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THE PRINCIPLE OF PROPORTIONALITY AND SECTION 5 THE BILL OF RIGHTS: CONTROLLING ADMINISTRATIVE ACTION

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ABSTRACT

This paper argues that section 5 of the Bill of Rights requires the development of proportionality as a separate head of judicial review where limitations to rights and freedoms affirmed by the Bill of Rights are at issue. The paper considers the development of the principle of proportionality in the United Kingdom as a separate head of review where Convention rights and freedoms are at issue under the Human Rights Act 1998. The United Kingdom experience under the Human Rights Act and Canadian experience under the Charter both suggest that the New Zealand courts have failed to take the correct approach to section 5 in the context of judicial review. This is supported by consideration of New Zealand's international obligations under the ICCPR, both with respect to permissible limitations and the obligation to provide an effective remedy. Judicial review restricted to the traditional heads of review, even following a "heightened scrutiny" *Wednesbury* standard, cannot meet the requirements under section 5 to determine the lawfulness of limits to rights and freedoms and will not meet New Zealand's obligation to provide an effective remedy under the ICCPR. In order to meet their constitutional duty, and their legal duty under the Bill of Rights, the courts must apply the principle of proportionality to determine the legality of limits to rights or freedoms imposed by executive or administrative action in judicial review.

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I INTRODUCTION

The principle of proportionality is a test used in various domestic jurisdictions and internationally to determine whether a limit on a fundamental right or freedom is justified, constitutional or lawful. Proportionality has emerged as a ground of review in the United Kingdom under their Human Rights Act 1998 (Human Rights Act). The Principle of Proportionality is used as part of the section 1 justified limitation test in judicial review under the Canadian Charter of Rights and Freedoms (the Charter). It is used by various

jurisdictions to determine the constitutionality of limits to constitutionally protected rights. It is the test required under the International Covenant on Civil and Political Rights (ICCPR)[1] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention)[2] for limitations required to be "necessary in a democratic society".

The New Zealand Bill of Rights Act 1990 (Bill of Rights) should have had a significant impact on judicial review in New Zealand. Section 5 of the Bill of Rights requires limitations on rights to be reasonable, prescribed by law and demonstrably justified in a free and democratic society. This paper argues that section 5 imports the principle of proportionality into New Zealand law, which should have emerged as a separate head of review with respect to administrative action limiting rights and freedoms protected by the Bill of Rights. To date this has not been recognised by the courts. This paper does not consider the wider question as to whether proportionality should be a separate ground of review in cases where a Bill of Rights right or freedom is not at issue.

In contrast to New Zealand, the entry into force of the Human Rights Act in the United Kingdom has had an immediate impact on judicial review of administrative decisions. In *R v Secretary of State for the Home Department, ex parte Daly* (*Daly*) the English courts ended the uncertainty regarding the existence of proportionality as a distinct head of review, at least with respect to rights and freedoms protected by the Human Rights Act.[3] In New Zealand there has been cautious early recognition of the applicability of the Canadian test to section 5 of the New Zealand Bill of Rights Act 1990 (Bill of Rights),[4] though it was not until 10 years after the entry into force of the Bill of Rights that the test was explicitly advocated.[5]

This paper considers the principle of proportionality in its international context and in the context of the United Kingdom, in particular under the Human Rights Act, to provide a context for discussion of proportionality in judicial review under the Bill of Rights Act. The "increased scrutiny" test

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[1] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
[2] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221.
[3] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, para 26 per Lord Steyn (HL(E)).
[4] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 Richardson J (CA).
[5] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 (CA).

developed by the courts in the United Kingdom prior to the entry into force of the Human Rights Act is considered, as the New Zealand position currently is analogous to that approach. The international and United Kingdom jurisprudence illustrate that this "increased scrutiny" approach cannot act as a substitute for the application of the proportionality test where rights are limited. The constitutional objections that have been raised against the introduction of proportionality as a ground of review are considered. These centre mainly on the concern that proportionality involves too high a degree of merits review, thereby taking the courts outside their proper constitutional role, and violating the proper separation of powers. These objections fail to consider that it is Parliament that has laid down the proportionality test by modelling that section on section 1 of the Charter. It is the proper constitutional role of the courts to determine the law, and whether a limitation to a right or freedom protected by the Bill of Rights is lawful. Therefore, as that process requires the application of the proportionality test, it is within the proper constitutional role of the courts to use proportionality as a ground of review where Bill of Rights' rights or freedoms are at issue.

II JUDICIAL REVIEW

A Judicial Review and Constitutional Principle

The arguments for and against proportionality, considered below, occur within the context of the question of the proper constitutional role of the courts and the proper extent of judicial review. "Judicial review was a judicial invention to secure that decisions are made by the executive or a public body according to the law even if the decision does not otherwise involve an actionable wrong."[6] Judicial review can be seen to rest on the constitutional principles of parliamentary sovereignty and the rule of law: "the sovereignty of Parliament and the principle of the rule of law justify the courts in insisting that officials properly implement the instructions of the legislature".[7] It is the proper constitutional role of the courts to determine questions of law, including the

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[6] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 388 (PC).

[7] Jeffrey Jowell QC "Beyond the Rule of Law: Towards Constitutional Judicial Review" (2000) PL 671, 672.

determination of the scope of a decision-makers power.[8] Judicial review is therefore "grounded in the court's constitutional duty to uphold the rule of law"[9]; it is a judicial invention "to secure the rule of law".[10] Bounding judicial review is the constitutional principle of the separation of powers. The courts are wary of exceeding their proper constitutional bounds:[11]

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will...under the guise of preventing the abuse of power, be itself guilty of abusing power.

The appeal/review distinction has been grounded in this concern to maintain the proper separation of powers between the courts and the other branches of government.

However, as Jowell notes, the principle of the rule of law cannot encompass the full range of principles that are of constitutional importance, such as "freedom of expression, the right to life, dignity, or even the notion of substantive (as opposed to merely formal) equality".[12] Judicial review based purely upon the principles of the rule of law and parliamentary sovereignty will remain very restricted in scope. Administrative law develops according to current perceptions of what is required of the courts in their distinctive judicial function[13], which in turn is influenced and changed by the shifting political, legal and social context over time. The recognition of a broader set of constitutional values relevant to judicial review is a development that has, in particular, arisen out of the human rights movement which gathered momentum in the latter part of the twentieth century. Human rights and freedoms are

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[8] *Bulk Gas Users' Group v Attorney-General* [1983] NZLR 129, 136 (CA).

[9] Philip Philip A Joseph "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" (2001) PL 354, 359 – 360 [Joseph *Ultra Vires*]; *Peters v Davison* [1999] 2 NZLR 164, 188 Richardson, Henry Keith JJ (CA); see also *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102, 110 – 111 (HC).

[10] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 730; Joseph *Ultra Vires*, above, 359.

[11] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 389 (PC), Lord Templeman quoting Lord Brightman in *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, 1173.

[12] Jowell, above, 673.

[13] *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641, 653 Cooke P (CA): "Like other branches of common law, administrative law develops and changes according to current perceptions of what is required of the Courts in their distinctive judicial function... At times it becomes necessary to give especial weight to human and civil rights, including class or group rights"; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 399 Thomas J (CA).

innately constitutional in nature;[14] they are rights and freedoms opposable by the individual against the state, and as such are fetters on state action/power. They have a direct impact on the powers of government, though in the Westminster system of Parliamentary democracy Parliament may retain the power to override fundamental rights and freedoms.[15]

The development of the concept of democracy away from a simple majoritarian model to a pluralistic model that recognises the necessity for limits based on fundamental human rights and freedoms, and the rights of minorities, [16] mandates a shift from review based simply on general standards of fairness to one based on constitutional values.[17] Such an approach recognises that some fundamental human rights and freedoms are "...anterior to any municipal law"[18], they are "inherent and fundamental to democratic society" and human rights instruments both domestically and internationally recognise rather than create them[19], and as such these fundamental rights are of constitutional importance. This shift towards a more pluralistic democracy is represented in the New Zealand context by the move to a Mixed Member Proportional (MMP) electoral system, while the passage of the Bill of Rights gives explicit recognition to fundamental human rights and freedoms as constitutional

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[14] Philip A Joseph "Constitutional Review Now" (1998) NZ Law Rev 85, 90.

[15] There may be a substantive limit to parliamentary sovereignty, where legislative power is circumscribed by implied or fundamental common law rights, though this proposition is controversial. "Some common law rights presumably run so deep that even Parliament could not override them" *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 Cooke J; see also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 489 – 495. The New Zealand, Canadian and United Kingdom Bills of Rights all maintain the legislative supremacy of Parliament. The New Zealand Bill of Rights Act expressly insulates inconsistent enactments, which cannot be interpreted consistently in accordance with s 6, through s 4. In Canada some of the Charter rights may be overridden when an explicit "notwithstanding" clause is inserted in the legislation by Parliament, though the clause must be renewed every five years, Canadian Charter of Rights and Freedoms, s 33. The Human Rights Act 1998 in the United Kingdom, like the Bill of Rights Act, preserves inconsistent enactments, in s 3(2), though the courts have the express power to make a declaration of incompatibility (s 4). Once a declaration of incompatibility is made the government has the power to amend enactments under s 10 to render them compatible.

[16] Lord Irvine of Lairg (3 Nov 1997) 582 HLD ser 5, col 1234: "[the Human Rights Act will] deliver a modern reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their human rights secured"

[17] Jeffrey Jowell QC "Beyond the Rule of Law: Towards Constitutional Judicial Review" (2000) PL 671, 671.

[18] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 270 Cooke P (CA).

[19] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 447 para 30 Lord Cooke of Thorndon (HL(E)).

values.[20] The increasing recognition of the significance of the treaty of Waitangi, and constitutional values extrapolated from the treaty, also represent a shift towards a more value based approach.[21]

In the United Kingdom, even before the entry into force of the Human Rights Act, the courts recognised "individual democratic rights against the state"[22] as part of the common law. These were recognised as fundamental rights[23] or constitutional rights[24], as relevant to the review of administrative decisions, and as placing limitations on the exercise of administrative powers. The entry into force of the Human Rights Act in the United Kingdom has expressly incorporated human rights standards as constitutional values fettering administrative action, and the Bill of Rights should have had the same effect in New Zealand.

B Traditional Application of Judicial Review: the Appeal/Review Distinction

1 The appeal/review distinction

The appeal/review distinction is an important element of traditional judicial review. Joseph is of the opinion that the distinction serves two purposes: to ensure that the courts maintain "judicial deference" and to legitimate judicial

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[20] New Zealand Bill of Rights Act 1990, s 3: by subjecting the action of the three branches of government to the Bill of Rights (subject to s 4) the Bill of Rights has a constitutional role and the rights and freedoms contained in it can be seen as constitutional values. *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667, 702 Hardie Boys J (CA): "The New Zealand Bill of Rights Act is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that the Bill affirms".

[21] Philip A Joseph "Constitutional Review Now" (1998) NZ Law Rev 85, 90, 93 – 108.

[22] Jowell, above, 672.

[23] For example the right to life requiring the courts to give a decision the "most anxious scrutiny" in an asylum case: *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514, 531 Lord Bridge (HL(E)); the right to freedom of expression in *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 All ER 400 (HL(E)); Jowell, above, 674 – 675.

