1 NZLR 523.

[45] Ibid, at 528.

[46] Ibid, at 554.

[47] P Rishworth, "Reflections on the Bill of Rights after *Quilter v Attorney-General*" [1998] NZ Law Review 683.

[48] Ibid, at 692.

The decision in *Moonen* and the first would-be declaration in *Poumako* appeared against the backdrop of this debate. Though undoubtedly the product of judicial boldness, the declaration was thus grounded in academic and legal precedent.

2. The Expanding Scope of NZBORA Remedies

A. Legislative origins

Given its legislative history, the NZBORA initially appeared hostile to the development of creative NZBORA-based remedies. The original White Paper proposal for a supreme law Bill of Rights included an express remedies clause in terms reproducing section 24(1) of the Canadian Charter of Rights and Freedoms.[49] This would have entitled litigants to "obtain such remedy as the court considers appropriate and just in the circumstances."[50] Sometime between the tabling of the Justice and Law Reform Select Committee's final report on the White Paper in October 1988 and Prime Minister Palmer's introduction of the New Zealand Bill of Rights Bill on 10 October 1989, however, this expansive remedial power was removed.[51] The result was an attenuated Bill of Rights, bereft of an express remedies provision and enacted as an ordinary statute.

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[49] *A Bill of Rights for New Zealand: A White Paper*, Presented to the House of Representatives by Leave of the Hon. Geoffrey Palmer, Minister of Justice (1985).

[50] Clause 25 of the draft Bill appended to the White Paper, ibid.

[51] P Rishworth, "The Birth and Rebirth of the Bill of Rights" in G Huscroft and P Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 1 at 20.

The inference drawn from this legislative history by the Crown in its argument in *Baigent* was that Parliament had not intended to give the courts a remedial jurisdiction.[52] Such a restrictive approach did not seem out of line with the treatment of the Bill of Rights Bill in Parliament. Indeed, even the architect and chief advocate of the new Bill, the Rt Hon Geoffrey Palmer, attempted to stifle opposition to the proposal by arguing in the House that the Bill would not empower judges to grant new remedies.[53]

Nevertheless, there were a number of early indications that the judicial provision of NZBORA remedies was anticipated. The Explanatory Note to the 1989 Bill accepted that "[t]he Courts might enforce [the] rights in different ways in different contexts."[54] Further, the Department of Justice prepared a report for the Justice and Law Reform Select Committee which noted that the express provision of remedies in the Bill was not required, as the courts could determine themselves whether remedies should be given.[55] Even initially, then, the remedial potential of the NZBORA was not entirely unappreciated.

B. Remedial expansion

Despite the silence of the enacted NZBORA on remedies, it has been observed that the judicial climate was ripe for active extension of the Act's remedial

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[52]Dr R Harrison, "The Remedial Jurisdiction for Breach of the Bill of Rights" in Huscroft and Rishworth (eds), ibid, 401 at 404. See also *Baigent*, supra n37, at 717.

[53]1990 NZ Parliamentary Debates 3450. See also Rishworth, supra n51, at 24.

[54]Noted by Cooke P in *Baigent*, supra n37, at 677.

[55]*Baigent*, supra n37, at 699 (per Hardie Boys J).

possibilities. Given the calls in Britain for the incorporation of the European Convention on Human Rights, the cases in Australia articulating implied constitutional rights,[56] and the judicial colloquia in Bangalore, Balliol and Bloemfontein promoting the judicial role in the enforcement of international human rights norms, Rishworth argues that a measure of judicial enthusiasm for the new NZBORA was hardly surprising.[57]

Equally, the global experience of bills of rights indicated that the absence of a remedial provision was never going to dampen such enthusiasm. Both the Constitution of the United States of America and the Irish Constitution lack such a provision, yet judges in both jurisdictions had found this no impediment to the meaningful enforcement of constitutional rights.[58] Such activism was not confined to jurisdictions with entrenched constitutions. In Canada, judges had held statutory provisions offending against substantive rights to be "inoperative" under the Canadian Bill of Rights of 1960, itself an ordinary statute.[59] Indeed, the common

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[56]See for example *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[57]P Rishworth, "Affirming the Fundamental Values of the Nation: How the Bill of Rights Act and the Human Rights Act Affect New Zealand Law" in Huscroft and Rishworth (eds), supra n51, 71 at 75-6, and Rishworth, supra n51, at 4.

[58]See *Marbury v Madison* 5 US (1 Cranch) 137 (1807) (US) and *The State (At the Prosecution of Quinn) v Ryan* [1965] IR 70, at 122 (Ireland).

[59]See *R v Drybones* (1970) 9 DLR (4th) 473. This approach relied on the language of s 2 of the Canadian Bill of Rights, which prevented judges from applying legislation so as to abrogate the fundamental rights and freedoms contained therein. Thus, the courts simply refused to apply offending legislation. The responsibility of the courts to declare such legislation inoperative under the Canadian Bill of Rights was affirmed by Beetz J in *Attorney-General of Canada v Canard* (1975) 52 DLR (3d) 548 at 574.

law tradition was equipped with a ready maxim to cover the NZBORA situation - 'ubi jus ibi remedium', where there is a right there is a remedy.[60]

The first tangible remedial advances were made by the courts in the area of criminal law. Soon after its first decision to hold evidence obtained in breach of the NZBORA inadmissible,[61] the Court of Appeal articulated a prima facie rule of exclusion in relation to such evidence.[62] In *R v Goodwin*,[63] the Court expanded on the rationale for assuming a remedial jurisdiction under the NZBORA. For Richardson J, the provision of remedies was necessary to avoid the characterisation of the NZBORA as an "elaborate charade".[64] Similarly, for Hardie-Boys J, the NZBORA imperative to vindicate rights necessitated the exclusion of such evidence as the "most effective...means of achieving this end".[65]

The subsequent decision of *R v Te Kira* explicitly recognised that the prima facie rule marked a major departure from pre-NZBORA jurisprudence.[66] Even Thomas J, whose judgment in *Te Kira* evidenced some regret for the hasty discarding of pre-NZBORA remedies, was prepared to accept that the prior

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[60]This maxim found potent expression in and is often cited in connection with *Ashby v White* (1703) 2 Ld Raym 938; 90 ER 1188. The maxim continues to be of relevance - see Anderson J's recourse to it in *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 at 187. Casey J found it of persuasive influence in *Baigent*, supra n37, at 717.

[61]*R v Accused (CA 227/91)* (1991) 7 CRNZ 407.

[62]*R v Kirifi* [1992] 2 NZLR 8.

[63][1993] 2 NZLR 153.

[64]Ibid, at 193.

[65]Ibid, at 202.

[66][1993] 3 NZLR 257. At 262, Cooke P found that in this respect the NZBORA does not "merely repeat the old law".

common law jurisdiction to exclude evidence unfairly obtained had been "dethroned....by the rights-oriented approach."[67] A similar approach in the remedial sphere was displayed by the Court in *Martin v Tauranga District Court.*[68] The Court rejected the fairness inquiry that governed pre-NZBORA stays of trial, proceeding instead on a rights-oriented approach focused on prejudice to the accused. It was becoming clear that the courts regarded the NZBORA not as an obstacle to the provision of remedies, but rather as a substantial imperative for remedial innovation.

C. A broad NZBORA remedial jurisdiction

The watershed in the development of NZBORA remedies was the Court of Appeal's decision in *Baigent*. In the course of establishing a distinct public law action for compensation for breaches of the NZBORA, the Court interpreted the NZBORA as providing judges with a broad discretion to "grant appropriate and effective remedies where rights have been infringed."[69] This remedial jurisdiction was linked to the "rights-centred approach" of the NZBORA,[70] with the determination of the adequacy and efficacy of such remedies being left to "the circumstances of each case."[71] Both the previously disparate remedies in the

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[67] Ibid, at 285.

[68] (1995) 12 CRNZ 509.

[69] *Baigent*, supra n37, at 702 (per Hardie-Boys J). Note also the repetition of the language of effective and adequate remedies in the judgments of Cooke P (at 676-7), Casey J (at 692) and McKay J (at 718).

[70] *Baigent*, supra n37, at 703.

[71] *Baigent*, supra n37, at 692.

criminal law field and the new compensatory remedy were co-opted into this remedial framework as particular exercises of the broader statutory discretion to grant effective remedies.[72]

There had been indications in earlier case law that the NZBORA might provide its own statutory remedial jurisdiction. Wylie J suggested in *Palmer v Superintendent Auckland Maximum Security Prison* that the NZBORA "impliedly empowers the Courts to grant whatever remedies may be appropriate to safeguard the rights therein."[73] In *Te Kira*, Thomas J noted the "enormous discretion reposed in the Courts in relation to remedies" under the NZBORA.[74] It was not until *Baigent*, however, that such a broad remedial power was specifically required.[75]

It was thus in the *Baigent* battleground that the "fight" for a general NZBORA remedial jurisdiction was "fought and won",[76] and it is in this context that the *Moonen* decision should be located. The Court in *Baigent* was prepared to adapt the NZBORA to meet new remedial needs. The declaration of inconsistency is a product of the same expansive remedial approach.

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[72]*Baigent*, supra n37, at 703 (per Hardie-Boys J) and 718 (per McKay J).

[73][1991] 3 NZLR 315 at 318.

[74]*Te Kira*, supra n66, at 283.

[75]In the circumstances of *Baigent*, supra n37, only a statutory remedy allowed the Court to circumvent the Crown's immunity for tortious actions committed in the execution of judicial processes provided by s 6(5) of the Crown Proceedings Act 1950.

[76]The terminology is that of Joseph in P Joseph, "Constitutional Law" [2000] NZ Law Review 301 at 318.

D. A different rationale for the declaration?

It has been noted above that the development of NZBORA remedies proceeded on the basis of the perceived rights-centred approach of the Act. Though the declaration of inconsistency is in line with the expansive judicial approach to remedies under the NZBORA, it marks a departure from this predominant reliance on a rights-centred rationale.

Paciocco, borrowing from Roach,[77] distinguishes three separate rationales for remedying state violations of rights conferred under a bill of rights.[78] The "rights objective" is personal, seeking to secure the rights guaranteed for the individual. The "enforcement objective" is focused on deterrence, aimed at securing future compliance with the requirements of the bill of rights. Finally, the "public interest objective" involves broader and more diffuse considerations, including the aim of affirming and inculcating rights-based values in society. In *R v Goodwin*, Richardson J adopted these categories in modified form in an explicit analysis of the NZBORA's position on the remedial spectrum.[79] Drawing on the twin purposes of the long title, Richardson J found that the NZBORA "mandates a rights-centred approach."[80] For Paciocco and Harrison, such an approach can

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[77]K Roach, "Section 24(1) of the Charter: Strategy and Structure" (1986-87) 29 Crim LQ 222.

[78]Paciocco, supra n21, at 41.

[79]*Goodwin*, supra n63, at 192-4.

[80]The long title of the NZBORA states its twin purposes - to affirm, protect and promote human rights and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. Both the language of affirmation and the Covenant's requirement of an effective remedy were used to support Richardson J's conclusion in *Goodwin*, supra n63, at

only be taken seriously by the provision of restitutionary remedies redressing the violation or preserving the efficacy of the rights protected by the NZBORA.[81]

The pre-*Moonen* NZBORA remedies are all consistent with this rights-centred approach. The exclusion of evidence, the stay of proceedings and the provision of compensation for rights breaches all have a restitutionary or preservation effect. The declaration of inconsistency, however, is of no legal effect. It can neither directly restore nor protect rights. To this extent, then, the declaration signals a departure from previous authority.

This perception does not, however, render the emergence of the declaration completely unexpected. The declaration accords closely with the public interest objective Paciocco noted as constituting a legitimate remedial rationale in rights jurisprudence. In this regard, declarations of the NZBORA-consistency of legislation may be viewed as directed to the inculcation of rights-based values in both the New Zealand legislature and wider society alike. The Court of Appeal had not entirely rejected the public interest objective in earlier cases.[82] Further, it should be noted that section 4 of the NZBORA precludes any restitutionary or preservation remedy in relation to legislation. By necessity, any NZBORA remedy in relation to such legislation cannot be grounded in the rights-centred approach. Once the declaration of inconsistency emerged in the debate between judges and

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193-194.

[81]Paciocco, supra n21, at 43-4 and Harrison, supra n52, at 414.

[82]Even whilst affirming the primacy of the rights-centred response to infringements, Hardie Boys J was careful not to exclude the enforcement and public interest objectives in *Baigent*, supra n37, at 702-3.

academics, and found statutory expression in the Human Rights Act 1998 (UK), it was always likely that the next species of remedy emerging within the general *Baigent* NZBORA remedial framework would differ from the restitutionary basis of previous remedies.