[24] For example the constitutional right of access to justice in *R v Secretary of State for the Home Department, ex parte Leech (No 2)* [1994] QB 198 (CA); the constitutional right of access to a court in *R v Lord Chancellor, ex parte Witham* [1998] 3 WLR 849 (DC); Jeffrey Jowell QC "Beyond the Rule of Law: Towards Constitutional Judicial Review" (2000) PL 671, 674 – 675.

review.[25] Inherent in the appeal/review distinction is a concern by the courts to maintain their proper constitutional role. It is argued that the limiting of review to the legality of the decision, with a focus on the decision making process rather than the merits of the decision, keeps review within the court's proper constitutional role of ensuring the rule of law and upholding the principle of legality. Merits review, it is said, substitutes the decision of the court for that of the decision maker, and in doing so the court may exceed its constitutional bounds.[26] The separation of powers is the principle behind these concerns: Parliament has granted the decision maker the discretion, accordingly the decision maker is the constitutionally proper person to make the decision; so if the court oversteps the mark in review it could potentially impinge on the constitutional role of both the legislative and executive branches.

However, the irrationality ground of review includes merits review on the ground of *Wednesbury* unreasonableness[27]. *Wednesbury* unreasonableness is a consideration of the merits,[28] albeit with such a high threshold of application in its traditional formulation that it will be met in only the most extreme cases.[29] The initially very high threshold of unreasonableness required for a decision to be impugned on *Wednesbury* unreasonableness grounds has given way to a sliding scale of review, dependent on the context of the review, with higher intensity review, such as the *ex parte Smith*[30] approach, lowering the threshold.[31]

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[25] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 742.

[26] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 389 Lord Templemann (PC) quoting *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, 1173 Lord Brightman (HL(E)).

[27] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

[28] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 738 – 739.

[29] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 Lord Diplock (HL(E)): a decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"; Joseph, above, 831 – 837. However, in practice the test has not been applied in its full rigour: *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 399 Thomas J (CA): "Yet, as most judges know, and many commentators have observed, the actual decisions of the courts do not reflect the severity of the test. The Courts in practice are willing to impugn decisions which are far from absurd or perverse and, indeed, even at times coldly rational".

[30] *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA) discussed below in Part III(D).

[31] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA); *Waitakere City Council v Lovelock*, above, 403 Thomas J; Joseph, above, 834 – 839; *Electoral Commission v Cameron* [1997] 2 NZLR 421, 433 (CA): "...it would seem entirely appropriate in such circumstances to have regard to any encroachment upon statutory functions and powers conferred on public authorities and to apply a somewhat lower standard of

On this ground of review the degree of merits review is greater or lesser depending on the context of review, with a higher degree of review of the merits where human rights are concerned.[32] The appeal/review distinction, in so far as it purports to rest on a bright line distinction between merits and procedural review, has been eroded to this extent by the development of administrative law, without breaching the constitutional principle of the separation of powers.

The recognition of constitutional values, such as fundamental rights and freedoms opposable to the state, as a basis for review further challenges the strict appeal/review dichotomy. Fundamental rights and freedoms are substantive legal guarantees; the courts' review of decisions limiting those substantive guarantees cannot merely assess the procedural aspects of the decision to impose a limitation without failing in their constitutional duty to uphold the rule of law. As will become clear in the discussion below, the assessment of the legality of a limit on a fundamental right or freedom necessitates consideration of the merits of the case. A limitation is not lawful merely because the decision maker adhered to all the procedural requirements in making their decision to impose the limit. Ultimately, it is the constitutional duty of the court to determine the legality of any limitations to fundamental rights or freedoms.[33]

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reasonableness than 'irrationality' in the strict sense"; at the high end of the scale is *Wellington City Council v Woolworths New Zealand (No 2)* [1996] 2 NZLR 537 (CA): "For the ultimate decisions to be invalidated as "unreasonable", to repeat expressions used in the cases, they must be so "perverse", "absurd" or "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made by an elected council".

[32] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd*, above, 66: "In some cases, such as those involving human rights, a less restricted approach, even perhaps, to use the expression commonly adopted in the United States, a 'hard look', may be needed"; *Waitakere City Council v Lovelock*, above, 403 Thomas J.

[33] At the very least this is a legal duty imposed by sections 3 and 5 of the New Zealand Bill of Rights Act 1990. The courts are bound to act consistently with the Bill of Rights by section 3, while section 5 makes any limit not protected by section 4 unlawful if it does not meet the criteria set out. The courts have a constitutional duty to determine the law, and therefore they have a constitutional duty to determine the legality of any limits imposed on the rights and freedoms protected by the Bill of Rights. A similar duty arises with respect to common law rights via the presumption that Parliament will not legislate to restrict common law rights in anything less than express terms; for example in *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 437 Lord Bingham of Cornhill held that a prisoner's rights to access to the courts and legal advice "may be curtailed only by clear and express words, and then only to the extent necessary to meet the ends which justify the curtailment". As a result administrative action limiting common law rights will be subjected to close scrutiny by the courts in judicial review.

2 *Judicial deference*

The concept of "deference", or a "margin of appreciation", may provide the necessary "principled distance" between the court and the decision-maker[34] to preserve the constitutional balance between the courts and the other branches of government in merits review. The House of Lords addressed the issue of judicial deference in *R (on the application of Prolife Alliance) v British Broadcasting Corporation*, noting that any "overtones of servility, or perhaps gracious concession, are [not] appropriate to describe what is happening", Lord Hoffman went on to say: [35]

> In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power *and what the legal limits of that power are*. That is a question of law and must therefore be decided by the courts... [The court's] allocation of decision-making power to the other branches of government is [not] a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law... The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in art 6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law. [emphasis added]

In the context of judicial review of any administrative action limiting fundamental rights and freedoms, the determination of the limits on the relevant decision making power is the crucial issue, and the determination of that issue is squarely within the proper constitutional function of the courts.

III THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality functions as an evaluative test for the justifiability of limitations on human rights and freedoms, constitutional values

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[34] *R (Mahmood) v Home Secretary* [2001] 1 WLR 840, 855 para 33 Laws LJ (CA).
[35] *R (on the application of Prolife Alliance v British Broadcasting Corporation* [2003] UKHL 23, paras 75 – 76 Lord Hoffman (HL(E)).

or other legal rights. The principle of proportionality is the test used to determine whether limitations are "necessary",[36] "reasonable"[37] or "demonstrably justified"[38] in a democratic society. The principle of proportionality involves three steps, although in some jurisdictions the third step is split into two separate steps.[39] The principle of proportionality asks whether a limitation satisfies three criteria:

(1) That the legislative objective is sufficiently important to justify limiting a fundamental right,

(2) That the measures designed to meet the legislative objective are rationally connected to it, and

(3) That the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[40]

This last step involves an analysis of the proportionality of the limitation, and care must be taken not to confuse the "principle of proportionality" with this last step of the principle.

A Civil Law Origins and European Court of Human Rights Application

The principle of proportionality originally stems from civil law jurisdictions. In Germany, for example, the principle is an unwritten

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[36] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 21: "The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society". The principle of proportionality is the test for "necessary" in this art: Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Arlington (Va), 1993) 378 – 379.

[37] Constitution of Antigua and Barbuda, s 12(4). Under this section limits to the right to freedom of expression of public officers must be "reasonably required for the proper performance of their functions" and must be "reasonably justifiable in a democratic society". The Privy Council held that the proportionality test was the correct test for assessing whether a limit was reasonably justifiable in a democratic society: *de Freitas v Ministry of Agriculture* [1999] 1 AC 69, 80 (PC).

[38] Canadian Charter of Rights and Freedoms s 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The proportionality test was laid down by the Supreme Court for the "demonstrably justified in a free and democratic society" element of s 1 in *R v Oakes* [1986] 1 SCR 103 (SCC).

[39] This is the test used in *de Freitas v Ministry of Agriculture* [1999] 1 AC 69, 80 (PC) and *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, para 27 Lord Steyn (HL(E)).

[40] This last step is sometimes split into two elements, as in the Canadian test in *R v Oakes*, above. Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswells, Toronto, 1997) 878 – 879: The two steps are "(3) Least drastic means: the law must impair the right no more than is necessary to accomplish the objective. (4) Proportionate effect: the law must not have a disproportionately severe effect on the persons to whom it applies"

constitutional principle that has application to administrative and legislative measures and is based on the "*Rechtsstaatsprinzip*" which entitles a citizen to "...a fundamental right or freedom against the State".[41]

The principle of proportionality has been applied by the European Court of Justice (ECJ) to European Community Law[42] and by the European Court of Human Rights (ECHR) to cases brought under the European Convention on Human Rights (the Convention).[43] This paper is concerned with the principle of proportionality with respect to human rights and will not consider its application in the European Community law context.

In the context of the ECHR the principle of proportionality arises out of the requirement for limitations to many of the Convention rights and freedoms to be "necessary in a democratic society".[44] In order to meet this test limitations must be required to meet a "pressing social need", the interference must be "proportionate to the legitimate aim pursued" and the reasons adduced by the state for imposing the limitation must be "relevant and sufficient".[45] In addition limitations must be prescribed by law and for one of the specified purposes included with respect to each right or freedom.[46] This approach is similar to the approach under the ICCPR considered below in part IV(A). In cases where limitations have been imposed by law for an allowable purpose it is often on the proportionality of the limitation that the case turns.[47]

In the ECHR the rigour of the proportionality approach can be mitigated by the margin of appreciation that the Court will give to states. The margin of appreciation is granted on the grounds that the domestic authorities are in a better position to determine domestic matters, from a closer and more intimate

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[41] Walter van Gerven 'The Effect of Proportionality on the Actions of Member States" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, 1999), 37, 44.

[42] Francis G Jacobs "Recent Developments in the Principle of Proportionality in European Community Law" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, 1999), 1.

[43] Jeremy McBride "Proportionality and the European Convention on Human Rights" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, 1999), 23.

[44] For example European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, art 8 right to respect for private and family life, art 9 freedom of thought conscience and religion, art 10 freedom of expression and art 11 freedom of assembly and association.

[45] For example: *Lingens v Austria* (1986) 8 EHRR 103, paras 39 – 40.

[46] For example: public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others with respect to art 9 of the Convention.

[47] Berend Hovius "The Limitation Clauses of the European Convention on Human Rights" (1985) 17 Ottawa L Rev 213, 241.

connection and understanding of local conditions than an international judge could have.[48] For example, a margin of appreciation is afforded to states in determining whether a pressing social need for a limitation exists.[49] The margin of appreciation is also extended to other parts of the ECHR's analysis of cases; for example, where the pressing social need is the protection of morals, the Court grants a wide margin of appreciation to the determination of the requirements of domestic morals as well as the necessity of a restriction intended to protect those morals.[50] A similar approach is taken when the pressing social need is the protection of the religious feelings of others.[51] The ECHR has acknowledged that "[t]he scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background".[52] The application of the margin of appreciation by the ECHR is not without its critics; it is claimed, for example, that the doctrine is ill-defined and the role in the court's reasoning is not always clear.[53]

B The Principle of Proportionality in Canada

The Canadian courts have used the principle of proportionality as part of the limitations test required under section 1 of the Charter.[54] The *Oakes* test requires the principle of proportionality to be applied to determine whether a limitation is "demonstrably justified in a free and democratic society".[55] The

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[48] *Müller v Switzerland* (1988) 13 EHRR 212, 228 – 229 para 35.
[49] *Lingens v Austria* (1986) 8 EHRR 103, para 39.
[50] *Müller v Switzerland*, above, 228 – 229 para 35: "The view taken of the requirement of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as the 'necessity' of a 'restriction' or 'penalty' intended to meet them".
[51] *Otto-Preminger Institute v Austria* (1994) 19 EHRR 34, 57 – 58 para 50.
[52] *Rasmussen v Denmark* (1984) 7 EHRR 371, 380 para 40.
[53] See Nicholas Lavender "The Problem of the Margin of Appreciation" (1997) 4 EHRLR 380.
[54] Canadian Charter of Rights and Freedoms, s 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
[55] *R v Oakes* [1986] 1 SCR 103, 138-139; Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Toronto, 1997) 877-879: "There are four criteria to be satisfied by a law that can be demonstrably justified in a free and democratic society: 1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a Charter Right. 2. Rational connection: the law must be rationally connected to the objective. 3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective. 4.