3. The Influence of the UK Analogue

A. The statutory declaration

The Human Rights Act 1998 (UK) received the royal assent on 9 November 1998, and came into effect on 2 October 2000.[83] In giving "further effect" to the rights and freedoms guaranteed under the European Convention on Human Rights,[84] the HRA seeks to "reconcile effective rights protection with the constitutional and Parliamentary nature of the governance of the United Kingdom."[85] The chief instrument of this reconciliation is the declaration of incompatibility. Section 3 of the HRA contains an interpretive directive to the courts in terms similar to section 6 of the NZBORA, providing that "[s]o far as it is possible to do so...legislation must be read and given effect in a way which is compatible with the Convention rights." If, however, a court decides that the relevant legislation is simply incompatible with a Convention right, section 4(2) of the HRA empowers

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[83]The Human Rights Act 1998 (UK) is hereinafter abbreviated to the HRA.

[84]The long title to the HRA provides this purpose for the Act.

[85]Lord Irvine of Lairg, *The Human Rights Act - So Far So Good*, unpublished speech, delivered 14 February 2001 in Madrid. Many thanks to Lord Irvine for providing me with this speech.

the court to make a declaration of that incompatibility.

The declaration of incompatibility is of no direct legal effect.[86] Nevertheless, it may precipitate a change in the law by virtue of the HRA's so-called "fast-track procedure" for amendment.[87] In respect of legislation subject to a declaration of incompatibility, section 10 empowers a Minister of the Crown to make remedial orders in order to remove the incompatibility if that Minister considers that there are "compelling reasons" to do so. By clause 2 of the Second Schedule to the HRA, remedial orders must be approved in draft by a resolution of each House of Parliament to be effective. In this way, the legislature retains a constant supervisory check on the section 10 power of executive amendment.[88]

The introduction of the Human Rights Bill to the House of Commons in October 1997, and the simultaneous publication of a White Paper outlining the new Labour government's objectives in promoting the legislation, effectively announced the innovative statutory declaration procedure to the world.[89] It can hardly be a coincidence that the introduction of the Bill preceded the most significant steps in the judicial development of the New Zealand declaration in *Quilter*, *Moonen* and *Poumako*. Indeed, the correlation was detected immediately following the *Quilter*

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[86]This is explicitly confirmed by s 4(6) of the HRA.

[87]This terminology is common in academic literature on the HRA, and is employed by Ewing in K D Ewing "The Human Rights Act and Parliamentary Democracy" (1999) 62(1) MLR 79 at 91.

[88]Though the Second Schedule anticipates circumvention of these requirements in situations of urgency, remedial orders made under such conditions will cease to have effect after 120 days unless both Houses of Parliament retrospectively approve such orders, again by resolution.

[89]R Clayton and H Tomlinson, *The Law of Human Rights* (2000) at 48.

decision.[90] The HRA declaration of incompatibility procedure was eventually explicitly acknowledged in Thomas J's judgment in *Poumako*, where it was highlighted to show the lack of an inherent contradiction between a declaration and section 4 of the NZBORA.[91]

B. A receptive judicial culture

Given the Court of Appeal's evident willingness in the post-NZBORA period to learn from the treatment of human rights in other jurisdictions, it is perhaps not surprising that the HRA should have acted as a stimulus for the development of the declaration. In developing the public law compensatory remedy in *Baigent*, the Court drew heavily on the jurisprudence of courts as diverse as the European Court of Human Rights, the Supreme Court of India and the Supreme Court of Ireland.[92] Though the HRA declaration is a statutory and not a common law mechanism, the Court in *Baigent* appeared to regard any differentiating factors relating to the source of legal ideas as relatively unimportant. The Court borrowed equally from jurisdictions possessing constitutions of supreme law status and constitutions containing express remedies clauses.[93] Given the similarities in the structure of

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[90]Rishworth observed that *Quilter* moved New Zealand closer to the "embryonic English position" and its declaration of incompatibility in Rishworth, supra n47, at 689-90.

[91]*Poumako*, supra n1, at para 106.

[92]In this respect, the judgment of Hardie Boys J is the most wide-ranging. See *Baigent*, supra n37, at 699-702.

[93]In relation to the NZBORA, Cooke P argued that the *nature* of remedies provided under the Act could not differ from those provided under a constitution with an express remedies provision. See *Baigent*, supra n37, at 677.

the HRA and the NZBORA, which both provide interpretive guidance to judges without establishing a power of judicial review of legislation, the HRA was always likely to be a fundamental point of reference for the New Zealand courts.

CHAPTER 3

The Legitimacy of the Declaration of Inconsistency

Introduction

This chapter considers the declaration of inconsistency from three different perspectives. The first assesses the declaration in its immediate context, the NZBORA itself. The second considers the impact of the declaration on the constitutional relationship between Parliament and the courts. The final assessment of the legitimacy of the declaration is made in the international human rights context. It will be argued throughout that the declaration is unlikely to prejudice the careful balance of interests evident in each setting. Rather, the declaration is a legitimate development which is consistent with both the general scheme of the NZBORA and the constitutional balance between the legislature and the judiciary. The declaration will promote a more coherent role for section 5 within the NZBORA, stimulate both institutional rights discourse and democratic supervision of rights, and provide valuable indications as to the likely response of a key international legal institution to New Zealand legislation.

1. The NZBORA and the Declaration

A. The legitimacy of the declaration's development

i. Specific legislative intent

It is clear that the judicial development of the declaration of inconsistency was not foreseen by the legislators enacting the NZBORA. The final report of the Justice and Law Reform Select Committee made no reference to such declarations,[94] nor was it adverted to in the course of Parliamentary debate on the Bill.[95] Though the original White Paper proposal did anticipate a declaratory power,[96] this was simply a corollary of a supreme law Bill of Rights. The rejection of the White Paper and its general remedial provision saw the attendant abandonment of all references to declarations being made against statutes under the NZBORA.[97] Being unforeseen by the legislature, the development in *Moonen* could be viewed as exceeding the boundaries of legitimate judicial inference from a statutory regime.

ii. The limits of specific legislative intent

There are problems in equating the scope of legitimate judicial action with the limits of Parliamentary foresight in the NZBORA context, however, which extend

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[94]"Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand" (1988) AJHR I 8C.

[95]Butler, supra n30, at 52.

[96]The White Paper, supra n49, at 115, envisaged that people who wished to take action forbidden by a statute claimed to be in breach of the Bill would be able to seek a declaration.

[97]The remedial provision was art 25 of the Draft Bill, attached to the White Paper, supra n49, at 114.

beyond the traditional impediments to discerning legislative intent.[98] The rejection of the White Paper's remedial provision is equivocal; it has been argued that far from depriving judges of remedial authority, the move implies that "Parliament was content to leave it to the Courts to provide the remedy".[99] Equally possible and perhaps more realistic interpretations of the change have included that the NZBORA legislators were insufficiently versed in the intricacies of the law of remedies to have formed any firm intention,[100] or failed for other reasons to address the matter in detail.[101]

The latter impression is supported by the uneasy relationship of the operative provisions in the NZBORA. The problematic juxtaposition of sections 4, 5 and 6 has exercised the courts greatly in the past,[102] and suggests that the transition from the supreme law White Paper Bill of Rights to the eventual statutory version was not attended by an extensive analysis of the ramifications of the change. In such a context, greater regard should be paid to the terms of the statute itself than to the limited focus of the legislators in assessing the legitimacy of the *Moonen* development.

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[98]Noted in Paciocco, supra n21, at 49-50. These include the difficulty of equating the views of Members of Parliament speaking to any proposition with the intent of the legislature as a whole, and the further difficulty of discerning any coherent legislative intent from legislation (such as the NZBORA) which is the product of a "multiplicity of actors".

[99]*Baigent*, supra n37, at 718 (per McKay J).

[100]Paciocco, supra n21, at 49.

[101]*Te Kira*, supra n66, at 284 (per Thomas J).

[102]See for example the divisions in the Court of Appeal in *Noort*, supra n26.

iii. The implications of section 5

Section 5 must certainly have some role in the operation of the NZBORA. As noted earlier, one early judicial response to section 5 was to confine its relevance to the Attorney-General's reporting power under section 7 and the development of the common law.[103] There are three major problems with this response. Firstly, though the practice has been different,[104] one may question whether section 5 forms a legally essential part of the Attorney-General's function at all. Section 7 is triggered by an apparent inconsistency with the "rights and freedoms" of the NZBORA rather than the NZBORA itself, which would necessitate section 5 analysis.[105] If not a legal corollary of the section 7 power, section 5 must have more legal utility than as a tool of common law development. This impression is supported by the language of section 5, which has a much broader ambit. The "reasonable limits prescribed by law" are not literally confined to limits found in the common law or proposed legislation, but rather embrace *any* legal limits on NZBORA rights, including those found in actual legislation. Finally, section 5 is

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[103]See *Noort*, supra n26, at 271 (per Cooke P) and 295 (per Gault J). See also the discussion in Chapter 1(3) above.

[104]Joseph noted that the "practice of the Attorney-General has been to report when it appears to him that any infringement of a right cannot be justified in terms of section 5" in P Joseph, "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" [1998] PL 266 at 269.

[105]Joseph felt that such an interpretation was untenable since the House would be deluged with s 7 reports, reducing the deterrent effect of the section in P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) at 872. In Joseph, supra n104, at 271, he appears to have changed his mind, applauding the s 19 HRA demand for a statement of compatibility or otherwise in relation to every bill as "an improvement on the New Zealand procedure."

placed between sections 4 and 6, the two pillars of NZBORA-based *statutory* interpretation. Section 5 is not subordinated to section 7 in the statutory schema; rather, it is the section 7 power which appears tangential to the operative provisions.

If section 5 thus has a valid role in respect of infringing legislation, the declaration may be seen as a legitimate (and even necessary) development. Without the declaration, the application of section 5 in this context is legally futile.[106] The connection of section 5 analysis to a formal remedy finally imbues it with a "useful purpose" in statutory interpretation.[107]

iv. An obligation to legislate consistently with the NZBORA?

Being a remedy directed at NZBORA-inconsistent legislation, the declaration of inconsistency would seem considerably more legitimate if the legislature were under a corresponding legal duty to legislate in NZBORA-consistent fashion. Such a duty may seem incongruous with section 4 NZBORA, which upholds the legal validity of NZBORA-inconsistent legislation. Nevertheless, despite observations in the High Court to the contrary,[108] Elias CJ and Tipping J recently characterised

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[106]Section 5 appears legally futile in relation to statutory interpretation as s 4 saves both reasonable and unreasonable legislative limits on rights. See the discussion in Chapter 1(3) above.

[107]*Moonen*, supra n2, at 17.

[108]Gallen J noted that the very existence of s 7 contemplates the possibility that Parliament will pass NZBORA-inconsistent legislation in *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 at 457. In *Westco Lagan v Attorney-General*, 15/8/00, McGechan J, HC Wellington CP142/00, at para 95, McGechan J observed that s 3 "does not enact otherwise".

such legislation as being "in breach of the obligation recognised by section 3".[109]

An argument to establish such a duty on the legislature could proceed as follows. Though not framed in duty-imposing terms, section 3 establishes that the NZBORA applies to acts done by the legislative branch of government. Section 2 constitutes a state affirmation of NZBORA rights, which amounts to a guarantee of preservation rather than of positive supply.[110] Employing the technical Hohfeldian terminology, section 2 affirms individuals' "immunities" under the NZBORA, while the section 3 state actors are burdened with the "disability" correlative.[111] The "disability" is (more naturally) a duty not to interfere. The activity of the legislature which most obviously interferes with NZBORA rights is the passage of legislation itself. Indeed, it has been observed in the Supreme Court of Canada that legislation is the "only way in which a legislature may infringe...a right or freedom".[112] When the legislature passes infringing legislation which cannot be saved by section 5, it thus breaches its legal duty not to interfere with individual rights.

Having established a legal breach, the question of remedies arises. In this respect, section 4 could be seen as of merely disabling effect, preventing the

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[109] *Pora*, supra n10, at para 35.

[110] Cf Art 1 European Convention on Human Rights, where the state parties agree that they "shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" (my emphasis). The s 2 NZBORA 'affirmation' suggests that the rights are already in existence, recalling the common law heritage of the NZBORA rights. See P Joseph "The Demise of Ultra Vires - Judicial Review in the New Zealand Courts" [2001] PL 354 at 371.

[111] W N Hohfeld (W W Cook ed), *Fundamental Legal Conceptions* (1919) at 8-9.

[112] *RWDSU Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573, 599 (per McIntyre J).

judicial invalidation of NZBORA-inconsistent legislation. As the legal breach must be remedied, however, some other "remedy...may be necessary to vindicate the law".[113] The declaration of inconsistency is directed precisely at the legal breach itself, yet does not offend against the section 4 remedial prohibition.[114] It would thus appear to be the perfect remedial option.