Canadian approach is significant for New Zealand as section 5 of the Bill of Rights was modelled on section 1 of the Charter.[56] As the Charter is supreme law in Canada any legislation that limits Charter rights and freedoms that does not pass the section 1 test will be struck down by the Courts. There is a savings provision that allows the federal or provincial legislatures to insulate legislation which does not meet the section 1 test by the insertion of a "notwithstanding" clause into the statute.[57]

In judicial review of administrative action any decision affecting Charter rights of freedoms will be set aside as unlawful if it cannot be justified under section 1.[58] Lamer J, speaking for the court on this issue in *Slaight Communications*, held that as administrative discretions were conferred by statute they were caught by the Charter. Unless the discretion expressly conferred, or by way of necessary implication conferred, a power to infringe the Charter, all such discretions could not infringe the Charter.[59] Where the legislation does confer such a power then the legislation itself must be tested against section 1 of the Charter. If the legislation fails that test it is unconstitutional and the order made under it is also unconstitutional.[60] There is no infringement of the Charter where the exercise of a discretion limiting a Charter right or freedom constitutes a justified limitation under section 1 of the Charter, so even where there is no express power to infringe the Charter, a decision maker can impose justified limitations on Charter rights within the scope of their legal discretion.[61]

The Supreme Court addressed the relationship between normal administrative review and Charter review In *Ross v New Brunswick School District No. 15*[62]. The Court held that where Charter values were at stake, and

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means: The law must impair the right no more than is necessary to accomplish the objective. 4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies."

[56] White Paper *A Bill of Rights for New Zealand* (1985) AJHR A6, para 10.26.

[57] Canadian Charter of Rights and Freedoms, s 33.

[58] David J Mullan *Administrative Law* (3 ed, Carswell, Scarborough (Ontario), 1996) § 498. Discretions may also be struck down for failure to satisfy the "prescribed by law" limb of section 1. This will not be considered in this paper.

[59] *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1078 Lamer J (SCC). Lamer J dissented in part from the Majority judgement; however the majority endorsed the comments on judicial review and the Charter cited in this paper at 1048 – 1049.

[60] *Slaight Communications Inc*, above, 1079 – 1080 Lamer J.

[61] *Slaight Communications*, above, 1077 – 1081 Lamer J.

[62] *Ross v New Brunswick School District No. 15* [1996] 62 ACWS (3d) 266 (SCC).

the review was made under section 1, then if the decision passed the section 1 test it could not be "unreasonable" in the normal administrative law sense. If the decision fails the section 1 test, then as it is unconstitutional the reasonableness of the decision is irrelevant.[63]

In the review of legislation against section 1 the Canadian courts show a degree of deference to the legislature. Deference is mainly shown at the first step, the question whether the objective is sufficiently important to limit the right, and the third step, the question whether the least drastic means have been used to achieved the objective. The decision of the democratically elected legislature is usually accepted as determinative of the issue as to whether the objective is sufficiently important.[64] The courts have only found a law to fail this stage of the test on very few occasions.[65] In the inquiry into the "least drastic means", a margin of appreciation is afforded the legislature because it will almost always be possible to imagine an approach that might limit the right to a lesser degree. The majority of the Supreme Court recognised the difficulties of applying the "least drastic means" requirement of the *Oakes* test in *R v Edwards Books and Art*, importing the word "reasonable" into this part of the test and asking whether the law limited the right "as little as is reasonably possible".[66]

C The Principle of Proportionality in Other Jurisdictions

The principle of proportionality is used in various other jurisdictions, such as South Africa, Lesotho and Zambia, as part of the test to determine the constitutionality of limitations on constitutionally protected rights and freedoms. In the Republic of South Africa section 36(1) of the constitution requires the principle of proportionality to be considered in determining whether limits to rights in the Bill of Rights are constitutional.[67] The constitution of

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[63] *Ross v New Brunswick School District No. 15* [1996] 62 ACWS (3d) 266, para 34 (SCC).
[64] Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Toronto, 1997) 879 – 889.
[65] For example, *R v Big M Drug Mart* [1985] 1 SCR 295 (SCC); *R v Zundel* [1992] 2 SCR 731 (SCC); Hogg, above, 884 – 887.
[66] *R v Edwards Books and Art* [1986] 2 SCR 713, 772 Dickson CJ (Chouinard and Le Dain JJ concurring) (SCC); Hogg, above, 894 – 895.
[67] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] 3 LRC 648, 674 – 675 (SACC). S 36(1): "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable

Lesotho does not have a specific limitations provision, so the courts have adopted the *Oakes*[68] test from Canada to determine whether limitations to constitutionally protected rights and freedoms are constitutional.[69] In Zambia the proportionality test is used to determine whether limitations are "reasonably required" and therefore constitutional.[70]

D The United Kingdom and the Human Rights Act 1998: Incorporating the Principle of Proportionality

1 Proportionality and judicial review prior to the entry into force of the Human Rights Act 1998

Prior to the entry into force of the Human Rights Act on 2 October 2000, proportionality had not emerged as an independent head of review in the United Kingdom. Instead the courts in the United Kingdom developed a higher intensity of review to try to give weight to fundamental human rights and freedoms, developed in *ex parte Smith*.[71] It is important to consider this approach because in New Zealand there is recognition that the intensity of review varies with the facts of the case, an approach that could accord with the *ex parte Smith* approach. In part IV it will be considered whether such an approach would be consistent with the requirements of the Bill of Rights and able to act as a substitute for the development of proportionality as a separate ground of review.

(a) Intensity of review

Faced with the inability to give effect to human rights with direct reference to the Convention, due to failure to incorporate the Convention into

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and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose".

[68] *R v Oakes* [1986] 1 SCR 103, 138-139 (SCC).

[69] *Attorney General v 'Mopa* [2003] 1 LRC 224, 236 para 33 (Lesotho CA).

[70] *M'membe and Another v The People* [1996] 2 LRC 280, 287 (Zambia SC).

[71] *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

United Kingdom law, the courts developed the concept of intensity of review as a means of giving some priority to human rights norms. The intensity of review increases with the gravity of the issue which the decision being reviewed determines. In *Budaycay*[72] the need for a higher intensity of review was noted, subject to the limitations that normally restrict interference by a court on judicial review.[73]

This approach of a higher intensity of review in cases where fundamental human rights were at issue was confirmed by *Brind*[74] and *ex parte Smith.*[75] The position from *Budaycay* and *Brind* was summarised in *ex parte Smith* where the judges of the Court of Appeal accepted counsel for the applicant's submission on the correct approach to the issue of irrationality:[76]

> The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.

This has been called a sub-*Wednesbury* approach,[77] contrasted with the traditional *Wednesbury*[78] approach and the super-*Wednesbury* approach that requires the extra element of bad faith, improper motive, or manifest absurdity in order to be *Wednesbury* reviewable.[79] It would seem implicit in the *ex parte*

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[72] *R v Home Secretary, ex parte Budaycay* [1987] 1 AC 514.

[73] *R v Home Secretary, ex parte Budaycay*, above, 531 Lord Bridge of Harwich: "...the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny." The other judges all concurred with Lord Bridge's analysis: 534 Lord Brandon of Oakbrook, 537 Lord Templeman, 538 Lord Griffiths, 538 Lord Goff of Chievely.

[74] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 748 – 749 Lord Bridge of Harwich (HL(E)).

[75] *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA).

[76] *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 554 – 555 Sir Thomas Bingham MR, 563 Henry LJ (CA).

[77] Martin Norris "*Ex Parte Smith*: Irrationality and Human Rights" (1996) PL 590, 594.

[78] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

[79] *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597 (HL(E)); discussed in *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 535 – 536 Simon Brown LJ (DC).

Smith approach that the threshold is indeed lowered,[80] although there seems to be some uncertainty arising from the decisions relied upon by the court in *ex parte Smith*. Prior to the Court of Appeal's analysis in *ex parte Smith*, the reasoning in *Brind* and *Budaycay* alone was not held to be enough to establish the lowering of the threshold of unreasonableness.[81] This was an approach followed by the Divisional Court in the *ex parte Smith* case where it was held that the higher intensity of review or increased scrutiny test did not involve a lowering of the threshold of unreasonableness.[82] If the threshold is not lowered, the question is raised of what the increased scrutiny actually achieves in protecting human rights norms, as the decision will be the same in any event. This point was not addressed directly by the Court of Appeal in *ex parte Smith*.

Ex parte Smith was applied in a number of subsequent cases. In *Canbolat*[83] the applicant failed in a challenge to a decision to return her to France on the grounds that France was not a safe third country where her asylum application would be heard in accordance with the relevant international Conventions. The Court of Appeal expressly endorsed the *ex parte Smith* formulation of the unreasonableness test to be used.[84] At issue in the case was evidence that while France did comply with the international conventions once a person was within the relevant domestic process, French officials had in a number of cases improperly and unlawfully excluded asylum seekers from the process and initiated their deportation without their asylum claims being considered.[85] The Court concluded that even though there was no indication that

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[80] Norris, above, 594.

[81] *R v Secretary of State for the Environment, ex parte National and Local Government Officers Association* (1992) 5 Admin LR 785, 797 – 798 Neill LJ (CA).

[82] *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 537 – 538 Simon Brown LJ (DC): "Rather they emphasise that within the limited scope of review open to it the court must be scrupulous to ensure that no recognised ground of challenge is in truth available to the applicants before rejecting his application. When the most fundamental human rights are threatened, the court will not, for example, be inclined to overlook some perhaps minor flaw in the decision making process, or adopt a particularly benevolent view of the minister's evidence, or exercise its discretion to withhold relief… In short… *even where fundamental human rights are being restricted, "the threshold of unreasonableness" is not lowered.* On the other hand, the minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the restriction and he must expect his reasons to be closely scrutinised. Even that approach, therefore, involves a more intensive review process and a greater readiness to interfere than would ordinarily characterise a judicial review challenge" [emphasis added].

[83] *R v Secretary of Sate for the Home Department, ex parte Canbolat* [1997] 1 WLR 1569 (CA).

[84] *Canbolat*, above, 1579.

[85] *Canbolat*, above, 1580.

the Secretary of State had considered the evidence of France's failures put to him by the applicant, and even though in future the Secretary of State *would* have to consider this evidence, the Secretary of State's decision passed the anxious scrutiny test.[86] This approach does not seem to conform in practice to the *ex parte Smith* approach that the Court says it is using. Far from requiring more by way of justification from the decision maker the Court has deferred to the decision despite not knowing whether the Secretary of State had considered evidence that he should have had regard to, and must have regard to in future decisions!