The major problem in this argument comes in its assertion that the passage of the legislation is an 'act' falling within the ambit of this section 3 'duty'. Such a proposition would be uncontroversial if made in respect of a supreme law Bill of Rights,[115] but the inclusion of the legislature in section 3 of the statutory NZBORA may be directed at securing compliance with rights in other spheres of legislative activity, such as the regulation of select committees. The NZBORA's effect on legislation seems more obviously regulated by the interpretive implications of the operative provisions than by an artificially constructed section 3 obligation. Indeed, it has even been argued that in the transition to a statutory Bill of Rights, the reference to the "legislative branch" in section 3 must have been retained purely to preserve the effect of mentioning all three governmental branches together.[116]

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[113]Right Hon Dame Sian Elias, *Constitutions and Courts*, the Tenth AIJA Oration in Judicial Administration (2000) at 12.

[114]Brookfield and Butler have both argued by expressio unius, exclusio alterius from the sheer particularity of the terms of s 4 that declarations of inconsistency are allowed under the NZBORA. Whatever the strength of this argument, it is clear that the declaration does not violate the s 4 prohibitions on judicial activity. See Butler, supra n25, at 139, and Brookfield, supra n39, at 239.

[115]The context of *Dolphin Delivery*, supra n112.

[116]P Rishworth, "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" in *Essays on the New Zealand Bill of Rights Act 1990* (1992) 7 at 15, n44.

Declaration enthusiasts may thus not be able to count on a 'legislative obligation' argument to support the new remedy. Nevertheless, in providing section 5 with new utility in the statutory context, the remedy is consistent with the broader scheme of the NZBORA.

B. The impact of the declaration on the NZBORA

The acceptance of a jurisdiction to make declarations of inconsistency has positive implications for the NZBORA itself. From a consequentialist viewpoint, these benefits may provide further support for ascribing a vigorous role to section 5. Two such benefits are articulated below.

i. Protecting Parliamentary sovereignty

Paradoxically, acceptance of a judicial declaratory jurisdiction under the NZBORA may actually have the effect of confirming, rather than detracting from, the primacy of Parliament. The power to make such declarations effectively militates against the potential for judicial activism inherent in section 6 of the NZBORA. Section 6 commands courts to prefer interpretations of legislation that are consistent with NZBORA rights. Judges, confronted by legislation that blatantly impinges upon NZBORA rights, may be tempted to adopt an interpretation of that legislation "so radical and strained that it arrogates to the judges a power completely to rewrite the existing law" under the guise of adherence to section

6.[117] Indeed, the refusal of the majority in *Poumako* to consider the possibility of a declaration of inconsistency arguably led to exactly this type of unjustifiable interpretation. Thomas J had significant cause to doubt the tenability of an interpretation of the Criminal Justice Amendment Act (No 2) 1999 which confined its retrospective application to a mere fifteen days.[118]

This benefit will thus only accrue if courts give sufficient consideration to the possibility of a declaration. In the UK, judicial reluctance to provide declarations except as a measure of last resort has already seen legislation (and Parliamentary supremacy) contorted by strained interpretation. In *R v A*, legislation prima facie incompatible with the right to a fair trial was read subject to an implied provision requiring adherence to the requirements of this right.[119] The 'reading in' of such provisions, in this case the very article 6 right that the original legislation appeared to qualify, constitutes a dangerous incursion on the legislative role. Recognition of the value in limiting the number of declarations granted by the courts in New Zealand should not obscure the need to avoid judicial legislation.

If the declaratory jurisdiction is approached in a robust fashion, the tension

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[117]Lord Irvine of Lairg warned against such interpretations in the UK context in Lord Irvine of Lairg, "Activism and Restraint: Human Rights and the Interpretative Process" [1999] EHRL Rev 350, 367. Butler observed that an excessively strong s 6 approach substitutes judicial legislation for judicial interpretation in A Butler, "Declaration of Incompatibility or Interpretation Consistent with Human Rights in New Zealand" [2001] PL 28 at 35-6.

[118]*Poumako*, supra n1, at paras 80-83.

[119][2001] UKHL 25, at paras 44-5 (per Lord Steyn). Admittedly, the House of Lords explicitly accepted that the interpretive injunction under s 3 HRA 1998 (UK) is actually stronger than that provided by s 6 NZBORA in that possible (and even linguistically strained) rather than merely reasonable interpretations are demanded by the HRA.

inherent in what has been labelled the "Janus-like posture of the courts" under the NZBORA, as the guardians of both human rights norms under section 6 and Parliamentary sovereignty under section 4, may finally be resolved.[120] The declaration allows courts to perform both NZBORA roles simultaneously.

ii. Augmenting NZBORA rights protection

The current Parliamentary safeguards against the passage of NZBORA-inconsistent legislation are somewhat limited. Bills are subject to NZBORA scrutiny in the form of pre-legislative checks by the Ministry of Justice or Crown Law Office,[121] and supervision by the Cabinet Legislation Committee.[122] If an inconsistency is identified, section 7 NZBORA enables the Attorney-General to "bring to the attention of the House of Representatives" any apparently NZBORA-inconsistent provisions in bills introduced into the House.

The Justice and Law Reform Select Committee felt that the prophylactic effect of section 7 would compensate for the general subordination of the NZBORA to other legislation.[123] Despite the pre-legislative safeguards, apparently infringing

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[120]Butler, supra n25, at 136.

[121]The Ministry is responsible for examining all bills for compliance with the NZBORA and advising the Attorney-General, unless the Ministry is promoting the bill in question, in which case the Crown Law Office performs the task. *Cabinet Office Manual* (2001), at para 5.39, which may be viewed on line at www.dpmc.govt.nz/cabinet/manual/index.html.

[122]When submitting a bill to the Cabinet Legislation Committee for approval for introduction to the House, Ministers must confirm in a covering submission that the bill complies with the NZBORA. *Cabinet Office Manual*, ibid, at paras 5.35-6, and the *Cabinet Office Step by Step Guide* (2001), at para 7.4, which may be viewed on line at www.dpmc.govt.nz/cabinet/guide/index.html.

legislation has occasionally escaped section 7 identification, and the legal advice on which the section 7 power is exercised has also been criticised.[124] The fact remains that section 4 ensures the legal validity of both deliberate and unconscious legislative restrictions on NZBORA rights.[125]

The prophylactic effect of section 7 is incomplete in two respects. Firstly, it only serves as a check on post-NZBORA legislation; pre-NZBORA legislation, despite being clearly within the ambit of the NZBORA's interpretive mandate, receives no such vetting. Secondly, the section 7 power is of dubious value in respect of NZBORA-inconsistent provisions that are added by way of amendment to bills already before the House. The history of the Criminal Justice Amendment Act (No 2) 1999, which prompted Thomas J's would-be declaration in *Poumako*, perfectly illustrates this lacuna in the NZBORA. As Thomas J observed, the relevant NZBORA-inconsistent provision in the Act was added by an amendment moved by a minority party well after the Bill's introduction, where section 7 could have been effective.[126] No other oversight was possible, as the amendment was also made after the relevant Select Committee had finished its consideration of the Bill.

As the declaratory jurisdiction asserted by the Court in *Moonen* embraces all statutory provisions, regardless of time or manner of origin, the declaration augments the protection afforded by section 7. It may be argued that such

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[123]Butler, supra n25, at 145.

[124]Joseph, supra n104, at 273.

[125]Butler, supra n25, at 137.

[126]*Poumako*, supra n1, at para 101.

enhanced protection is unjustified, as section 7 confines the checks on NZBORA-inconsistent legislation to the Parliamentary process itself. Given that the interpretive consistency demanded by section 6 of the NZBORA is directed to all legislation, however, it is difficult to see why the policy of the NZBORA should necessarily require that Parliament confine its consideration of legislative inconsistencies to the narrow ambit of section 7. It is similarly important to note that the declaration itself is not antithetical to Parliamentary processes. Ultimately, like section 7, the declaration is a Parliamentary aid to NZBORA-consistency, not a demand. Parliament remains free to override such warnings. The declaration simply ensures that this process is a more considered, deliberate one. It is difficult to see how Parliament can further its stated objective in the long title to the NZBORA to "affirm, protect and promote human rights" when it is not aware of potential legislative transgressions upon them.

2. The Relationship between Parliament and the Courts

A. Parliamentary sovereignty and the declaration

The New Zealand constitutional landscape is still defined by the "sovereignty grundnorm."[127] The grundnorm was given specific endorsement in the NZBORA context through the deliberate legislative choice to enact a statutory rather than a supreme law Bill of Rights, and is embodied in the section 4 prohibition on the judicial invalidation of statutes inconsistent with the Act.

[127]Butler, supra n117, at 36.

The declaration does not erode this constitutional principle. Parliamentary sovereignty, in classical Diceyan terms, provides the legislature with the "right to make or unmake any law whatever".[128] This right remains untouched by the declaration. As Thomas J noted in *Poumako*, Parliament may leave a legislative provision declared inconsistent with the NZBORA in place, or even reinforce it.[129] In this respect, the declaration recognised in *Moonen* is analogous to the UK statutory declaration procedure under the HRA, which was explicitly designed to maximise "the protection of human rights without trespassing on Parliamentary sovereignty."[130]

B. A constitutional yardstick - article 9 Bill of Rights 1688

The legitimacy inquiry into the declaration of inconsistency is not, however, completed by an assessment of its impact upon the doctrine of Parliamentary sovereignty. Over centuries of common law and constitutional practice, a more subtle relationship between the judiciary and the legislature has evolved. That relationship finds the starting point of its expression in article 9 of the Bill of Rights 1688 (UK). It remains to be seen whether the declaration of inconsistency does unacceptable violence to the 'rule of comity' which flows from article 9. If it does so, thus altering a balance derived from centuries of constitutional experience, there

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[128]N Bamforth, "Parliamentary Sovereignty and the Human Rights Act 1998" [1998] PL 572 at 572.

[129]*Poumako*, supra n1, at para 103.

[130]HL Deb, Vol 582, col 1228 (3 Nov 1997), per Lord Irvine of Lairg.

may be a strong case for questioning the constitutional appropriateness of the declaration.

Article 9 is currently in force in New Zealand.[131] Article 9 provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or any place out of Parliament.

On its face, article 9 looks like it merely encapsulates Parliamentary privilege, the principle for which it is most frequently cited. This 'narrow' reading of article 9 would hardly seem to be threatened by the declaration. As observed by Lord Browne-Wilkinson, delivering the judgment of the Privy Council in *Prebble v Television New Zealand Ltd*,[132] the rationale of this narrow scope accorded to article 9 is "to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say."[133] Given that the declaration of inconsistency operates neither to invalidate an impugned statute nor impose personal liability on Members of Parliament for the passage of NZBORA-inconsistent legislation, it is unlikely that the declaration would have this prohibited chilling effect on Parliamentary speech.

The constitutional ramifications of article 9, however, are more extensive than this narrow formulation admits. The Privy Council in *Prebble* recognised that

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[131]By virtue of s 242 Legislature Act 1908 and the Imperial Laws Application Act 1988.

[132][1994] 3 NZLR 1.

[133]Ibid, at 8.

there is "a broader principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles."[134] This broader principle was labelled the "rule of comity" by McGechan J in *Westco Lagan*.[135] In essence, the rule of comity establishes a "constitutional boundary".[136] It emphasises the "undesirability of an unnecessary clash between the legislature and the judiciary",[137] a prospect to be avoided by the exercise of "mutual restraint" by both organs of the state.[138]

From the decision in *Mangawaro Enterprises*, moreover, it appears that the declaration of inconsistency could well involve a breach of the rule of comity. In that case, the plaintiff company claimed a declaration that it was entitled to compensation by the Crown for an export ban on indigenous timber that affected its business. The terms of the Forests Amendment Act 1993 did not permit the provision of such compensation. Gallen J refused to grant a declaration as sought by the plaintiff. Gallen J warned that "in the absence of some entrenched constitutional provision...the Court would be usurping the authority of the legislature if it endeavoured to substitute its own opinion of the legislation proposed."[139] A declaration of inconsistency can easily be characterised as just such a substitution of judicial opinion of a statute for that of the legislature. Nevertheless, examination

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[134]Ibid, at 7. This statement of the broader principle found further support in *R v Commissioner for Standards, ex p Al Fayed* [1998] 1 All ER 93.

[135]*Westco Lagan*, supra n108, at para 64.

[136]*Westco Lagan*, supra n108, at para 98.

[137]*Mangawaro Enterprises*, supra n108, at 458.

[138]Idem.

[139]*Mangawaro Enterprises*, supra n108, at 459.

of further case law illustrates that the principle of comity is more robust than this initial conclusion indicates. It is argued below that the declaration of inconsistency poses no grave risk to the evolving balance between the courts and Parliament.