The approach in *R v Lord Saville of Newdigate, ex parte A*[87] by contrast is a more robust approach. The Court of Appeal quashed the decision of the Bloody Sunday Inquiry Tribunal to refuse to give anonymity to soldiers giving evidence before it who had fired their weapons in the massacre, and went on to say that they did not consider that "any decision was possible other than to grant the anonymity to the soldiers".[88] The Court endorsed the *ex parte Smith* approach,[89] and in reviewing the Tribunal's decision conducted a thorough review of the merits of the decision. The Court questioned, among other things, the weight attached to considerations of an open search for the truth as opposed to the risk and perceived risk to the soldiers, and the validity of the Tribunal's reasoning that suppressing the witnesses' names would undermine the openness of the proceedings.[90] The Court makes the qualification that they had come to their decision "not primarily because of the points of criticism... [t]hose criticisms would not in our judgement in themselves entitle the court to interfere".[91] Instead the Court held that the Tribunal had used the wrong approach to the question, which did not "accord to the applicants fundamental

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[86] *Canbolat*, above, 1581: "The evidence on behalf of the Secretary of State does not specifically deal with this report. We do not know what weight the Secretary of State attaches to it. We would have been assisted by knowing his approach to this material. *However it may well be that when he reached his decision, there was no more than a summary in English available to him. The position is not clear. We would have thought however that this is material to which he certainly should have regard if it was available when he granted a certificate and which we would expect him to comment on in future*" [emphasis added].

[87] *R v Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1855 (CA). The soldiers wanted their names to be protected, but were prepared to testify publicly in the course of the Tribunal's proceedings.

[88] *R v Lord Saville of Newdigate, ex parte A*, above, 1878.

[89] *R v Lord Saville of Newdigate, ex parte A*, above, 1866 – 1867.

[90] *R v Lord Saville of Newdigate, ex parte A*, above, 1871 – 1878.

[91] *R v Lord Saville of Newdigate, ex parte A*, above, 1875.

rights the required weight" and had failed to analyse the extent to which the granting of anonymity would compromise the public and open nature of the proceedings.[92] In contrast to *Canbolat*[93] the Court examined the merits and the eventual decision was, despite claims to the, contrary clearly merits based. The threshold of unreasonableness was clearly lower than the usual *Wednesbury* standard.[94]

Mahmood[95] was decided after the entry into force of the Human Rights Act but considered a decision that was made prior to its entry into force.[96] The Court of Appeal declined to decide the case under the Human Rights Act.[97] The majority of the Court followed the *ex parte Smith* approach, holding that the approach was "a settled principle of the common law".[98] The Court held that it was necessary to grant a margin of appreciation to the decision maker in order to maintain "...a principled distance between the court's adjudication in a case such as this and the Secretary of State's decision, based on his perception of the case's merits".[99]

This increased scrutiny review is of relevance as the New Zealand courts take a similar approach. While not explicitly adopting the *ex parte Smith* approach the courts raise or lower the *Wednesbury* threshold depending on the context of the case,[100] with some recognition that where human rights are at issue a "hard look" might be appropriate.[101] The increased scrutiny review provides a questionable degree of effective protection to human rights. The *ex parte Smith* approach will not meet required international standards for an effective remedy because, as the ECHR's rejection of the judicial review in *ex*

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[92] *R v Lord Saville of Newdigate, ex parte A*, above, 1870 – 1871.
[93] *R v Secretary of Sate for the Home Department, ex parte Canbolat* [1997] 1 WLR 1569 (CA).
[94] It is hard to see how they could have concluded that there was only one possible decision that could be reached unless the analysis and decision was on the merits.
[95] *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (CA).
[96] The decision to deport Mahmood was taken on 29 September 1999, the Human Rights Act entered into force on 2 October 2000, and the case was heard on 10 October 2000.
[97] *R (Mahmood) v Secretary of State for the Home Department*, above, 851 – 853 paras 27 – 29 Laws LJ, 855 para 35 May LJ. Lord Phillips of Worth Matravers MR disagreed on this point, taking the view that the court should approach the case as if the Act was in force at the time the decision was taken, but reached the same result in any event.
[98] *R (Mahmood) v Secretary of State for the Home Department*, above, 847 para 18 Laws LJ.
[99] *R (Mahmood) v Secretary of State for the Home Department*, above, 854 – 855 para 33 Laws LJ.
[100] *Electoral Commission v Cameron* [1997] 2 NZLR 421, 433 (CA); *Wellington City Council v Woolworths (No 2)* [1996] 2 NZLR 537, 552 (CA).
[101] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA).

parte Smith as an effective remedy showed,[102] it still does not allow a court to analyse the complaint and found its decision on the required criteria. The required criteria are, for many of the rights and freedoms, those incorporated in the principle of proportionality.

(b) Proportionality before the Human Rights Act 1998

Prior to the entry into force of the Human Rights Act in the United Kingdom proportionality had not emerged as an independent head of review.[103] Lord Diplock raised the possibility that proportionality might eventually emerge as a separate head of review as early as 1985 in the *CCSU*[104] case. After classifying the three main grounds of judicial review as illegality, irrationality and procedural impropriety, he added "That is not to say that further developments... may not in the course of time add further grounds... I have in mind particularly the possible adoption in the future of the principle of 'proportionality' "[105]. The courts dealt with submissions relating to proportionality as a separate head of review over the following years, without taking the step of accepting the development, until the entry into force of the Human Rights Act 1998 provided the basis for the adoption of proportionality in *Daly*.[106]

Proportionality was advanced as a ground for judicial review in *Brind*.[107] The existence of proportionality as a ground of review was rejected both by the

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[102] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

[103] The courts had been obliged under section 2(1) of the European Communities Act 1972 to apply the principle of proportionality to "...administrative decisions that fall under the rubric of community law": Gareth Wong "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" (2000) PL 92, 95; Nicholas Green "Proportionality and the Supremacy of Parliament in the UK" in Evelyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, 1999), 145; Jonathan L Back-Branch "Parliamentary Supremacy or Political Expediency?: The Constitutional Position of the Human Rights Act under British Law" (2002) 23 Statute Law Review 59, 77-79.

[104] *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374 (HL(E)).

[105] *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374, 410 Lord Diplock (HL(E)).

[106] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433.

[107] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. Judicial review was sought of the Secretary of State's directives issued to the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority (IBA), restricting their direct broadcast of the words spoken by members of proscribed organisations in Northern Ireland

Court of Appeal[108] and the House of Lords.[109] In the Court of Appeal two of the three judges saw proportionality merely as an aspect of the irrationality ground of review, on the basis that a decision with a total lack of proportionality would be unreasonable on application of the *Wednesbury* test.[110] In the House of Lords, Lord Ackner correctly distinguished the proportionality argument advanced by the appellants from this *Wednesbury* application of a concept of proportionality:[111]

> This is not a repetition of the *Wednesbury* "irrational test" under another guise. Clearly a decision by a minister which suffers from a total lack of proportionality will qualify for the *Wednesbury* unreasonable epithet. It is, ex hypothesi, a decision which no reasonable minister could make. This is, however, a different and severer test. Mr Lester is asking your lordships to adopt a different principle – the principle of "proportionality" which is recognised in the administrative law of several members of the European Economic Community.

The House of Lords declined to adopt proportionality on the grounds that it represented a shift to merits review that was constitutionally unjustified,[112] qualified in Lord Ackner's case by the proviso "unless and until Parliament incorporates the Convention into domestic law"[113]. The distinction between manifest disproportionality in the *Wednesbury* sense and the principle of proportionality is an important one to bear in mind; the latter clearly goes further than a *Wednesbury* proportionality approach.[114]

In *R v Ministry of Defence, ex parte Smith*[115] both the Divisional Court and the Court of Appeal accepted that the Convention would have to be incorporated before the policy at issue could be reviewed on proportionality

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[108] *R v Secretary of State for the Home Department, ex parte Brind*, above, 722 - 723 Lord Donaldson of Lymington MR, 729 McCowan LJ (CA).
[109] *R v Secretary of State for the Home Department, ex parte Brind*, above, 749 Lord Bridge of Harwich, 750 Lord Roskill,
[110] *R v Secretary of State for the Home Department, ex parte Brind*, above, 722 - 723 Lord Donaldson of Lymington MR, 729 McCowan LJ (CA).
[111] *R v Secretary of State for the Home Department, ex parte Brind*, above, 762 Lord Ackner (HL(E)).
[112] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 749 Lord Bridge of Harwich, 750 Lord Roskill, 762 – 763 Lord Ackner (HL(E)).
[113] *R v Secretary of State for the Home Department, ex parte Brind*, above, 762 – 763 Lord Ackner (HL(E)).
[114] *R v Secretary of State for the Home Department, ex parte Brind*, above, 766 – 767 Lord Lowry (HL(E)); *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 446 Lord Steyn (HL(E)).
[115] *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

grounds.[116] At the Divisional Court Simon Brown LJ made powerful remarks to the effect that though the policy survived scrutiny under the irrationality ground of review it would be unlikely to survive a challenge to the European Court of Human Rights.[117] However, the other judge at the Divisional Court disagreed with these remarks[118] and the Court of Appeal felt that since the Convention was not a part of domestic law it was "unhelpful" for the courts to consider what might happen at Strasbourg.[119] The applicants in the case did in fact succeed at the European Court of Human Rights, who held not only that the policy was a violation of the applicant's rights under Article 8 of the Convention,[120] but also that the failure of the Courts in the United Kingdom to apply the proportionality test had led to a breach of the right to an effective remedy under Article 13.[121] The relevance of this latter finding to judicial review under the Bill of Rights will be discussed more fully below in part IV(A) of this paper.

2 Proportionality and judicial review after the entry into force of the Human Rights Act 1998

With the entry into force of the Human Rights Act on 2 October 2000, proportionality rapidly emerged as an independent head of review where a Convention right was at issue. That result was inevitable following the ECHR decision in *Smith and Grady*,[122] and was necessary to meet the United Kingdom's international obligations. The inability of the courts in the United Kingdom to consider the proportionality of limits to Convention rights in the context of judicial review inevitably rendered the courts unable to grant an effective remedy in some cases. The adequacy of judicial review on *Wednesbury* grounds as a remedy under the Convention and the ICCPR is discussed below in

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[116] *R v Ministry of Defence, ex parte Smith*, above, 536, 541 – 542 Simon Brown LJ (DC), 558 – 559 Sir Thomas Bingham MR, 564 Henry LJ (CA). There was another ground on which proportionality could have been argued, that of EC Law and the effect of the European Communities Act 1972 through a European Council directive. Both the Divisional Court and the Court of Appeal held that the Directive did not apply. The issue of proportionality and its application with respect to EC law is not within the scope of this paper.

[117] *R v Ministry of Defence, ex parte Smith*, above, 541 – 542 Simon Brown LJ (DC).

[118] *R v Ministry of Defence, ex parte Smith*, above, 546 Curtis J (DC).

[119] *R v Ministry of Defence, ex parte Smith*, above, 517, 558 – 559 Sir Thomas Bingham MR, 564 Henry LJ (CA).

[120] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, 529 – 537 paras 87 – 112.

[121] *Smith and Grady v United Kingdom*, above, 540 – 544 paras 129 – 139.

[122] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

part IV(A). The House of Lords, for their part, were quite clear that even the heightened intensity of review in *ex parte Smith*[123] was insufficient to meet obligations under the Human Rights Act.[124]

The step was taken by the House of Lords in *R v Secretary of State for the Home Department, ex parte Daly* (*Daly*)[125] on 23 May 2001, remarkably little time having elapsed since the entry into force of the Human Rights Act. In *Daly* the House of Lords adopted the three-stage test from *de Freitas*:[126]

> ...the court should ask itself... whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

The ECHR decision in *Smith and Grady* had dispelled the view that the traditional standards of review and the higher standards of review "under the convention or the common law of human rights... are substantially the same."[127] Proportionality review might require "the reviewing court to assess the balance which the decision maker has struck... [and] it may require attention to be directed to the relative weight accorded to interests and considerations".[128]

In *R v Shayler*[129], following the decision in *Daly*, Lord Bingham of Cornhill emphasised that "...in any application for judicial review alleging an alleged violation of a Convention right the court will now conduct a *more*

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[123] *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA).