A number of specific limitations on the power of the courts have been derived from the rule of comity. Firstly, the courts have consistently refused to question or assess the *bona fides* of the legislative process. Thus, in *British Railways Board v Pickin*,[140] the House of Lords refused to entertain a claim that Parliament had been fraudulently misled into passing a private Act. In *Prebble*, a defendant to a defamation action pleaded particulars referring to speeches, actions and proceedings in the House of Representatives. While the Privy Council accepted that it was open to the defendant to use *Hansard* to prove what was said and done in Parliament as a matter of historical fact, the Court noted that such facts could not be used to "suggest that the words were improperly spoken or the statute passed to achieve an improper purpose."[141] It is clear, however, that the declaration of inconsistency does not offend against this prohibition on challenging the *bona fides* of the legislative process. The declaration makes a finding that the relevant legislation is inconsistent with the NZBORA, but does not impugn the validity of the legislation nor the motives of the legislators concerned.

The rule of comity has also been viewed as prohibiting a legal stand-off between Parliament and the courts. In *Mangawaro Enterprises*, the plaintiff

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[140] [1974] AC 765.

[141] *Prebble*, supra n132, at 11.

company also challenged the non-exercise of the Attorney-General's reporting function under section 7 NZBORA when the Forests Amendment Bill, allegedly inconsistent with various aspects of the NZBORA, was first introduced into the House of Representatives in 1992. Gallen J held that the obligation imposed on the Attorney-General by virtue of section 7 was insulated against such challenge by article 9 Bill of Rights 1688.[142] In the course of his judgment, Gallen J referred to a hypothetical question posed by the Master in the Court below that highlighted the futility of the plaintiff's challenge:

> One only has to ask what would happen if the Court did interfere and order the Attorney-General to report pursuant to s 7 on a particular enactment and the Attorney-General refused to comply?[143]

This question explicitly envisages a legal stand-off that would be unacceptable to the rule of comity.

At first blush it appears that the declaration could prompt Parliamentary non-compliance with a judicial order. Even in the United Kingdom, where the declaratory jurisdiction was provided to the courts on the express understanding that Parliament would almost invariably legislate to correct any incompatibilities with European Convention rights thereby identified,[144] it has been anticipated that

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[142] *Mangawaro Enterprises*, supra n108, at 456.

[143] *Mangawaro Enterprises*, supra n108, at 458.

[144] Bamforth notes that the architect of the Human Rights Act 1998 (UK), the Lord Chancellor, Irvine of Lairg, explicitly acknowledged in a public lecture that such a Parliamentary response would usually be forthcoming: "Parliament may - not must, but in

such declarations may be ignored by the legislature in relation to particularly controversial policy matters.[145] Nevertheless, a refusal by the legislature to act on a declaration of inconsistency is not equivalent to non-compliance with a court order. Unlike the legal direction to the Attorney-General contemplated in *Mangawaro Enterprises*, the declaration has no immediate legal force. Any stand-off that flowed from a declaration could only be characterised as one of political, not legal effect. In this respect, therefore, the rule of comity remains undisturbed by the declaration of inconsistency.

Nevertheless, the rule of comity has been extended beyond a prohibition on a legal stand-off between the courts and Parliament. In both *Prebble* and *Pickin*, it was suggested that the mere prospect of the two institutions coming to a different conclusion on the same matter could precipitate the kind of constitutional conflict that the rule of comity is designed to avoid. Thus, in *Prebble*, it was noted that misleading the House is a contempt of the House punishable by the House. If the courts were also to decide "whether or not a member or witness had misled the House there would be serious risk of [unacceptable] conflicting decisions on the issue."[146] Lord Simon of Glaisdale considered a similar possibility "unthinkable" in *Pickin*.[147] The relevant fear in that case was that concurrent judicial and

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practice, we believe, usually will - legislate". Bamforth, supra n128, at 573, n7.

[145]Ewing notes that contentious statutes may include abortion legislation, provisions dealing with emergencies, and provisions of constitutional significance in Ewing, supra n87, at 92.

[146]*Prebble*, supra n132, at 8.

[147]*Pickin*, supra n140, at 800.

Parliamentary inquiries - "conceivably arriving at different conclusions" - might be made into whether the legislature had been misled into passing an enactment.[148]

There are two situations in which the declaration of inconsistency could offend against this third formulation of the rule of comity. The first arises in the initial legislative context. Should the Attorney-General raise an apparent inconsistency pursuant to section 7, but the House affirm the NZBORA-consistency of the bill in subsequent debate and pass it unaltered, a later declaration of inconsistency pertaining to the same legislation would appear to constitute a judicial decision at odds with the one prevailing in the House. The second situation arises following a declaration of inconsistency. If the House considers the possibility of legislative amendment, a majority conclusion affirming the NZBORA-consistency of the impugned legislation could again be reached. In either situation, the conflicting conclusions would appear to fall foul of the *Prebble/Pickin* prohibition.

Nevertheless, recent decisions indicate that the *Pickin/Prebble* formulation of the rule of comity may be unduly sensitive in the modern constitutional context. In *Westco Lagan*, McGechan J accepted that the Court has the jurisdiction to determine whether there has been compliance with any mandatory 'manner and form' requirements imposed by statute for the enactment of legislation by Parliament.[149] This jurisdiction entails the power of the Court to intervene in the

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[148]Idem.

[149]This proposition actually has a significant pedigree; see *Trethowan v Peden* (1930) 31 SR (NSW) 183, upheld in the High Court of Australia in *Attorney-General v Trethowan* (1931) 44 CLR 394. McGechan J noted that such 'manner and form' requirements would have to be procedural and not substantive in character. He provided the examples of

legislative process at "some suitable point before enactment."[150] This conclusion appears to endorse a far more interventionist attitude towards the legislative domain than found favour in *Pickin*, and seems to at least qualify the principle that "[t]he remedy for a Parliamentary wrong...must be sought from Parliament, and cannot be gained from the courts."[151]

McGechan J went on to articulate a far more robust conception of the rule of comity. For the learned judge, the essence of the rule is simply that "the Courts should not interfere so as to frustrate the powers of the House to enact legislation".[152] Subject to this inviolable core of the principle, constitutional boundaries "may evolve and modify as time and circumstances dictate".[153] The declaration of inconsistency cannot possibly frustrate the legislative power of Parliament. Legislation is not invalidated by the declaration, nor need Parliament even reconsider the impugned statutory provisions. Though some ambivalence towards the declaration may be perceived in McGechan J's judgment in *Westco Lagan*,[154] the declaration is perfectly consistent with the approach to the rule of

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compliance with the entrenched provisions of the Electoral Act 1993 and the Constitution Act 1986 requirement of Royal Assent to legislation. See *Westco Lagan*, supra n108, at paras 91-3.

[150] *Westco Lagan*, supra n108, at para 93.

[151] *Pickin*, supra n140, at 793 (per Lord Wilberforce). Lord Morris drew a similar conclusion at 790.

[152] *Westco Lagan*, supra n108, at para 98. Cf McGechan J's apparent reluctance to pre-empt impending legislation by invalidating impugned regulations in *Turners v Growers Exports Ltd v Moyle*, 15/12/88, McGechan J, HC Wellington CP720/88. The refusal to provide a remedy in that case, however, appeared largely due to the fact that invalidation of the regulations would have caused administrative chaos in the kiwifruit industry.

[153] *Westco Lagan*, supra n108, at para 98.

comity taken in the case.

The conclusion that New Zealand courts are countenancing a more robust judicial attitude towards Parliament is reinforced by the decision of the Court of Appeal in *Ngati Apa Ki Te Waipounamu Trust v The Queen.*[155] The joint judgment of Blanchard and Tipping JJ explores the constitutional boundary established by article 9 Bill of Rights 1688. In this case, Ngati Apa sought an order setting aside a decision of the Maori Appellate Court on the grounds of procedural impropriety and failure of natural justice. Parliament, however, had incorporated this order into two different legislative provisions as the statutory basis for its settlement of Ngai Tahu claims for breaches of the Treaty of Waitangi.[156] Blanchard and Tipping JJ observed that granting the relief claimed by Ngati Apa would "be tantamount to an attack on Parliament's decision to accept the Maori Appellate Court's order", which by removing a "fundamental premise" of the legislation could amount to a breach of article 9.[157] Nevertheless, the judges were prepared to accept that the High Court could make a declaration that the order was in breach of natural justice or some other procedural requirement.[158] Such a declaration would "simply inform Parliament that what it thought was a secure

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[154]McGechan J described the *Moonen* proposals for declarations of inconsistency as being "(with respect) adventurous". *Westco Lagan*, supra n108, at para 59.

[155][2000] 2 NZLR 659.

[156]The relevant legislative provisions were s 5 of the Te Runanga O Ngai Tahu Act 1996 and s 8 of the Ngai Tahu Claims Settlement Act 1998.

[157]*Ngati Apa*, supra n155, at paras 155-6.

[158]This was the majority approach of the Court of Appeal in *Ngati Apa*. Keith J agreed that a limited declaration was possible. *Ngati Apa*, supra n155, at para 117.

foundation for the Settlement Act was not in fact secure."[159]

The implications for the declaration of inconsistency are clear. The declaration of inconsistency, which alerts Parliament to a legislative inconsistency with the NZBORA, has a similarly informative function to the declaration envisaged in *Ngati Apa*. Indeed, it can be argued that *Ngati Apa* goes further than *Moonen*, for it anticipates a declaration that an order forming the basis of a statute is legally invalid. By contrast, the declaration of inconsistency confines its claims to the NZBORA-consistency of legislation. Further, it should be noted that *Ngati Apa* effectively repudiates the *Prebble/Pickin* formulation of the rule of comity. In asserting the insecurity of an order relied upon by Parliament as secure, the *Ngati Apa* declaration involves a judicial conclusion at odds with that of Parliament on the same subject matter. On the robust version of the rule of comity that has evolved in *Ngati Apa* and *Westco Lagan*, then, it appears that the declaration of inconsistency falls within the appropriate constitutional boundaries.

C. The new constitutional dynamic - a dialogue on rights

The declaration is not only consistent with the present constitutional balance, but also appears consonant with a new constitutional dynamic. In the Canadian human rights context, Hogg and Bushell have discerned the existence of a "Charter dialogue" between the legislature and the judiciary.[160] In Canada, the legislature

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[159] *Ngati Apa*, supra n155, at para 156.

[160] P W Hogg and A A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ

has tended to respond to judicial decisions to strike down legislation contrary to the Charter by amending the impugned legislation to effect the legislative objective in Charter-consistent fashion.[161] This "two-way exchange...on the topic of human rights" is seen as beneficial for promoting greater human rights protection and elevating the importance of rights issues in both institutions, without raising absolute barriers to democratic policy choices.[162]

The declaration of inconsistency may precipitate an analogous NZBORA-dialogue in New Zealand. This would not be a surprising development, given the recent calls for a "fruitful partnership" between Parliament and the courts.[163] Indeed, the shared commitment of both institutions to fundamental human rights was cited by Thomas J in *Poumako* as a justification for the development of the declaration.[164] The nature of the declaration will, however, qualify the vigour of the dialogue. The declaration thus promises more uncertain gain in relation to the first benefit or 'dialogue value' identified by Hogg and Bushell, the enhanced protection

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75. The "Charter" referred to is the Canadian Charter of Rights and Freedoms, supra n32.

[161]This had happened in two thirds of all cases considered in Hogg and Bushell, ibid, at 80.

[162]Ibid, at 80-1.

[163]Thomas J is the major proponent of this theory, which borrows heavily from Professor Jaffe's argument in L L Jaffe, *English and American Judges as Lawmakers* (1969). See E W Thomas, "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31(1) VUWLR 5 at 35 for an extrajudicial exposition, or the judgments of Thomas J in *Fulcher v Parole Board* (1997) 15 CRNZ 222 at 242, *R v Hines* [1997] 3 NZLR 529 at 580, *Pora*, supra n10, at para 167, and *Poumako*, supra n1, at para 101.

[164]Thomas J observed that this shared commitment meant that the legislature "should endorse any procedure which will avoid a serious lapse on the part of either institution". *Poumako*, supra n1, at para 99.

of rights, as the declaration exerts political rather than legal pressure on Parliament to this end. The corollary, however, is the absence of interference with democratic policy choices.[165]

Though similarly qualified, the second benefit of increased institutional consideration of rights is nevertheless likely to be significant in New Zealand. As they are framed, NZBORA rights are absolute, general and hence content-devoid. The NZBORA affirms the importance of such rights but gives little guidance as to their (highly contestable) content. In the declaration of inconsistency, the courts have a vehicle for formally articulating the appropriate limits on, and hence the appropriate content of NZBORA rights. The unique political value of the declaration is likely to prompt greater Parliamentary consideration of the content of such rights. In defining this content, the accountability inherent in the declaration should facilitate an increased level of justification, promoting a constitutional climate appropriate for a jurisdiction with a bill of rights.[166] This climate is certainly evident in Canada. In response to a decision of the Supreme Court allowing a defence of intoxication,[167] the Canadian Federal Parliament amended its Criminal Code to exclude such a possibility, providing a specific rights-based justification in a statutory preamble.[168] The declaration may thus promote greater certainty, consideration and justification in relation to NZBORA rights.