[124] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 446 – 447 paras 27 – 28 Lord Steyn, 447 para 32 Lord Cooke of Thorndon (HL(E)).

[125] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL(E)). Prior to *Daly* the Privy Council had considered limits to a Convention right with respect to Scotland on 5 December 2000 in *Brown v Stott* [2003] 1 AC 681, as under the devolution legislation the Convention was considered to be in force in Scotland. The right in question was the right against self-incrimination, which was implied within art 6 of the Convention (*Murray v United Kingdom* (1996) 22 EHRR 29, 60 – 61 para 45). The court did not use the principle of proportionality, but did consider whether the limitation in question was proportional (the last limb of the principle of proportionality).

[126] *R v Secretary of State for the Home Department, ex parte Daly*, above, para 27 Lord Steyn (HL(E)), approving the three stage test used by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 Lord Clyde (PC).

[127] *R v Secretary of State for the Home Department, ex parte Daly*, above, 447 para 32 Lord Cooke of Thorndon.

[128] *R v Secretary of State for the Home Department, ex parte Daly*, above, 446 para 27 Lord Steyn.

[129] *R v Shayler* [2003] 1 AC 247 (HL(E)).

rigorous and intrusive review than was once thought to be permissible"[130] [emphasis added]. Lord Hope of Craighead held that:[131]

> The principle involves a question of balance between competing interests. But it is important to appreciate that there is a process of analysis that must be carried through. The starting point is that an authority which seeks to justify a restriction on a fundamental right on the ground of a pressing social need has a burden to discharge. There is a burden on the state to show that the legislative means adopted were no greater than necessary... As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them".

Lord Hope later emphasised both that the intensity of review under a proportionality review is greater than that under the *Wednesbury* approach, and that "[i]t is, above all, important that cases involving Convention rights are *analysed in the right way*" [emphasis added].[132]

The issue of the margin of appreciation was addressed in *Farrakhan*.[133] The decision of the Secretary of State for the Home Department to exclude Mr Farrakhan from the United Kingdom was challenged on the grounds that his exclusion, which was intended to restrict his freedom of expression by preventing him airing his controversial views, engaged article 10 of the Convention, and that the decision was a disproportionate interference. The judge at first instance approached the case on the basis that with a Convention right at issue "the terms of the Secretary of State's decision had to demonstrate that he had properly found and identified 'substantial and objective justification' for his decision",[134] a burden the judge held was not met. The Court of Appeal disagreed on the approach, emphasising that the margin of appreciation accorded to a decision maker had to be properly identified. The *Wednesbury* test

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[130] *R v Shayler*, above, 272 para 33 Lord Bingham of Cornhill.
[131] *R v Shayler*, above, 281 paras 59 and 61 Lord Hope of Craighead.
[132] *R v Shayler*, above, 285 para 75 Lord Hope of Craighead; *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 446 para 28 Lord Steyn (HL(E)): "The difference in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way".
[133] *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606; [2002] QB 1391 (CA).
[134] *R (Farrakhan) v Secretary of State for the Home Department*, above, para 31.

"left a very wide margin of appreciation to the decision maker... [i]ndeed, the margin was far too wide to accommodate the demands of the Convention".[135] The Court held that in determining whether a limitation on a Convention right is justified the doctrine of proportionality must be applied. When applying the proportionality test the width of the margin of appreciation given to the decision maker will vary, depending on the right at issue and the facts of the case, and "...the margin of appreciation or discretion accorded to the decision maker is all-important, for it is only by recognising the margin of discretion that the court avoids substituting its own decision for that of the decision maker".[136] In the *Farrakhan* case the Court of Appeal cited several factors that supported a wide margin of appreciation, and concluded that the decision was not a disproportionate limitation on the freedom of expression rights under article 10 of the Convention.[137] The importance of this approach will be considered below in Part V(B), in considering the question whether the proportionality head of review represents a shift to merits review.

The proportionality cases emphasise several propositions:

(1) The intensity of review under a proportionality review is greater than under the traditional *Wednesbury* review, and also greater than under the *ex parte Smith* "anxious scrutiny" *Wednesbury* approach.

(2) The method of analysis is important as proportionality review and traditional review grounds may yield different results.

(3) The burden is on the authority seeking to justify a limitation on a right, and the facts said to support that justification must be given a close and penetrating examination.

(4) The margin of appreciation granted to the decision maker preserves the nature of the exercise as a review.

(5) The margin of appreciation afforded to the decision maker is narrower than that used in the traditional *Wednesbury* test, and will vary with the facts and context of the case. Correctly

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[135] *R (Farrakhan) v Secretary of State for the Home Department*, above, paras 64 – 65.
[136] *R (Farrakhan) v Secretary of State for the Home Department*, above, paras 64 – 65.
[137] *R (Farrakhan) v Secretary of State for the Home Department*, above, paras 71 – 79.

identifying and applying the correct margin of appreciation is a vital part of a proportionality review.

IV THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND PROPORTIONALITY

A New Zealand's International Obligations

1 The Bill of Rights and the International Covenant on Civil and Political Rights

New Zealand ratified the International Covenant on Civil and Political Rights (the ICCPR) on 28 December 1978.[138] As a state party to the ICCPR New Zealand has an obligation at international law to perform its obligations in good faith.[139] In interpreting the Bill of Rights, regard should be had to New Zealand's international obligations, as there is a presumption that Parliament would not legislate in a manner inconsistent with those international obligations.[140] This presumption has been expressly approved by the Court of Appeal. Richardson J in *Ashby v Minister of Immigration* noted that "it has been increasingly recognised in recent years that, even though treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation will do their best conformably with the subject-matter and the policy of the legislation to see that their decisions are consistent with our international obligations".[141] This general presumption of statutory interpretation is strengthened in the case of the Bill of Rights by its purpose to

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[138] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171; Office of the United Nations High Commissioner for Human Rights *Status of Ratifications of the Principal International Human Rights Treaties as of 7 July 2003* <http://www.unhchr.ch/pdf/report.pdf> (last accessed 15 July 2003).

[139] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 26.

[140] *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771 Lord Diplock (HL): "...it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after a treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not be inconsistent with it".

[141] *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 229 Richardson J, also noted by Somers J at 232. See also *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA).

affirm New Zealand's obligations under the ICCPR.[142] That the Bill of Rights was intended to incorporate international standards is also supported by the Prime Minister's comments in moving the Bill's second reading, to the effect that New Zealand has "...ratified many conventions on human rights; we have accepted many international obligations in that regard; and *those international standards should now be incorporated visibly and plainly into New Zealand domestic law*" [emphasis added].[143] That the Bill of Rights incorporates New Zealand's international obligations was also recognised by the Government in its fourth periodic report to the Human Rights Committee.[144]

The meaning of an enactment is to be "ascertained from the text in light of its purpose"[145] and the long title of the enactment is a matter that may be considered to ascertain the meaning.[146] The long title makes it clear that the Bill of Rights was enacted in order to "affirm" New Zealand's commitment to the ICCPR.[147] In *King-Ansell v Police*[148] a reference in the long title of the Race Relations Act 1971 to the Act's purpose to implement the International Convention on the Elimination of All Forms of Racial Discrimination was important in the outcome of the case.[149] Woodhouse J noted that "...the express mention in the Act of its intention to implement the Convention demonstrates, if

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[142] New Zealand Bill of Rights Act 1990, long title.
[143] Rt Hon Geoffrey Palmer (14 August 1990) 510 NZPD 3451.
[144] Human Rights Committee *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth Periodic Report of States Parties Due in 1995: New Zealand* (14 May 2001) CCPR/C/NZL/2001/4, para 40: "The Bill of Rights Act and the Human Rights Act 1993 *are designed to implement New Zealand's international obligations*. Therefore, the judicial interpretation or application of those Acts will involve references to the relevant international conventions such as the International Covenant on Civil and Political Rights" [emphasis added].
[145] Interpretation Act 1999, s 5(1).
[146] Interpretation Act 1999, ss 5(2) and 5(3).
[147] New Zealand Bill of Rights Act 1990, Long Title.
[148] *King-Ansell v Police* [1979] 2 NZLR 531 (CA).
[149] *King-Ansell v Police*, above, 536 – 537 Woodhouse J, 540 – 541 Richardson J. This case concerned the appeal by a member of the New Zealand National Socialist Party against his conviction under s 25(1) of the Race Relations Act 1977 for distributing anti-Semitic pamphlets with the "intent to excite ill-will against a group of persons in New Zealand, namely Jews, on the ground of their ethnic origins". It was argued Jews were not an "ethnic" group. The reference to the International Convention on the Elimination of All Forms of Racial Discrimination was important in indicating that the meaning of "ethnic" had to be given a meaning commensurate with the english version of the Convention, and therefore the meaning "ethnic" would have in english internationally. That allowed "ethnic" to be given a broad meaning that would include Jews as an "ethnic" group.

that were necessary, that the language of the Act is intended to adopt and reflect its purposes".[150]

The Courts have recognised the importance of the ICCPR and New Zealand's obligations under the ICCPR to the application of the Bill of Rights:[151]

> In approaching the Bill of Rights Act it must be of *cardinal importance* to bear in mind the antecedents. The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them... Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights Act. [emphasis added]

The relationship of the Bill of Rights and the ICCPR was also considered in *Simpson v Attorney-General [Baigent's Case]*.[152] In that case the long title affirmation of New Zealand's commitment to the ICCPR and the obligation to provide an effective remedy for violation of any of the protected rights and freedoms that New Zealand had accepted under the ICCPR[153] were important in the reasoning of the majority of the Court of Appeal in holding that there was a public cause of action for damages under the Bill of Rights Act.[154] Hardie Boys J noted that he would be "...most reluctant to conclude that the Act, which purports to affirm this commitment [to an effective remedy under article 2(3)], should be construed other than in a manner that gives effect to it".[155] In *Tavita v Minister of Immigration*[156] the Court of Appeal saw as "unattractive" an argument that the Minister in the exercise of a discretion might be entitled to ignore international human rights instruments that have *not* been incorporated into New Zealand law, as such an argument implied "New Zealand's

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[150] *King-Ansell v Police*, above, 536.
[151] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 270 Cooke P (CA).
[152] *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).
[153] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 2(3).
[154] *Baigent's Case*, above, 676 Cooke P, 690 – 691 Casey J, 699 Hardie Boys J, 718 McKay J, Gault J dissenting.
[155] *Baigent's Case*, above, 699 Hardie Boys J.
[156] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

adherence... has been at least partly window dressing".[157] To argue that the courts, bound by section 3 of the Bill of Rights to act consistently with it, are not required to interpret the Bill of Rights consistently with the underlying international obligations that it affirms, would be an equally unattractive argument.

The Hong Kong Court of Appeal commented, with reference to the Hong Kong Bill of Rights Ordinance 1991, that "...the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant".[158] The Hong Kong Bill of Rights was intended to give effect to Hong Kong's obligations under the ICCPR, a point made more explicitly than in the New Zealand Bill of Rights.[159] However, both the Hong Kong and the New Zealand Bill of Rights have the ICCPR, and the obligations under that treaty, underlying their enactment and the metaphor of the Hong Kong Court of Appeal is applicable to the New Zealand Bill of Rights. The starting point under the Bill of Rights should be the international obligations that it affirms, and was intended to implement.[160] The interpretation of the Bill of Rights should, therefore, be viewed through the "glass" of the ICCPR and New Zealand's commitments under it. Where there is ambiguity in the interpretation of the Bill of Rights the interpretation that is consistent with New Zealand's international obligations under the ICCPR is to be preferred.[161]

There are two main elements of New Zealand's international obligations that are of interest for this paper: the obligations with respect to the limitation of rights and freedoms and the obligation to provide an effective remedy for violations of rights and freedoms.

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[157] *Tavita*, above, 265 – 266. Hardie Boys J in *Baigent's Case* warns against considering the Bill of Rights as "window dressing": *Baigent's Case*, above, 691.

[158] *R v Sin Yau-ming* [1992] LRC (Const) 547, 561 Silke V-P.

[159] Hong Kong became a party to the ICCPR through the United Kingdom's ratification in 1976, *R v Sin Yau-ming*, above, 558. The Hong Kong Bill of Rights is stronger than the New Zealand Bill of Rights in this respect, with inconsistent pre-existing legislation repealed by virtue of s 3, and with s 2(3) explicitly noting that the purpose of the Bill of Rights is to incorporate the ICCPR into Hong Kong law: *R v Sin Yau-ming*, above, 558 – 559.

[160] Rt Hon Geoffrey Palmer (14 August 1990) 510 NZPD 3451.

[161] The Canadian and United Kingdom approaches are relevant, and should be considered. However, the Bill of Rights is intended to "affirm" New Zealand's obligations under the ICCPR (New Zealand Bill of Rights Act 1990, long title) and if the Canadian or United Kingdom approaches diverge from the requirements of New Zealand's international obligations under the ICCPR it is the international obligations that should be followed.

2 *Limitation of rights*

Rights and freedoms are generally not absolute in nature[162] and international human rights treaties have recognised that there can be limitations to individual's rights based on the countervailing rights of others or certain important social goals. As discussed in part III of this paper the ECHR has used the principle of proportionality as the test for whether limitations to Convention rights are "necessary in a democratic society" and therefore justified under the Convention. The Convention shares a number of similarities with the ICCPR in its text and the jurisprudence of the ECHR can provide persuasive authority for determining New Zealand's obligations under the ICCPR. The starting point for discussion however must be the ICCPR.

The ICCPR does not contain a general limitations provision, instead the permissible limitations for each of the rights and freedoms guaranteed is contained within the article specifying the right. So, for example, restrictions on the right of peaceable assembly must be "in conformity with the law" and "necessary in a democratic society" for the purposes of "...national security, public order, the protection of public health or morals or the protection of the rights and freedoms of others".[163] Some rights have no allowable limitations, such as the right not to be subjected to torture or cruel, inhuman or degrading treatment.[164] The table below indicates the rights and freedoms that have limitations provisions linked to a set of specified allowable purposes for any limitation:

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[162] Some are absolute, including the right not to be subjected to torture.
[163] ICCPR, above, art 21.
[164] ICCPR, above, art 7.

ICCPR Art	Right/Freedom	Limitation Requirements
Art 12(3)	Liberty of movement and freedom to choose residence	"provided by law" "necessary" for the specified purposes[165]
Art 18(3)	Freedom of thought, conscience and religion	"prescribed by law" "necessary" for the specified purposes[166]
Art 19(3)	Freedom of expression	"provided by law" "necessary for the specified purposes[167]
Art 21	Right of peaceable assembly	"imposed in conformity with the law" "necessary in a democratic society" for the specified purposes [168]
Art 22(2)	Freedom of association	"prescribed by law" "necessary in a democratic society" for the specified purposes[169]

The necessity element in each case incorporates the requirement that restriction must be proportional.[170] "The *principle of proportionality* requires that the type and intensity of any interference be absolutely necessary to attain a purpose."[171] Those rights requiring limitations to be necessary in a democratic society impose a further obligation that limitations conform to a "...common, *minimum democratic standard*".[172] Nowak suggests that the criteria of "pluralism,

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[165] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171 [ICCPR], art 12(3): national security, public order (ordre public), public health or morals or the rights and freedoms of others. Limits must also be consistent with the other rights recognised in the ICCPR.

[166] ICCPR, above, art 18(3): public safety, order, health, or morals or the fundamental rights and freedoms of others.

[167] ICCPR, above, art 19(3): respect of the rights or reputations of others, to protect national security, public order (ordre public), public health, morals.

[168] ICCPR, above, art 21: national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

[169] ICCPR, above, art 22(2): national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

[170] Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Arlington (Va), 1993), 211 art 12, 325 art 18, 351 – 352 art 19, 378 – 379 art 21, 394 art 22. This paper is not concerned with the "prescribed" or "provided" by law limb of the limitation provisions.

[171] Nowak, above, 379.

[172] Nowak, above, 379.

tolerance and broadmindedness"[173] adopted by the ECHR in the *Handyside* case[174] are valid minimum standards to consider in this context.

The absence of a general limiting provision in other rights of the ICCPR does not mean they are absolute. The permissible restrictions are narrowly specified within the right. The article 8 right not to be required to perform forced or compulsory labour[175] does not include hard labour performed as part of a sentence imposed by a court[176] or further specified exceptions.[177] In the case of other rights some limitations are implicit in the right, even where the text contains no specific or general limitation provision. The right to marry[178] is one example, while it has no general or specific limitation in the text, other than the parties are "of marriageable age", there are some limitations implicit in the right, though narrow and limited to "those obstacles and prohibitions of marriage generally recognised by the States Parties".[179]

It should also be noted that the Human Rights Committee has expressly rejected the "margin of appreciation" doctrine used by the ECHR in its consideration of communications made under the First Optional Protocol to the ICCPR.[180] Whether this has any implications to a domestic margin of appreciation doctrine will be considered below in Part V(C).

The Bill of Rights approaches the question of justified limitations to the rights and freedoms affirmed by the Bill of Rights with a single applicable limitations provision. The approach to limitations in section 5 of the Bill of Rights imposes one general test for determining the lawfulness of limitations; limitations are to be reasonable, prescribed by law and demonstrably justified in a free and democratic society. Proportionality is the test required under the

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[173] Nowak, above, 379.
[174] *Handyside v United Kingdom* (1976) 1 EHRR 737, 754 para 49; See also *Young, James and Webster v The United Kingdom* [1982] 4 EHRR 38, para 63.
[175] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171 [ICCPR], art 8(3)(a).
[176] ICCPR, above, art 8(3)(b).
[177] ICCPR, above, art 8(3)(c).
[178] ICCPR, above, art 23(2).
[179] Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Arlington (Va), 1993), 409 – 410: for example restrictions on the grounds of consanguinity and affinity and the prohibition of bigamy.
[180] *Länsman v Finland* (8 November 1994) Human Rights Committee Communication No 511/1992 CCPR/C/52/D/511/1992; *Mahuika v New Zealand* (15 November 2000) Human Rights Committee Communication No 547/1993.

test used under the Convention for the "necessary in a democratic society" limb of its limitations provisions,[182] it is the test used by the Canadian courts for the "demonstrably justified in a free and democratic society" limb of the Charter's limitations provision,[183] it is used to determine whether limitations are "reasonably required",[184] and the Privy Council held it was the test for whether a limit was "reasonably justifiable in a democratic society".[185] The test in New Zealand for whether a limitation is "demonstrably justified in a free and democratic society" in accordance with section 5 of the Bill of Rights should be the proportionality test embodied in the principle of proportionality.

3 The obligation to provide an "effective remedy": is Wednesbury judicial review an effective remedy?

(a) The obligation to provide an effective remedy

Under article 2(3)(a) of the ICCPR New Zealand is required "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy..."[186] There are significant links between article 2(3) of the ICCPR and article 13 of the Convention. Article 13 of the Convention was based on the text of an early draft of the ICCPR,[187] while article 2(3) of the ICCPR was then in turn based on article 13 of the Convention, though it goes further than the Convention.[188] Consequently, the ECHR jurisprudence on article 13 of the Convention is of relevance to New Zealand's obligations under the ICCPR.

The relevance of article 2(3) of the ICCPR to the Bill of Rights has already been discussed above, in the context of *Baigent's Case*.[189] The Court of

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[182] See n 170, above, and accompanying text.
[183] *R v Oakes* [1986] 1 SCR 103 (SCC).
[184] *M'membe and Another v The People* [1996] 2 LRC 280, 287 (Zambia SC).
[185] *De Freitas v Ministry of Agriculture* [1999] 1 AC 69, 80 (PC).
[186] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 2(3)(a).
[187] Jean Raymond "A Contribution to the Interpretation of Article 13 of the European Convention on Human Rights" (1980) V HR Rev 161, 161 – 162.
[188] Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Arlington (Va), 1993) 57 – 59: the priority of a judicial remedy and the duty of states to develop judicial remedies are implicit in art 2(3).
[189] *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

Appeal recognised in *Baigent's Case* that the courts were obligated under the Bill of Rights to provide an effective remedy for violations of the rights and freedoms affirmed: "the Act is binding on us [by virtue of section 3], and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed".[190] The range of remedies available is consonant with the range of remedies available in general law, including judicial review. In *Goodwin* Richardson J noted that:[191]

> "...the premise underlying the Act is that the Courts will affirmatively protect those fundamental rights and freedoms by recourse to *appropriate remedies within their jurisdiction*. Traditional remedies include the exclusion of evidence wrongly obtained, stay of proceedings, habeas corpus, damages for false imprisonment and *judicial review of the exercise of statutory powers*" [emphasis added].

The issue whether judicial review, limited to the *Wednesbury* approach, even where the threshold is lowered, constitutes an "effective remedy" in terms of New Zealand's international commitments is therefore of considerable importance.

(b) ECHR jurisprudence: is judicial review an effective remedy?

The issue of whether judicial review, restricted to the traditional heads of review, constitutes an "effective remedy" has been considered by the ECHR with regard to article 13 of the Convention. The starting point is the obligation article 13[192] places on states parties:[193]

> Article 13 guarantees the availability of a remedy at national level to enforce the *substance* of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13

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[190] *Baigent's Case*, above, 676 Cooke P.

[191] *R v Goodwin* [1993] 2 NZLR 153, 191 – 192 Richardson J (CA).

[192] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, art 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"; compare this with the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 2(3)(a): "3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

[193] *Soering v United Kingdom* (1989) 11 EHRR 439, 481 para 120. Note that under the art 2(3) of the ICCPR priority is to be given to judicial remedies, and there is a duty on the state to develop judicial remedies for breaches of the ICCPR. See above n 188.

> is thus to require the provision of a domestic remedy allowing the competent 'national authority' both to deal with the substance of the relevant Convention complaint and to grant appropriate relief [emphasis added].

In early cases the Court found that the application of judicial review, in its "heightened scrutiny" application, was an effective remedy. In the cases of *Soering*[194] and *Vilvarajah*[195] judicial review was an effective remedy in terms of article 13. However, in *Soering* the judicial review application he had made was prior to the decision actually being taken by the relevant Minister and it had failed as it was therefore "premature".[196] Because of the fact that Soering could have brought a judicial review application at "the appropriate moment" and argued *Wednesbury* unreasonableness, and the fact that "such a claim would have been given 'the most anxious scrutiny' in view of the fundamental human right at stake" the Court held there had been no breach of article 13.[197] The Court relied on the House of Lords dicta in *Budaycay* suggesting the lowering of the threshold of the unreasonableness test in cases where the life of the applicant is at risk.[198] In *Vilvarajah* the Court accepted that their reasoning in *Soering* applied,[199] though there was a dissenting opinion that judicial review could not constitute an effective remedy where any facts were in dispute, as the reviewing

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[194] *Soering v United Kingdom*, above. This case concerned the extradition of Soering, a West German national, to the United States on a murder charge that carried the death penalty on the basis that the "death row phenomenon" he would be subjected to before execution would constitute a breach of art 3 of the Convention, the right not to be subjected to torture or degrading treatment or punishment. The Court found that if Soering was deported it would constitute a breach of art 3; however, there was no breach of art 13.