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[165]See the discussion at 2(D) of this Chapter below.

[166]Butler notes that one of the aims of a bill of rights is to create a "culture of justification". Butler, supra n25, at 135.

[167]*R v Daviault* [1994] 3 SCR 63.

[168]An Act to Amend the Criminal Code (self-induced intoxication), SC 1995, c 32, s 1.

D. Democratic objections to the declaration

There are legal commentators who have questioned the legitimacy of the declaration on the grounds that it involves an arrogation of political and hence de facto legal power by the judiciary. Ewing is thus concerned that evolving "constitutional practice" will see UK legislators reduced to mere "judges' runners".[169] Huscroft similarly fears that New Zealand legislators will simply acquiesce with controversial and contestable declarations because of the privileged position of the courts in the public trust.[170] On this view, the legislative choices of a representative and accountable Parliament are effectively subordinated to the declaratory power of an unelected, unaccountable judiciary. These objections depict the declaration not as a tool of constitutional dialogue but rather as facilitating a form of undemocratic judicial ventriloquism.[171]

The political impact of a declaration is an arguably more debatable empirical question in New Zealand than in the UK, where the very statutory framework of Ministerial remedial orders in which the declaration of incompatibility operates anticipates acquiescence by the legislature with judicial decisions as to the rights-consistency of legislation.[172] Nevertheless, it is entirely foreseeable that the New

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[169]Ewing, supra n87, at 92.

[170]G Huscroft, "Rights, Bills of Rights, and the Role of Courts and Legislatures", unpublished paper, 2001, at 18.

[171]C P Manfredi and J B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall LJ 513 at 521.

[172]This conclusion was readily apparent to the UK Parliament during the passage of the Human Rights Act. Lord Borrie, in a 2nd Reading debate in the House of Lords, stressed that "government and Parliament will faithfully implement any declaratory judgment made by

Zealand declaration, sparingly used, will generate sufficient media interest and public pressure to have a similar political impact. It is important to recognise, however, that Parliament will only be politically pressured into complying with a declaration through amending legislation if it is apparent that the electorate demands such an outcome. This scenario is entirely consistent with majoritarian principles; in relation to declarations of inconsistency, as Goldsworthy notes, the "democratic process will determine what is or is not politically feasible."[173]

Majoritarian commentators would no doubt respond, however, that the strength of public trust in the judiciary, and the popular assumption that judges have access to some sort of 'higher truth' in such matters, mean that the public's response to a declaration would be illegitimately distorted. Nevertheless, such an amended majoritarian argument trespasses into argumentative territory traditionally eschewed by such commentators. Majoritarian theory is predicated on a refusal to question the motives or capacities of an electorate; regardless of such variables, all individual political responses are equally valid. It is unclear why the impact of judicial decisions upon a supposedly naive electorate should be characterised as an illegitimate distortion of democracy, whilst political campaigns by lobby groups based on content-devoid rhetoric and political parties driven by a leader's personal charisma are seen as normal incidents of the democratic process.[174]

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the High Court". HL Deb, vol 582, cols 1275-6 (3 Nov 1997), per Lord Borrie.

[173]J Goldsworthy, "Legislation, Interpretation and Judicial Review" (2001) 51 University of Toronto Law Journal 75 at 82.

[174]Goldsworthy thus argues that the distortion objection "would reflect exactly the same

Critics may also rely on a meta-objection to the declaration, which would deny the courts any place in a constitutional dialogue with the legislature on human rights issues. This objection could harness Waldron's argument that rights are inherently contestable, and are best resolved by the representative processes of Parliament, involving debate encompassing a broad range of community interests and opinion.[175] The declaration would thus only distract from the appropriate process for resolving disputes about rights. This objection, however, has little place in New Zealand. The courts are commanded by the NZBORA itself to be involved in contests over rights. Given that the declaration of inconsistency reserves the definitive legal resolution of contestable rights to Parliament, the representative process retains its primacy.

A more fundamental response to Waldron's thesis further illustrates the value of a NZBORA-dialogue.[176] Waldron's argument proceeds on the assumption that a conscious decision on contestable rights is actually made, after vigorous debate, within a legislative forum. The history of the declaration in New Zealand already illustrates the empirical fallacy of such an assumption. The legislative confusion inherent in the apparent inconsistency between section 4(2) Criminal Justice Act 1985 and section 2(4) Criminal Justice Amendment Act (No 2) 1999

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lack of faith in the electorate's capacity for enlightened self-government that motivates proponents of constitutionally entrenched rights", a lack of faith consistently criticised by majoritarian theorists. Ibid, at 81-2.

[175]See J Waldron, *Law and Disagreement* (1999).

[176]See the discussion at 2(C) in this Chapter above.

was sufficiently problematic to resist two attempts by the Court of Appeal to find a definitive interpretation.[177] In *Pora*, Thomas J thus drew an inference difficult to resist - that the amending legislation, of potentially major constitutional import, was passed without consideration of its significance.[178] Pressures of time and resources mean that such "inadvertent legislation...abridging human rights" can and will be passed.[179] The declaration, by drawing Parliament's attention to the implications of legislation deemed NZBORA-inconsistent by the judiciary, can facilitate the more considered legislative response to disputes about rights that Waldron himself desires.[180] In this respect, declarations of inconsistency augment rather than detract from the processes of democratic government.[181]

3. The International Dimension

Both the Court in *Moonen* and Thomas J in *Poumako* referred to the potential utility of a declaration of inconsistency should "the matter come to be examined by the Human Rights Committee".[182] These observations highlight the

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[177] *Poumako*, supra n1, and *Pora*, supra n10.

[178] *Pora*, supra n10, at paras 121-3. As noted by Thomas J in *Poumako*, supra n1, at para 101, the "retrospective impact [of the legislation] was dealt with in a single remark to the House and attracted no comment."

[179] *Pora*, supra n10, at para 121.

[180] This also accords with Ely's general thesis - that judicial intervention may be justified when it is necessary to ensure that democratic institutions actually work as intended. J H Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

[181] Lord Bingham made a similar comment in relation to the HRA in the UK: "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them." This comment was repeated in a speech by Lord Irvine, supra n85.

[182] *Moonen*, supra n2, at 17; *Poumako*, supra n1, at para 97 (per Thomas J).

contemporary importance of international mechanisms for enforcing human rights. The potential implications of the declaration for New Zealand's role within the international human rights system thus provides another potential line of inquiry into its legitimacy.

A. The declaration and New Zealand's ICCPR obligations

New Zealand is a state party to the International Covenant on Civil and Political Rights (the ICCPR).[183] As such, it is committed under article 2(3)(a) to the provision of an "effective remedy" to any person whose ICCPR rights are violated, and to the further development of "the possibilities of judicial remedy" under article 2(3)(b). State parties are also bound by article 40(1) of the ICCPR to submit periodic reports on measures taken to give effect to the ICCPR rights within their jurisdiction, a process supervised by the Human Rights Committee.

Though the declaration of inconsistency is clearly a newly developed judicial remedy for the purposes of article 2(3)(b), it is unlikely that its addition to the NZBORA remedial armoury will significantly affect the present attitude of the Human Rights Committee towards the standard of New Zealand's human rights protection. In discussion during the presentation of New Zealand's third periodic report, the Human Rights Committee was concerned that section 4 of the NZBORA, which preserves the validity of legislation inconsistent with fundamental rights, impeded

[183]International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, 999 UNTS 171 (*entered into force* 23 Mar. 1976), GA Res. 2200 (XXI), 21 UN GAOR Supp. (No 16) at 52, UN Doc. A/6316 (1966).

New Zealand's ability to meet its article 2(3) obligations.[184] Unimpressed with New Zealand's argument that public opinion did not support a supreme bill of rights, the Committee ultimately recommended that New Zealand provide its judiciary with an overriding power to strike down legislation inconsistent with ICCPR rights. While traditionally not thought to be a requirement under article 2(3),[185] the Committee has increasingly emphasised that the ICCPR needs to be accorded a higher status than ordinary domestic law.[186] Given that the declaration of inconsistency has no direct legal impact on the validity of NZBORA-inconsistent legislation, the development in *Moonen* will thus not meet the high threshold for state compliance with article 2(3) obligations.

B. The declaration as potential obstacle to the Human Rights Committee

The Human Rights Committee has a second major role within the international human rights system. Under the First Optional Protocol to the ICCPR (the OP), the Committee has jurisdiction over individual communications from

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[184]See *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Report of the States Parties Due in 1990: New Zealand*, UN GAOR, Hum. Rts. Comm., addendum, 6, UN Doc. CCPR/C/64/Add.10 (1994), and *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant (continued): New Zealand*, UN GAOR, Hum. Rts. Comm., 53d Sess., 1393d mtg., 13, UN Doc. CCPR/C/SR.1393 (1995).

[185]See *Matadeen v Pointu* [1999] AC 98, 116.

[186]The Committee has made this point in relation to periodic reports from state parties as diverse as Ireland, Norway and Latvia. See CCPR/C/79/Add.21 (Ireland, 28 July 1993), para 18, CCPR/C/79/Add.27 (Norway, 29 October 1993), para 8, and CCPR/C/79/Add.53 (Latvia, 26 July 1995), para 18.

authors claiming to be victims of state violations of ICCPR rights.[187] New Zealand acceded to the Optional Protocol in 1989, and is hence subject to this complaints jurisdiction. There is the potential for concern, however, that the development of the declaration of inconsistency could actually impede access by New Zealanders to this international forum.

The concern arises from a restriction to the admissibility of individual communications. Article 5(2)(b) of the OP provides that the Committee shall not consider any communication unless the relevant "individual has exhausted all available domestic remedies". Before the arrival of the declaration, it was clear that article 5(2)(b) would not preclude a direct application to the Committee if unambiguous legislation made the pursuit of a remedy for rights violations in New Zealand courts futile.[188] As the declaration now provides a remedy against such unambiguous legislation, however, it is prima facie arguable that individual litigants must first pursue the possibility of a declaration, to the highest appellate authority if necessary, before article 5(2)(b) may be satisfied and the Committee's individual communication jurisdiction invoked. The considerable delay and expense attending such a course could make such complaints a mere theoretical possibility.

The Committee has consistently stressed that the remedies which need to be exhausted under article 5(2)(b) are those that are both available and effective, the

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[187]First Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* 16 Dec 1966, 999 UNTS 302 (*entered into force* 23 Mar 1976), GA Res. 2200 (XXI), 21 UN GAOR, Supp. (no. 16) 59, UN Doc. A/6316 (1966).

[188]S Davidson, "Individual Communications to the United Nations Human Rights Committee: A New Zealand Perspective" [1997] NZ Law Review 375 at 385.

latter requirement demanding that they have a reasonable prospect of success.[189] The problem with the declaration of inconsistency, however, is that even a successful claim for a declaration does not necessarily guarantee redress of the relevant violation of rights. Parliament remains free to ignore the declaration.

Though the Committee's variable approach in its views under the OP makes prediction somewhat difficult, the Committee has shown a tendency to refer to the nature of the article 2(3) obligation on states to provide effective domestic remedies in assessing whether domestic remedies have been exhausted for the purposes of individual communication admissibility.[190] Remedies which are not effective in this respect do not need to be exhausted. Remedies deemed effective under article 2(3) by the Committee have included those able to remedy violations, provide adequate compensation, or prevent similar violations occurring in the future.[191] Much could thus depend on the operation of the declaration in practice. If declarations proved generally unable to prompt the promulgation of amending legislation, or if legislative change to redress rights violations were to be typically accompanied by unacceptable delay,[192] declarations could not be considered

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[189]See for example *Torres Ramirez v Uruguay*, GAOR, 35th Sess., Supp. No.40 (A/35/40), Report of the Human Rights Committee, 121 and *Collins v Jamaica*, GAOR, 44th Sess., Supp. No. 40 (A/48/40), Report of the Human Rights Committee, vol.II, 85.

[190]A direct reference to a connection between the two articles was made by the Committee in *Dermit Barbato v Uruguay*, GAOR, 37th Sess., Supp. No.40 (A/35/40), Report of the Human Rights Committee, 127.

[191]See *Mpandanjila et al v Zaire*, GAOR, 41st Sess., Supp. No.40 (A/41/40), Report of the Human Rights Committee, 121 at para 11; *Hermoza v Peru*, GAOR, 44th Sess., Supp. No.40 (A/44/40), Report of the Human Rights Committee, 200 at para 13.1.