[195] *Vilvarajah v United Kingdom* (1992) 14 EHRR 248. This case concerned the rejection of an asylum claim by a number of Sri Lankan nationals by the United Kingdom. The authorities held that they did not have a well founded fear of persecution in Sri Lanka and they were deported back to Sri Lanka. Subsequent to their deportation the appeals of all the applicants were allowed and at the time of this case all were back in the United Kingdom while their asylum applications were considered. All had applied for a judicial review of the initial decision to deport them, which in all cases had failed. Their case was brought to the ECHR alleging that they had reasonable grounds to fear that they would be subject to persecution, torture, arbitrary execution or inhuman or degrading treatment contrary to art 3 of the Convention if returned to Sri Lanka. They further alleged that they had no effective remedy under United Kingdom law in respect of their complaint under art 3. The Court held there was no breach of art 3 or of art 13.

[196] *Soering*, above, 447 para 22, 481 para 122.

[197] *Soering*, above, 481 – 482 paras 122 – 124.

[198] *Soering,* above, 451 para 35.

[199] *Vilvarajah,* above, paras 117 – 127.

court was not able to examine the merits.[200] In both the *Soering* and *Vilvarajah* cases the Commission, unlike the Court, had found a breach of article 13.[201]

In contrast to these two cases, in *Chahal* the Court found that there was a violation of article 13.[202] In *Chahal* the basis for the deportation was national security, and consequently in the judicial review proceedings before the domestic courts the evidence before them was limited. The courts were limited to considering whether the Home Secretary had balanced the risks to the United Kingdom against the risks to the individual, although the scales were weighed towards the former consideration. The ECHR noted that in the Court of Appeal case it was held that the "...Home Secretary appeared to have taken into account the evidence that the applicant might be persecuted and it was not possible for the court to judge whether his decision to deport was irrational or perverse because it did not have access to the evidence relating to the national security risk posed by Mr Chahal."[203] The ECHR held that Chahal's article 3 rights were absolute and had to be assessed independently of the question of the security risk he might or might not pose to the United Kingdom.[204] In these circumstances judicial review did not constitute an effective remedy as the court could not "...review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations", instead the "...courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security".[205] In this case the courts exercising judicial

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[200] *Vilvarajah v United Kingdom: Partly Dissenting Opinion of Judge Walsh joined by Judge Russo* (1992) 14 EHRR 248, 294 para 2.

[201] *Soering v United Kingdom* (1989) 11 EHRR 439, 480 para 116; *Vilvarajah v United Kingdom* (1992) 14 EHRR 248, para 99.

[202] *Chahal v United Kingdom* (1996) 23 EHRR 413, paras 145 – 155. This case concerned the intended deportation of a Sikh activist resident in the United Kingdom for a number of years and accused by the United Kingdom government of engaging in terrorist activities. He was to be deported on national security grounds, despite a finding that he had sufficient grounds to found a claim to asylum. He failed in judicial review proceedings, which were limited by the national security considerations in the evidence before them. The Court found that deportation would be a breach of art 3, and that in respect of his art 3 claim there had also been a breach of art 13.

[203] *Chahal v United Kingdom*, above, para 41.

[204] *Chahal v United Kingdom*, above, paras 80 – 81.

[205] *Chahal v United Kingdom*, above, para 151.

review could not deal with the *substance* of the relevant Convention complaint, as required by article 13.[206]

In *Smith and Grady*[207] the Court also found that judicial review was not an effective remedy in terms of article 13. Smith and Grady had challenged, by way of judicial review, the Ministry of Defence's blanket policy that any service person found to be homosexual would be dishonourably discharged from the service. Applying the *Wednesbury* head of review the Court of Appeal held that the policy could not be characterised as irrational even on the lowered threshold where fundamental rights and freedoms are engaged.[208] Smith and Grady challenged the decision in the ECHR on a number of grounds, including a violation of their article 13 right to an effective remedy. The ECHR held that there had been a breach of their right to an effective remedy:[209]

> As was made clear by the High Court and the Court of Appeal in the judicial review proceedings, since the Convention did not form part of English law, questions as to the whether the application of the policy violated the applicant's rights under Article 8 and, in particular, as to whether the policy had been shown by the authorities to respond to a pressing social need or to be proportionate to any legitimate aim served, were not questions to which answers could be properly offered. The sole issue before the domestic courts was whether the policy could be said to be "irrational".
>
> In such circumstances, the Court considers it clear that, even assuming the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued...

As with *Chahal* the substance of the applicants claims under the convention could not be considered by the courts in judicial review proceedings. In this case the substance of the claims was that the Ministry of Defence policy represented

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[206] *Soering v United Kingdom* (1989) 11 EHRR 439, 481 para 120; *Vilvarajah v United Kingdom* (1992) 14 EHRR 248, para 122; *Chahal v United Kingdom* (1996) 23 EHRR 413, para 145.

[207] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

[208] *R v Ministry of Defence ex parte Smith* [1996] QB 517, 558 Sir Thomas Bingham MR, 563 Henry LJ, 566 Thorpe LJ (CA).

[209] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, 542 – 544 paras 135 – 139.

an unjustified limitation on their Convention rights. The courts were not able to deal with this claim because as proportionality as a basis of review was unavailable, they were unable to consider whether the policy met the requirements for a limitation under the Convention.

The Court also held that judicial review was an inadequate remedy for the purposes of article 13 in *Hatton v United Kingdom.*[210] This was decided on the basis that "...the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not allow consideration of whether the increase in night flights under the 1993 scheme represented a justifiable limitation on their right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow airport... In these circumstances, the Court considers that the scope of review by the domestic courts ...was not sufficient to comply with Article 13".[211] The inability of traditional judicial review to consider the proportionality of limits on the applicant's article 8 rights meant that judicial review could not deal with the substance of the Convention complaint. The Court's analysis of the article 8 claim, in finding a breach, involves the application of the principle of proportionality. It was the failure of the United Kingdom government to conduct adequate research into the effects of the 1993 policy on article 8 rights of those living near the airport, "with the aim of finding *the least onerous solution* as regards human rights"[212] [emphasis added], that defeated their claim to have adequately balanced the rights of the applicants with the justifications for the policy.[213]

The Court has also held in several cases that judicial review fails to satisfy the requirements of article 6(1) of the Convention[214] and article 5(4) of

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[210] *Hatton v United Kingdom* (2002) 34 EHRR 1. This case concerned an alleged violation of the art 8 guarantees of the right to respect for family and private life. The applicants argued that their right was breached by aircraft noise caused under a new landing policy at Heathrow for landing activity late at night and early in the morning, causing them physical and emotional distress from the inability to sleep. The Court found a breach of art 8 and art 13.

[211] *Hatton v United Kingdom*, above, paras 115 – 116.

[212] *Hatton v United Kingdom*, above, para 106.

[213] *Hatton v United Kingdom*, above, paras 94 – 107.

[214] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221 [the Convention], art 6(1): "In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing... by an independent and impartial tribunal established by law". Compare with the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171 [ICCPR], art 14(1): "In the

the Convention.[215] The Court has held that judicial review did not satisfy the requirements of article 6(1) in a number of cases, on the basis that judicial review does not allow for a "determination" to be made in the sense required by article 6(1), because in judicial review the court does not have the jurisdiction to consider the merits of the matter.[216] In some cases taken under article 5(4) cases it was held that judicial review did not meet the requirements of article 5(4) because "the scope of the control afforded [by judicial review] is ...not wide enough to bear on the conditions essential for the 'lawfulness,' in the sense of Article 5(4) of the Convention"[217] These cases further demonstrate the limitations of traditional judicial review in a human rights context.

Traditional judicial review will have difficulty in meeting the requirement that the competent 'national authority', in this case the courts, deal with the substance of the relevant Convention complaint, in particular where any limitation of the right requires an analysis under the principle of proportionality.[218] It is also arguable that *Wednesbury* review in cases where other rights and freedoms are concerned will not be able to sufficiently deal with the substance of the complaint to qualify as an effective remedy. Even in heightened scrutiny situations, under the *ex parte Smith* approach, the margin of appreciation under *Wednesbury* and the reluctance of the courts to dispute findings of fact made within a decision makers discretion make it unlikely that where it is those very facts that are the basis of the dispute the court will be able

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determination of ...his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

[215] The Convention, art 5(4): "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". Compare with ICCPR, above, art 9(4): "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

[216] *O v united Kingdom* (1987) 10 EHRR 82, para 63; *W v United Kingdom* (1988) 10 EHRR 29, para 82; *R v United Kingdom* (1988) 10 EHRR 74, para 87. All of these cases involved the placement of children into care by local authorities, who then denied all access to the parents. The parents were limited in their ability to challenge the denial of access through the courts to challenging the parental rights resolution, of applying for judicial review or of instituting wardship proceedings. The Court held in each of these cases that none of these alternatives met the requirements of art 6(1).

[217] *Weeks v United Kingdom* (1987) 10 EHRR 293, para 69. This case concerned the decision by the executive to re-incarcerate an offender paroled from a life sentence after the commission of another offence while on parole.

[218] Under the Convention these are: art 8 Right to respect for private and family life; art 9 Freedom of thought, conscience and religion; art 10 Freedom of expression; art 11 Freedom of assembly and association. For the ICCPR see above Part IV(A)(2) of this paper.

to deal with the substance of the complaint.[219] The House of Lords recognised the limitations of even the stricter *ex parte Smith* approach in *Daly*,[220] noting that:[221]

> [t]he differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way.

Lord Cooke of Thorndon noted that the view that the standards of review under the traditional grounds of review and the higher standards of review under the convention or "the common law of human rights" are "substantially the same appears to have received its quietus in *Smith and Grady v UK*".[222]

(c) Implications for New Zealand and judicial review under the Bill of Rights

Under the Bill of Rights there is one limitations provision, section 5, for all of the rights and freedoms protected. Under section 5 any limit must be evaluated against the principle of proportionality, to determine whether the "demonstrably justified in a free and democratic society" limb of section 5 is satisfied. Where an administrative action or decision limits a right of freedom protected by the Bill of Rights is judicially reviewed, the lawfulness of that limit cannot be determined by application of the traditional grounds of review. As the preceding discussion has made clear, traditional judicial review is too limited in scope to address the questions and conduct the analysis required under the proportionality test. This is clear from the United Kingdom jurisprudence under the Human Rights Act where the courts have stressed the importance of *analysing the case in the correct way*.

In *Soering* and *Vilvarajah*, where judicial review was held to be an effective remedy, the rights in question were not ones with limitations

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[219] This was the applicants' argument before the ECHR in both the *Soering* and the *Vilvarajah* cases: *Soering v United Kingdom* (1989) 11 EHRR 439, 481 para 119; *Vilvarajah v United Kingdom* (1992) 14 EHRR 248, para 118. In both cases the Commission had agreed with the applicants that judicial review was too narrow to effectively deal with the substance of the applicants' complaints: *Soering*, para 116; *Vilvarajah*, para 99.

[220] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 446 para 27 Lord Steyn (HL(E)).

[221] *Daly*, above, 446 para 28 Lord Steyn.