[192]Article 5(2)(b) of the OP makes an express exception to the need to exhaust domestic

effective remedies for the purposes of article 2(3), and hence article 5(2)(b).[193] There would thus be no need to exhaust the possibility of a declaratory remedy before making a communication to the Committee.[194]

If, however, as Lord Irvine of Lairg believes will happen in the UK,[195] declarations invariably prompt the New Zealand legislature to take effective remedial action, this avenue of local redress may have to be exhausted before communications are deemed admissible, at least where a litigant has a reasonable prospect of successfully obtaining a declaration. It is important to note, however, that such a situation would be perfectly consonant with the policy underlying the article 5(2)(b) requirement. Where there is a reasonable prospect of obtaining a remedy which may redress the relevant violation of the right in the domestic context, it is entirely appropriate that this remedy should be sought before recourse is had to an international forum. Thus, the availability of the declaration could only impede access to the Committee in cases which could be satisfactorily resolved in

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remedies where "the application of [such] remedies is unreasonably prolonged".

[193]Davidson observes in this regard that "remedies which in reality do not provide redress for violations, will not be a bar to admissibility" in S Davidson, "The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the ICCPR" (1991) 4(3) Canterbury Law Review 337 at 349.

[194]There may be a question as to whether the declaration, of no direct legal force, is even a remedy within the meaning of art 5(2)(b). The Committee held that extraordinary administrative remedies such as a petition for mercy to the Governor-General and complaints to the Department of Justice did not need to be exhausted in *Ellis v Jamaica*, GAOR, 47th Sess., Supp. No.40 (A/47/40), Report of the Human Rights Committee, 265 and *Prince v Jamaica*, GAOR, 47th Sess., Supp. No.40 (A/47/40), Report of the Human Rights Committee, 250 respectively.

[195]See n144 above.

a litigant's favour in New Zealand. This is no different to the impediments posed by other efficacious judicial remedies in New Zealand. The declaration of inconsistency does not create unjustified obstacles to the Human Rights Committee.

C. More dialogue values

The process of granting such declarations also has two ancillary benefits. The first is in enabling the Human Rights Committee itself to conduct more informed and focused reviews of New Zealand's periodic reports. It has been recognised that such declarations would probably "lead to adverse comment and pressure to amend the law [from the Committee]".[196] As New Zealand freely accepted the supervisory jurisdiction of the Committee in becoming a state party to the ICCPR, any measure which enhances the quality of such supervision is to be considered beneficial. The flow of information between domestic courts and the Committee should be neither surprising nor alarming. The Committee frequently has recourse to domestic judicial decisions in assessing periodic reports. Further, the Court of Appeal has indicated previously that the relationship between New Zealand courts and the Committee is a close one.[197]

Secondly, the declaration will function as an early warning system for the executive. As Boerefijn notes, the Committee may review domestic legislation *in*

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[196]Rishworth, supra n47, at 694.

[197]Cooke P described the Human Rights Committee as "part of this country's judicial structure" in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

abstracto under the state reporting procedure; there need not be a particular case before the Committee in which a rights violation is alleged.[198] New Zealand can thus be the subject of criticism that may not be foreseen in advance. With the advent of the declaration, the executive now has the benefit of a judicial remedy promoting state awareness of potential holes in the domestic statutory framework of human rights protection. This in turn allows legislative amendment to ensure rights-consistency prior to the submission of a periodic report. This is surely an example of positive constitutional dialogue between the various branches of state at work.[199]

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[198]Ineke Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee* (1999) at 330.

[199]See the discussion at 2(C) in this Chapter above.

CHAPTER 4

The Methodology of the Declaration of Inconsistency

1. The Legitimacy of the NZBORA-inconsistency Test

The declaration of inconsistency presupposes a judicial analysis of the reasonableness of statutory limits on rights, which must be "demonstrably justified in a free and democratic society".[200] Given its value-laden terms, fears that this section 5 inquiry will rely more on the arbitrary normative preferences of judges than genuine legal analysis may provide a further argument against the adoption of the declaration. Such fears have some basis in *Moonen*, where the Court observed that "[o]f necessity value judgments will be involved" in section 5 analysis.[201]

Naturally, section 5 may provide its own response. If section 5 demands application to statutes as well as the common law,[202] judges will be grappling with the requirements of a free and democratic society at Parliament's command. Closer inspection of the nature of the section 5 inquiry outlined in *Moonen*, however, provides a more complete answer to fears of judicial activism. The test promises both value for the declaration in the dialogue with the legislature as well

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[200]Section 5 NZBORA.

[201]*Moonen*, supra n2, at 16-17.

[202]See the discussion in Chapter 3(1)(A)(iii) above.

as predictability in judicial analysis.

A. The Oakes test in New Zealand

In outlining the correct approach to section 5 NZBORA, the Court in *Moonen* drew heavily on the Canadian experience of the analogous section 1 of the Charter.[203] The definitive test of reasonable limits on Charter rights was provided by Dickson CJ's judgment in *R v Oakes*.[204]

The test comprises "two central criteria."[205] The first requires that the objective of the legislation infringing Charter rights be of sufficient importance. At a minimum, the legislation must be directed at "pressing and substantial" concerns.[206] The second requires a proportionality in the means used to obtain this objective. There are three separate components to this proportionality assessment. The 'rational connection' test requires the means to be rationally connected to the objective; not "arbitrary, unfair or based on irrelevant considerations".[207] The 'minimal impairment' test requires the means to impair the right in question "as little as possible".[208] Subsequent decisions have recast this

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[203]The Canadian Charter of Rights and Freedoms, supra n32.

[204]*Oakes*, supra n33, at 138-140. Rothstein notes that the *Oakes* test has been applied in approximately 85% of s 1 cases considered by the Supreme Court of Canada. See M Rothstein, "Section 1: Justifying Breaches of Charter Rights and Freedoms" (2000) 27:2 Man LJ 171 at 172.

[205]*Oakes*, supra n33, at 138.

[206]*Oakes*, supra n33, at 138-39.

[207]*Oakes*, supra n33, at 139. The labels used to denote the various components of the proportionality assessment are those employed in L Trakman, W Cole-Hamilton and J Gatien, "*R v Oakes* 1986-1997: Back to the Drawing Board" (1998) 36:1 Osgoode Hall LJ 83.

test to avoid its logical stringency, requiring the legislature to impair rights "as little as is reasonably possible".[209] Finally, the 'proportionate effects' test requires a proportionality between the effects of the measures limiting rights and the legislative objective. As further refined in the case law, this test also requires a proportionality between the salutary and deleterious effects of the measures.[210]

The section 5 inquiry set out in *Moonen* affirmed the relevance of both the significance of the legislative objective and the proportionality of the statutory means employed, echoing the bipartite structure of the *Oakes* test.[211] Subject to the clarification of some ambiguities in the *Moonen* test,[212] it thus appears that *Oakes*-based Charter jurisprudence provides a solid basis for predicting the nature of judicial determinations of NZBORA-consistency.

B. The Oakes test as an appropriate legal inquiry

As applied in Canada, the *Oakes* test rarely allows judicial value judgments to be decisive when assessing the Charter-consistency of legislation. Though the substantive limb of the *Oakes* test may initially appear to be the most dangerous in this regard, the requirement that the legislative objective be of sufficient importance

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[208] *Oakes*, supra n33, at 139.

[209] See for example *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 at 772 (per Dickson CJ).

[210] *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 at 889.

[211] *Moonen*, supra n2, at 16.

[212] In *Moonen*, supra n2, at 16, the minimal impairment test appeared without the *Edward Books* qualification, no specific threshold was set for the importance of the legislative objective, and there was only an imprecise allusion to the proportionate effects test.

has failed to fire the judicial imagination. Between 1986 and 1997, 97% of those statutory provisions constituting a prima facie infringement of Charter rights satisfied this requirement.[213] The fact that legislative objectives may be framed in broad terms,[214] and that only one of multiple legislative purposes must meet the threshold,[215] further qualifies its scope. On this basis, a spousal allowance programme which discriminated on the prohibited ground of marital status was nevertheless upheld on the basis that one objective of the discrimination was to provide an economically viable programme for those whom it did target.[216]

The real work in the *Oakes* test is done in its next two stages. Legislative provisions failed the rational connection test in 9% of cases in the 1986-1997 period.[217] The natural judicial aversion to finding that a law has been passed without a rational basis operates as a considerable check on judicial activism in this context.[218] When this test does operate in New Zealand, it is likely to proceed on a legalistic basis. Judicial findings of arbitrary, unfair or irrational legislation recall familiar grounds of judicial review.

Though the most active of the *Oakes* components,[219] the minimal

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[213]Trakman et al, supra n207, at 140 (Appendix A, Table 1).

[214]The breadth of the perceived legislative objective occasionally renders judicial analysis futile. In *R v Butler* [1992] 1 SCR 452, for example, the legislative objective was argued to be the prevention of harm to society.

[215]*Delisle v Attorney-General* (1999) 176 DLR (4th) 513.

[216]*Collins v The Queen* [1999] FCJ No. 1578.

[217]Trakman et al, supra n207, at 140 (Appendix A, Table 1).

[218]P J Monahan and A Petter, "Developments in Constitutional Law: the 1985-86 Term" (1987) 9 Supreme Court LR 69 at 109.

[219]In the 1986-97 period, 58% of legislation considered under s 1 failed (*inter alia*) the

impairment test also poses no inherent danger. It essentially seeks to marry two principles immanent in the NZBORA, viz. the affirmation of human rights with overriding Parliamentary sovereignty, by inquiring whether the same legislative gain can be achieved at a lesser cost to human rights. A negative judicial finding on this ground generally involves a positive explanation of more rights-consistent alternative laws available in respect of the same legislative goal, demonstrating the dialogue value of the declaration.[220] The final *Oakes* requirement, the proportionate effects test, has had little independent utility in the Canadian context.[221] Commentators attribute this test's practical redundancy to other *Oakes* components encroaching on its analytical ground.[222]

The *Oakes* test has rightly been described as "methodological in design and technical in application."[223] Even if applied with more vigour in the New Zealand context, the very nature of the *Oakes* test militates against unconstrained judicial activism. Far from being a value-laden exercise, the *Oakes* test actually comprises two different, yet equally arid, cost-benefit analyses.[224] The first and

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minimal impairment test. Trakman et al, supra n207, at 140 (Appendix A, Table 1).

[220]Hogg and Bushell, supra n160, at 85. See Chapter 3(2)(C) above for further discussion.

[221]Trakman et al, supra n207, point out that from 1986-97, every legislative provision failing the minimal impairment test also failed the proportionate effects test, and every provision passing the former test also passed the latter. A later exception is *JG v New Brunswick Minister of Health and Community Services et al* (1999) 177 DLR (4th) 124, where the Supreme Court of Canada focused only on the proportionate effects test.

[222]Rothstein, supra n204, at 182. See also P W Hogg, *Constitutional Law of Canada* (1997) c.35 at 37.

[223]Trakman et al, supra n207, at 86.

[224]D Beatty "The End of Law: At Least As We Have Known It" in R F Devlin (ed), *Canadian*

fourth components of the *Oakes* test (important objective and proportionate effect) collectively constitute a standard utilitarian assessment.[225] The second and third components (rational connection and minimal impairment) operate as a Paretian test, ensuring the legislative benefits come at the least possible cost.[226] As such, the *Oakes* test operates as a jurisprudential "distancing device".[227] The opportunity for judicial normative preferences to dominate within such an analytical framework is limited.

C. The danger of improper deference

While Canadian case law generally evidences a legalistic and predictable approach to section 1 of the Charter, a strain of normative reasoning pervades a number of recent decisions. This has its origins in the seminal judgment of Dickson CJ in *Oakes* itself. In articulating the four-part *Oakes* test outlined above, Dickson CJ noted that it was the principles of a free and democratic society, as embodied in the Charter, against which legislation must ultimately be judged.[228]

Perspectives on Legal Theory (1991) 391 at 393-4.

[225]Ibid, at 393.

[226]Newman explains the Paretian principle as stating that social welfare is always better if the welfare of one individual is improved without harming the welfare of any other. D Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 Sask L Rev 543 at 547.

[227]Raz defines "distancing devices" as "devices [judges] can rely on to settle [disputes]...in a way that is independent of the personal tastes of the judges". J Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998) 152 at 190.

[228]*Oakes*, supra n33, at 136. The principles included respect for human dignity, a commitment to social justice and equality, and the accommodation of a plurality of beliefs

La Forest J's minority judgment rekindled this value-based perspective on section 1 in *RJR-MacDonald Inc v Canada (Attorney-General)*, holding that the provision entailed "an unavoidably normative inquiry".[229] The vehicle for this normative inquiry, ironically, is a contextual analysis designed to determine the appropriate degree of deference due to the legislature under section 1. The nature of both the infringing legislation and the right infringed are considered crucial aspects of this context. Where, as in *RJR-MacDonald*, the legislation is of major social value, and the right infringed far from the core values of that right, the legislation need only demonstrate an "attenuated level of s 1 justification".[230]

The *RJR* minority's approach, however, risks shifting the assessment of the reasonableness of legislative limits from the predictable *Oakes* inquiry to the initial contextual inquiry, where it may be driven by judicial normative preferences. This danger was explicitly identified by McLachlin J in *R v Lucas*.[231] The problem is obscured in *RJR-MacDonald* itself, which was concerned with a legislative ban on tobacco advertising. In such legislative contexts, there may be widespread popular approval for judicial statements emphasising the importance of addressing the social evil of tobacco addition and highlighting the low value of expression inherent

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and cultures.

[229]La Forest J, also delivering the reasons of L'Heureux-Dube and Gonthier JJ, in *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at 270.

[230]Ibid, at 284.

[231][1998] 1 SCR 439. At 486-7, McLachlin J noted that the majority's willingness to consider the low value of defamatory expression in such a contextual inquiry risked "shortcutting the cost-benefit analysis proposed by *Oakes*."

in advertising a harmful product.[232] In such controversial areas as abortion, genetic modification or even modern art,[233] however, such a contextual inquiry risks substituting judicial values for legal analysis. Post-*RJR MacDonald* decisions found it difficult to maintain even a coherent method of combining this contextual analysis with the *Oakes* test.[234] The *RJR* normative inquiry is thus neither predictable nor particularly helpful in advancing a dialogue with a legislature more attuned to the balance of social values on contestable issues, and should not be adopted in New Zealand.

D. Illegitimate declarations - the danger of legislative policy

It has been noted above that the minimal impairment test encourages the judicial identification of more rights-consistent legislative means of accomplishing the relevant legislative objective. This positive dialogue aspect of the declaration, however, should not extend to strict judicial dictation of the legislative means which must be employed in order to survive a section 5 analysis. The declaration allows the identification of NZBORA-based limits on legislative power, but does not confer a de facto legislative power upon the courts. Such a parallel performance of the legislative role would offend constitutional comity and disregards important

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[232]The minority's rhetoric about tobacco advertising being "as far from the 'core' of freedom of expression values as prostitution, hate mongering, or pornography", however, might be considerably more controversial. *RJR-MacDonald*, supra n229, at 282-3.

[233]Consider the controversy surrounding Tania Kovats' 'Virgin in a Condom' exhibition piece at Te Papa in 1998.

[234]Newman, supra n226, at 561-3, and Trakman et al, supra n207, at 118-9.

differences in institutional capacity between the organs of state.

Lessons may be learned from both Canada and England in this regard. In *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*,[235] Iacobucci J declared unconstitutional censorship legislation invalid, then proceeded to offer specific guidelines for legislative reform. Necessary procedural safeguards for any regulatory system were outlined, and Iacobucci J articulated his preference for judicial policing of imported obscene material through application of the Criminal Code.[236] Such judicial advice comes very close to a pronouncement on legislative policy. As Iacobucci J himself acknowledged, retreating from a definite finding on the legislative reform issue, "as a matter of law, I am quite rightly restricted to what is constitutional..[not] what is optimally right or just".[237]

The declaration of incompatibility raises similar issues in the UK. In a recent case, the English Court of Appeal implicitly recommended the non-exercise of the section 10 Ministerial remedial power by setting out "matters which the Secretary of State will wish to bear in mind" in responding to the Court's declaration.[238] These matters included the fact that the present practice of the impugned statutory body rarely infringed rights and that legislative reform seemed imminent. Such attempts to anticipate legislative rejection of the declaration are as unhelpful as attempts to mould an appropriate legislative response, and undercut the declaration's dialogue

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[235][2000] SCC 69.

[236]Ibid, at paras 275-280.

[237]Ibid, at para 280.

[238]*R (on the application of H) v Mental Health Tribunal* [2001] EWCA Civ 415, at para 34.

value by implying that rights-inconsistent legislation is of trivial effect. Given that in both the UK and New Zealand the declaration is a discretionary remedy,[239] declining to issue a declaration in such circumstances would better preserve the integrity of both the courts and the declaration itself.

2. The Competency of the NZBORA-inconsistency Test

Even if the section 5 NZBORA inquiry is not unacceptably uncertain and value-laden, its ability to process the necessary social science evidence could well be questioned. Beatty's characterisation of the *Oakes* test as embracing two separate cost-benefit analyses is only comforting if the courts are sufficiently equipped to make them. An ill-informed declaration could well be an improper one, having a political effect disproportionate to its legal quality. The warning of the majority in *R v Hines* is apposite here.[240] The judgment of Richardson P recognises that "[l]itigation under the adversary processes of the Courts is not an ideal vehicle for conducting a social or economic policy assessment."[241] This is particularly true of polycentric policy issues, where a representative legislature is more suited to making global accommodations of the interlocking interests involved.[242] Nevertheless, the *Oakes* test and New Zealand legal process itself

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[239]By s 4 (2) HRA, if satisfied of a legislative incompatibility with a Convention right, a court "*may* make a declaration of that compatibility". In *Moonen*, supra n2, at 17, the Court held that a legislative inconsistency with s 5 "*may*" prompt the courts "to declare this to be so".

[240]*Hines*, supra n163.

[241]*Hines*, supra n163, at 539.

both possess sufficient flexibility to justify confidence in section 5 NZBORA analysis.

A. Proper deference - institutional capacity

The Canadian courts, alert to the limits of their own competence, tailored the application of the *Oakes* test to provide the legislature with more "room to manoeuvre".[243] This occurred in three main ways, all of which may be readily adopted in New Zealand. The first was a refusal to carry the minimal impairment test to the logical extreme of requiring the least rights-invasive legislative means possible. Legislation falling within a "range of reasonable alternatives" is thus not considered "overbroad".[244] The second was inherent in the civil standard of proof which governs the *Oakes* inquiry.[245] A traditionally flexible standard, the balance of probabilities test allows the degree of probability required to vary with the subject-matter of the inquiry.[246] In a difficult policy setting, where a legislature finds it "difficult to forecast the future", the government need not adduce "definitive social science conclusions" to justify its legislation.[247]

The third strategy involved judicial deference to legislative policy choices within the *Oakes* inquiry. In this respect, a number of decisions have distinguished

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[242]Rothstein, supra n204, at 179. See also *Hines*, supra n163, at 539.

[243]*Edwards Books*, supra n209, at 795 (per Iacobucci J).

[244]*RJR-MacDonald*, supra n229, at 342-3. The concession is all the more significant for being made by McLachlin J, whose judgment for the majority generally emphasised the importance of strict judicial scrutiny of potentially unconstitutional legislation.

[245]*Oakes*, supra n33, at 137-8.

[246]See *Bater v Bater* [1950] 2 All ER 458, 459 (per Lord Denning).

[247]*RJR-MacDonald*, supra n229, at 275.

between two types of legislative policy choices.[248] On this view, when legislation strikes a balance between the competing claims of multiple groups, typically involving the allocation of scarce state resources, the legislature is performing its unique function as a social arbitrator. It alone has the institutional capacity and representative mandate to perform this role, and a lower standard of section 1 justification will be appropriate. In other situations, however, typically in the criminal justice realm, the state is the "singular antagonist of the individual whose right has been infringed".[249] Here, the rights conflict may be readily discerned, and is more amenable to legal resolution.

This vision of the legislative role presents a false dichotomy. As other judgments have recognised, the legislature makes a representative allocation of social priorities even in criminal justice legislation, weighing the interests of the accused and victims, both potential and actual.[250] Nevertheless, three factors diminish the need for deference in this latter setting. Unlike more polycentric contexts, the group most affected by criminal justice legislation (i.e. criminals) is already in sharp relief. Justice rights also transcend mere claims for state resources in their importance, since violations of these rights often lead to the deprivation of liberty. Finally, the courts have extensive experience and expertise

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[248]See *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at 993-4, *RJR-MacDonald*, supra n229, at 277, and the minority judgment of Gonthier J in *Thomson Newspapers Co v Canada (Attorney-General)* [1998] 1 SCR 877.

[249]*Irwin Toy*, ibid, at 993-4.

[250]*RJR-MacDonald*, supra n229, at 332, and *Thomson Newspapers*, supra n248, at 942.

in regulating criminal justice.[251] Provided its limitations were acknowledged, the establishment of a sliding scale of deference according to the institutional capacity of the courts to handle the relevant policy context would thus support legitimate section 5 analysis in New Zealand.

B. Augmenting judicial competency

To facilitate more comprehensive section 5 analysis, the adversarial system itself may require some procedural revision. New Zealand could borrow from the array of procedural devices developed in other jurisdictions to facilitate constitutional analysis. To secure a defence of rights-infringing legislation, the HRA provides the Crown with automatic notice and a right to intervene whenever a declaration of incompatibility is contemplated.[252] This effectively provides the courts with access to the government's collections of relevant empirical data. Broader social and rights-based perspectives may also be gathered by allowing third party intervention and inviting assistance from amici curiae.[253] Finally, section 5 decision-making will probably necessitate the acceptance of Brandeis briefs.[254] The judicial analysis of "social, legal, moral, economic, administrative,

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[251] *Hines*, supra n163, at 580 (per Thomas J); *RJR-MacDonald*, supra n229, at 277 (per La Forest J), where courts are labelled "specialists in the protection of liberty."

[252] Section 5(1) and (2) HRA.

[253] See below for the positive effects of broader standing rights in terms of allowing the courts to have the benefit of the expertise of representative plaintiffs.

[254] Harlow defines a Brandeis brief as a "documentary exposition of social and economic evidence designed to inform the court about the context of the case before it." C Harlow, "Public Interest Litigation in England: The State of the Art" in J Cooper and R Dhavan (eds), *Public Interest Law* (1986) 90 at 136.

[and] ethical" evidence demands no less substantial empirical support.[255]

The courts may also benefit from increased reference to Parliamentary and pre-legislative materials. In determining NZBORA-inconsistency, the courts would be assisted by consideration of any reports made by the Attorney-General under section 7 and any Parliamentary debates on the NZBORA-consistency of the impugned legislation.[256] This may require a reformulation of the rule in *Pepper v Hart*.[257] In Canada, such practices have facilitated an advanced constitutional dialogue, where both legislature and judiciary speak the same Charter "language". Thus, in *M v H*,[258] Bastarache J noted the appropriateness in section 1 analysis of evaluating legislative intent "on its own terms" as expressed in the legislative history of a provision.[259] Similarly, the legislature has occasionally provided *Oakes*-centred justifications in statutory preambles designed to prevent judicial invalidation.[260] The adoption of measures designed to improve section 5 decision-making in New Zealand may thus heighten the rights-consciousness of both legislature and judiciary in similar fashion.

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[255]*Moonen*, supra n2, at 17.

[256]Clayton and Tomlinson believe that judicial reliance on *Hansard* will increase in respect of both situations in relation to the HRA. Clayton and Tomlinson, supra n89, at 173.

[257][1993] 1 AC 593. This influential House of Lords decision only permitted recourse to clear Ministerial statements in *Hansard* to resolve legislative ambiguity, and only where the statement relied upon was directly in point.

[258][1999] 2 SCR 3.

[259]Ibid, at 182.

[260]See the examples set out in Hogg and Bushell, supra n160, at 101-4. A specific example is provided in Chapter 3(2)(C) above.

3. Standing

A. Two tests of standing

The determination of who might be entitled to a declaration will also have an impact on its proper and practical use and the quality of section 5 decision-making. The two tests of standing most likely to be adopted in relation to the declaration are set out below.

i. The 'victim' test

This test prevails in the Human Rights Committee in relation to its jurisdiction to receive individual communications.[261] It has also been adopted in the UK HRA. The HRA incorporates into UK domestic law certain rights found in the European Convention on Human Rights (the Convention).[262] Section 7(1) HRA allows proceedings to be taken against a public authority that acts in a way which is incompatible with those Convention rights.[263] The compatibility of UK legislation with Convention rights is most likely to be tested, and declarations of incompatibility issued, in such proceedings.[264] Section 7(1), however, requires that the claimant

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[261]Article 1 of the OP requires that authors of communications must claim to be "victims of a violation by that State Party of any of the rights set forth in the [ICCPR]". For further discussion of the requirement, see P R Ghandi, *The Human Rights Committee and the Right of Individual Communication* (1998) at 90ff.

[262]Section 1(1) HRA.

[263]Such action is deemed unlawful by s 6(1) HRA.

[264]This is because s 6(2) provides a defence for public authorities acting to give effect to legislation which cannot be read compatibly with the Convention. If the legislation *can* be read compatibly with Convention rights pursuant to s 3, the defence will fail. If it cannot, the defence will succeed, and the courts' only remedial option is to issue a declaration of

in such proceedings be a "victim". By section 7(7), this means a victim for the purposes of article 34 of the Convention.

Standing under the HRA is thus contingent upon the approach taken by the European Court of Human Rights to "victim" status. The decisions of the Court make it clear that this test requires the rights of a complainant to be directly or indirectly affected by the act or omission in question.[265] The victim test effectively prevents representative plaintiffs such as pressure groups or unions, not themselves affected by the alleged breach, from bringing claims on behalf of other parties or in the public interest. A gay rights organisation has thus been denied standing under the Convention to challenge legislation prohibiting male homosexual activity,[266] and broadcasting unions were similarly prevented from challenging a legislative prohibition on transmitting interviews with representatives of Northern Ireland's paramilitary groups.[267]

ii. The test of 'sufficient interest'

Both the UK and New Zealand have taken a liberal approach to standing in the wider public law arena. In contrast to the HRA position, both jurisdictions have

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inconsistency under s 4. See J Miles, "Standing under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication" (2000) 59(1) CLJ 133 at 163.

[265]Clayton and Tomlinson, supra n89, at 1489-96.

[266]*Norris and National Gay Federation v Ireland*, Application No. 10581/83 (1984) 44 DR 132.

[267]*Purcell v Ireland*, Application No. 15404/89 (1991) 70 DR 262.

determined that representative plaintiffs may possess a "sufficient interest in the matter to which the proceeding relates" to support an application for judicial review.[268] In the seminal decision on this point,[269] Lord Diplock observed that there would be a "grave lacuna in our system of public law if a pressure group...or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law".[270]

The evident priority given to the merits of the application over the nature of the applicant in *IRC* has found potent expression in the New Zealand trend to confine the effect of standing concerns to the exercise of the courts' remedial discretion. This allows the merits of the claim to be ventilated. If the claim would succeed on the substantive issues, it will be unusual for it to fail for want of standing.[271] Indeed, whilst a more substantive threshold is occasionally articulated,[272] a claim will only be shut out *in limine* if it is clearly frivolous,

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[268]This test is enshrined in s 31(3) Supreme Court Act 1981 (UK). Similar tests pervade New Zealand case law. See the "legitimate interest" deemed sufficient in *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No. 3)* [1981] 1 NZLR 216, and the "genuine interest" supporting the applicant's standing in *Society for the Protection of Auckland City and Waterfront v Auckland City Council*, 19/9/00, Morris J, HC Auckland M1031-SW00, at para 28.

[269]*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. Marriot and Nicol observe that this decision liberalised the standing regime in the UK in J Marriott and D Nicol, "The Human Rights Act, Representative Standing and the Victim Culture" [1998] EHRLR 730 at 731.

[270]*Inland Revenue Commissioners*, ibid, at 645. Lord Diplock's remarks were adopted by the New Zealand Court of Appeal in *EDS v South Pacific*, supra n268, at 221.

[271]*O'Neill v Otago Area Health Board*, 10/4/92, Tipping J, HC Dunedin CP 50/91.

[272]For Fisher J, the fundamental question in relation to such plaintiffs is "whether standing is necessary or desirable in order to protect the public interest". *DJ Moxon & Ors v Casino*

vexatious or untenable, or if the plaintiff lacks good faith.[273]

B. Arguments against broader standing

i. Arguments of propriety

Adopting a 'sufficient interest' test of standing in relation to declarations of inconsistency arguably lends itself to forum-shopping by pressure groups. If its submissions to a Parliamentary Select Committee prove unsuccessful, a pressure group may turn to the courts to further its political agenda.[274] Further, in the absence of a need to demonstrate a tangible effect on personal interests, challenges to legislation may be made *in abstracto*. This moves the courts away from their traditional role of resolving concrete disputes.[275] Though such arguments did not prompt the acceptance of the victim test in the HRA,[276] it is clear that the statutory declaration of incompatibility will not have such consequences for the UK courts.

The nature of the declaration provides a powerful response to such

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Control Authority, 24/5/00, Fisher J, HC Hamilton M324/99.

[273]See *Society for the Protection of Auckland City and Waterfront*, supra n268, at para 29, and *O'Neill v Otago Area Health Board*, supra n271.

[274]Marriott and Nicol note that the Court may thus become "an arena for generating publicity...[and] building up political pressure". Marriott and Nicol, supra n269, at 738.

[275]An outline of this traditional role may be found in *Ainsbury v Millington* [1987] 1 WLR 379 at 381.

[276]Rather, the Lord Chancellor made the contestable claim that the victim test should be adopted in order to maintain consistency between the UK's domestic law and the Convention. HL Deb, Vol 583, cols 830-831 (November 24, 1997). For criticism of the claim, see Marriott and Nicol, supra n274, at 738.

concerns. A declaration of inconsistency makes a finding that legislation is inconsistent with the NZBORA as a matter of law.[277] The Court in *Moonen* held that "New Zealand society as a whole" could rightly expect such declarations by virtue of section 5.[278] If declarations thus operate in the public interest to articulate legal conclusions on the NZBORA-consistency of legislation, it is difficult to see why the furtherance of that public interest should depend on the status of the applicant. Irrespective of whether it is challenged by an individual victim or a pressure group, NZBORA-inconsistent legislation is of same legal and public significance. Further, the legislature should not be entitled to evade the public accountability inherent in the declaration simply because individual victims are not sufficiently affected or motivated to institute legal proceedings.[279]

Adopting the victim test would also precipitate an unfortunate discrepancy between judicial review and the NZBORA. Representative plaintiffs could hold public authorities to their public law obligations in judicial review, but not hold the legislature to the NZBORA standard of rights-consistency by pursuing a declaration. Ultimately, if a pressure group promotes the public interest in NZBORA-consistent government in a manner that simultaneously advances its own political interests, this may be the inevitable cost of enhanced human rights protection.[280] Moreover,

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[277]For Thomas J in *Poumako*, supra n1, at para 105, the consistency of legislation "with the fundamental rights affirmed by Parliament in the Bill of Rights....is very much a legal issue".

[278]*Moonen*, supra n2, at 17.

[279]Miles notes that this argument is a corollary of a "communitarian model of rights enforcement" in Miles, supra n264, at 150.

[280]The protection of human rights is of course a major objective of the NZBORA, as affirmed by recital (a) to the long title of the Act.

given that the declaration facilitates a dialogue about the content of rights in New Zealand, avoids strained interpretations and corrects legislative oversights,[281] broader standing actually furthers the capacity of the declaration to enhance the democratic process.

It could be argued that a representative plaintiff is not needed in the NZBORA context. The Lord Chancellor thus suggested that where no HRA "victims" may be found, the issue is likely to be academic and the courts should not be troubled.[282] This argument ignores the fact that the declaration offers little incentive to attract the average individual plaintiff, who must incur significant costs for uncertain gain.[283] Indeed, the individual litigant's resources are most likely to be directed to a section 6 NZBORA argument to read legislation consistently with the rights from which the litigant hopes to benefit. Even more so than in the general public law context, where representative plaintiffs have been needed to pursue certain claims,[284] it may thus take a politically motivated representative plaintiff to put the issue of a declaration squarely before the courts.

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[281]See Chapter 3 above.

[282]HL Deb, Vol 583, col 832 (November 24 1997).

[283]Feldman thus suggests that litigants with significant commercial interests are those most likely to pursue declarations of incompatibility under the UK HRA. For these people, the declaration's potential for long term benefit may outweigh the immediate costs of litigation. D Feldman, "Remedies for Violations of Convention Rights under the Human Rights Act" [1998] EHRLR 691 at 699.

[284]Thus, in the course of granting World Development Movement standing in *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, 618, Rose LJ noted that "[i]f there is a public law error, it is difficult to see how else it could be challenged and corrected except by such an applicant".

Fears about changes to the disputes-resolution role of the courts also misconceive the nature of the declaration, which necessarily involves an assessment of the consistency of legislation with abstract and content-devoid NZBORA rights. The court is not applying settled law to a concrete dispute, but is embarking on an expository or law-making exercise.[285] Recognising standing for representative plaintiffs is more likely to enhance the quality of this exercise. Such plaintiffs, often armed with specialist expertise, considerable resources and litigation experience, are more likely to have the capacity to represent the interests of absent victims, and to furnish the court with the kind of empirical evidence required under a section 5 analysis, than any individual victim.[286] The expertise and experience of such plaintiffs in the human rights arena has already been established in judicial review proceedings.[287] In the absence of the wide-ranging empirical data likely to be provided by such plaintiffs, the victim test may actually 'individualise' the harm exposed, concealing the true extent to which such rights have been abridged by the legislature.[288]

ii. Arguments of practicality

The inevitable costs in terms of judicial resources may provide a further

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[285]Miles, supra n264, at 164.

[286]Miles, supra n264, at 147.

[287]The Courts in *ex p World Development Movement Ltd*, supra n282, and *R v HM Inspectorate of Pollution and the Ministry of Agriculture, Fisheries and Food, ex p Greenpeace Ltd* [1994] 4 All ER 329 were clearly impressed by both the credentials and connections of the World Development Movement and Greenpeace respectively.

[288]Marriott and Nicol, supra n269, at 738.

objection to broader standing. Interest group applications for declarations may clog the courts, to the detriment of actual victims of NZBORA-inconsistent legislation.[289] Such claims are of course speculative, and have been countered in the UK context by equally speculative claims that representative plaintiffs could act as a litigation sieve, presenting the most meritorious claims in an effective fashion and hence preventing a series of poorly argued individual applications.[290]

Though practical objections may clearly have decisive force in relation to transnational fora which are perpetually overloaded, such as the Human Rights Committee or the European Court of Human Rights,[291] the case is less persuasive in relation to unitary jurisdictions.[292] The control of standing as a matter of judicial discretion operates as a further safeguard.[293] For example, the courts may decline standing to multiple representative plaintiffs in the same proceeding where the consequence would be undue duplication and delay.[294] To the extent that broader standing does increase the burden on the courts, the increase will thus be a supervised one. Given the enhanced protection of human rights and better quality

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[289]Miles, supra n264, at 144.

[290]See the comments of Earl Russell, HL Deb, Vol 585, cols 807-808 (5 February 1998).

[291]Both of which operate under the victim test of standing. See above at 3(A)(i) of this Chapter.

[292]For example, such fears of overloading by virtue of allowing representative plaintiffs standing under the UK HRA were rejected by a working party on public interest cases. See Justice/Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on Interventions in Public Interest Cases* (1996) at 10-12.

[293]P L Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can Bar Rev 490 at 519.

[294]*DJ Moxon*, supra n272, at para 106.

judicial decision-making promoted by the 'sufficient interest' test, it will be a price worth paying.

CONCLUSION

In its short life, the declaration of inconsistency has already received its share of criticism. This paper has sought to show that these objections are both overstated and outweighed by the benefits it brings to the New Zealand legal system. Concerns that the declaration will distort majoritarian will overlook the fact that it will be democratic responses, of a kind no less pure than others deemed valid by majoritarians, which will determine the political value of the declaration. Worries of constitutional imbalance are eased by an appreciation of the robustness of the relationship of comity between the courts and Parliament and the preservation of Parliamentary sovereignty. Fears of value-laden, uncertain and ill-informed judicial decision-making in relation to the declaration are allayed by a proper appraisal of the *Oakes* test and the opportunities for legal reform. Finally, though the declaration was not within the contemplation of the legislature enacting the NZBORA, the open texture of the Act militates against such a blinkered vision of legitimate judicial development.

The declaration promises to give much more than it will take. Assessed in the context of its pedigree and overseas analogues, it seems a natural rather than surprising expansion of the NZBORA's remedial scope. The declaration gives greater coherency to the operative provisions of the NZBORA by lending utility to section 5 analysis. Rather than detracting from Parliament's role, the declaration augments the democratic supervision and promotion of rights. The declaration

responds to the threat to Parliamentary sovereignty from aggressive section 6 interpretation, enables the correction of unconscious legislative incursions on rights, and warns Parliament about its international legal responsibilities. By virtue of its promotion of public accountability, the declaration promises to facilitate a constitutional dialogue entailing enhanced certainty, consideration and justification in relation to NZBORA rights. The declaration has a further benefit for New Zealand democracy, for it allows direct public participation in such institutional discussions about rights.

In the course of affirming its legitimacy and feasibility, this paper has also recommended the adoption of a number of positive steps to enhance both facets of the declaration of inconsistency. Deference to the legislature in policy-laden contexts, recognition of Brandeis briefs, amici curiae, and the adoption of broad standing requirements will all assist in this regard. Supported by such measures, the declaration can be seen as a valuable expression of the rights-consistent approach demanded by the NZBORA.

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