[222] *Daly*, above, 447 para 32 Lord Cooke of Thorndon.

provisions requiring the application of the proportionality test, while all limits under section 5 of the Bill of Rights must satisfy the proportionality test. The application of traditional judicial review to cases involving limitations to rights protected by the Bill of Rights is therefore an inadequate approach that is likely to lead to the wrong result. Where the right limited is one that requires the limitation to meet the proportionality test under the ICCPR, this would constitute a breach of New Zealand's international obligations both with respect to the right, by imposing a limitation not allowed under the treaty, and of the obligation to provide an effective remedy.

B Section 5 of the Bill of Rights, the Principle of Proportionality and the Control of Administrative Action

The Bill of Rights has a potentially powerful impact on subordinate legislation and administrative decision making, and therefore on judicial review. In practice the Bill of Rights has not had the impact on administrative law and judicial review that some commentators anticipated.[223] The main area of impact of the Bill of Rights has been in criminal matters, mostly in terms of evidence exclusion, as well as freedom of expression matters such as injunctions, name suppression and defamation.

Section 5 lays down the test to determine what limits can lawfully be placed on the rights and freedoms protected by the Bill of Rights. Section 5 is subject to section 4, so any inconsistent enactments that are not section 5 justified are not "impliedly repealed or revoked, or... in any way invalid or ineffective".[224] Any limit not protected by section 4 that fails the section 5 test is therefore unlawful. While section 4 protects both inconsistent subordinate legislation, as well as inconsistent primary legislation, the empowering sections of the Act authorising the creation of the subordinate legislation must be interpreted consistent with the Bill of Rights under section 6. Therefore, unless the empowering sections clearly and unambiguously authorise the creation of subordinate legislation in breach of the Bill of Rights, then those empowering sections must be interpreted as only empowering the creation of Bill of Rights

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[223] P A Joseph "Constitutional Review Now" (1988) NZLR 85, 119.
[224] New Zealand Bill of Rights Act 1990, s 4.

consistent subordinate legislation, and any inconsistent regulations will be *ultra vires*.[225] Similarly, wide discretions granted to decision makers, in the absence of an explicit mandate to breach the Bill of Rights in the empowering section, must be exercised consistently with the Bill of Rights and unjustified limitations made pursuant to those discretions would be *ultra vires* the empowering section.

The effect of the Bill of Rights on administrative decision making is clear: unless the decision making power is drawn by the empowering enactment in terms that expressly authorises a breach of the right or freedom in question, in which case they are protected by section 4,[226] then the decision maker may only lawfully limit that right or freedom if they comply with section 5. If the decision falls outside of the terms of a justified limitation under section 5, then clearly the decision maker has sought to impose a limitation on a right or freedom that is not lawful and a remedy will be available to those whose rights or freedoms were breached.[227]

C *Judicial Review and Proportionality in New Zealand: Current Position*

1 *Is Proportionality a separate ground of review?*

Proportionality has not yet emerged as a separate head of review in New Zealand, except for limited application in the area of the proportionality of penalties imposed.[228] In *Bevan*[229] the Court of Appeal upheld the quashing of Bevan's punishment by the Institute of Chartered Accountants on the ground that it was "altogether excessive and out of proportion to the occasion".[230] However, the Court stressed that it was not holding that proportionality is a distinct head of review, instead the Court was limiting itself to "...the penalty cases such as *Hook* and take[s] comfort from commentary on proportionality which, while recording the controversy about its separate existence, singles out

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[225] *Drew v Attorney-General* [2002] 1 NZLR 58, para 68 (CA).
[226] Because any ambiguity in meaning will lead to a Bill of Rights consistent meaning being preferred under s6.
[227] The appropriate remedies available to the courts within their jurisdiction are available: *R v Goodwin* [1993] 2 NZLR 153, 191 – 192 Richardson J (CA).
[228] *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA).
[229] *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA).
[230] *Institute of Chartered Accountants of New Zealand v Bevan*, above, 171 para 53.

the penalty area as established".[231] Thomas J had discussed proportionality in his *obiter* comments in *Waitakere City Council v Lovelock*.[232] The analysis there seemed to see proportionality as an aspect of unreasonableness, a proposition that with respect to the principle of proportionality in a human rights context is not correct.[233]

These cases considered the question of proportionality as a separate head of review in judicial review in all cases. This paper is concerned with the narrower question of the availability of proportionality review in cases where a right of freedom protected by the Bill of Rights is at issue. In considering the emergence of proportionality as a head of review where Bill of Rights' rights and freedoms are at issue, it is important to recall that the Bill of Rights does more than preserve the status quo.[234] The international obligations affirmed by the Bill of Rights are also of importance; New Zealand's obligations under article 2(3) of the ICCPR were an important part of the decision by the Court of Appeal to create a Bill of Rights action for compensation.[235]

2 New Zealand and the ex parte Smith approach: an alternative to proportionality?

The fact that the intensity of review will vary with the subject matter of the case has been recognised in New Zealand. In *Electoral Commission and Cameron*[236] the Court of Appeal noted that in the context of that case it was appropriate to "apply a somewhat lower standard of reasonableness than

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[231] *Institute of Chartered Accountants of New Zealand v Bevan*, above, 171 para 55.
[232] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA); *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606, 635 – 636 (HC): Tipping J rejected proportionality as a separate ground of review, seeing it instead as an aspect of *Wednesbury* unreasonableness.
[233] *Waitakere City Council v Lovelock*, above, 407 – 408 Thomas J. Thomas J was discussing proportionality in the broader context of judicial review as a whole, and there may well be merit in his analysis for proportionality review outside the human rights context. However, as discussed above in Part III(D), the *Wednesbury* sense of proportionality and principle of proportionality in a human rights context are very different tests, as noted by Lord Ackner, *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 762 (HL(E)).
[234] *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667, 676 Cooke P (CA): "...the long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law where necessary. Such a measure is not to be approached as if it did no more than preserve the status quo"; *Ministry of Transport v Noort* [1992] 3 NZLR 260, 266, 270 Cooke P (CA).
[235] *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667, 676 Cooke P, 690 – 691 Casey J, 699 Hardie Boys J, 718 McKay J. See Part IV(A) above.
[236] *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

'irrationality' in the strict sense".[237] At the other end of the spectrum the *Woolworths (No 2)*[238] and *Waitakere City Council*[239] cases indicated that in the context of the rate-striking decisions of local authorities the *Wednesbury* threshold the courts are to apply is a very high one.[240] There is also the recognition that where human rights are at issue a "hard look" might be required.[241] The *ex parte Smith* approach to review where human rights are at issue would accord with the tenor of New Zealand administrative law as it stands.

However, the *ex parte Smith* approach is not an alternative to the acceptance of proportionality as a ground of review where Bill of Rights' rights and freedoms are at issue. The main difficulty for such a claim is that the section 5 test requires an analysis under the principle of proportionality, in order to meet New Zealand's international obligations, by the clear intent of the drafters of the Bill of Rights in modelling section 5 on section 1 of the Charter, and from consideration of other jurisdictions. As will be clear from the discussion below, the judicial review of any administrative action limiting a right or freedom protected by the Bill of Rights requires an assessment of the lawfulness of that limit in terms of section 5. The *ex parte Smith* approach is conceptually and analytically inappropriate for this task. The ECHR jurisprudence makes this clear, as do the requirements for establishing allowable limits under the ICCPR. The courts would risk breaching New Zealand's international obligations if they were to fail to assess correctly the lawfulness of a limitation to a right, by both breaching the individual's protected right and by failing to provide an effective remedy. The courts would also fail in their constitutional duty to uphold the law.

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[237] *Electoral Commission v Cameron*, above, 433.
[238] *Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA).
[239] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).
[240] *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537, 552 (CA): "It is common ground that the council weighed all the relevant considerations, did not have regard to irrelevant considerations, consulted adequately, followed all the appropriate statutory procedures and processes, and made its rating determinations in good faith and in what it judged to be the best interests of the city and its ratepayers. *For the ultimate decisions to be invalidated as "unreasonable", to repeat expressions used in the cases, they must be so "perverse", "absurd" or "outrageous in [their] defiance of logic"* that Parliament could not have contemplated such decisions being made by an elected council".
[241] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66; *Waitakere City Council v Lovelock*, above, 403 Thomas J.

D The Principle of Proportionality and the Section 5 Test

The New Zealand Courts have effectively endorsed the principle of proportionality as the test required under section 5 for justified limitations on the rights and freedoms contained in the Bill of Rights. After a discussion by Richardson J in *Noort*[242] it was not until *Moonen* that the test was laid out by the Court of Appeal in detail.[243] However, the proportionality test is not assured yet in New Zealand as the Court of Appeal has in fact suggested that the formulation in *Moonen* is only a guide and other approaches may be taken.[244] As the United Kingdom cases show, in review cases dealing with limitations on rights it is important to analyse the case correctly;[245] with respect to the Court of Appeal this paper submits that other approaches are not appropriate as they cannot ensure that the court will fulfil its legal obligation to correctly assess whether a limitation is demonstrably justified.

A comparison of the *Moonen* test with the test in *Daly* illustrates the commonality of approach:[246]

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[242] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283-284 per Richardson J (CA).
[243] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 (CA).
[244] *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754, 760 para 14 – 15 (CA): "We emphasise, too, that the five–step discussion in Moonen 1 was immediately prefaced by the statement… 'Although other approaches will probably lead to the same result, those concerned with the necessary analysis and application of ss 4, 5 and 6 of the Bill of Rights may in practice find the following approach helpful when it is said that the provisions of another Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights.' Clearly, it was not intended to be prescriptive. "May" means may. The five–step approach may be helpful. Other approaches are open".
[245] *R v Shayler* [2003] 1 AC 247, 285 para 75 Lord Hope of Craighead (HL(E)); *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 446 para 28 Lord Steyn (HL(E)).
[246] A comparison with the *Oakes* test would show a similarly close correspondence.

Principle of Proportionality – the House of Lords test in *Daly*[247]	***Moonen* Test[248] - Justifiable Limitations Under section 5 of the Bill of Rights**
Is the legislative objective sufficiently important to justify limiting a fundamental right?	"Identify the objective which the legislature was endeavouring to achieve by the provision in question… The importance and significance of that objective must then be assessed."
Are the measures designed to meet the legislative object rationally connected to it?	"… [T]he limitation involved must be justifiable in the light of the objective… The means used must also have a rational relationship with the objective…"
Are the means used to impair the right or freedom no more than is necessary to accomplish the objective?	"The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective… and in achieving the objective there must be as little interference as possible with the right or freedom affected."

The *Moonen* test satisfies New Zealand's international obligations and is consistent with the approaches to similarly worded provisions in the constitutions and Bills of Rights in other comparable jurisdictions. The application of the *Moonen* test in judicial review where the limitation of a right protected by the Bill of Rights is at issue, provided the court does not grant too wide a margin of appreciation to the decision-maker, would satisfy New Zealand's obligations by ensuring limitations are consistent with the requirements of the ICCPR and the obligation to provide an effective remedy. It is also worth noting that the *Moonen* test is being applied by the Ministry of Justice in carrying out section 7 reviews of legislation to determine whether any prima facie breaches of the Bill of Rights in draft legislation are justifiable limitations, suggesting that the Ministry of Justice for its part accepts that this is the correct test.[249]

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[247] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, para 27 per Lord Steyn.

[248] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17.

[249] New Zealand Bill of Rights Act 1990, s 7; Ministry of Justice *Guidelines on Process & Content of Legislation* (2001 ed) para 4.1.2 <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html> (last accessed 19 May 03).

V THE PRINCIPLE OF PROPORTIONALITY, THE BILL OF RIGHTS AND JUDICIAL REVIEW

A The Proportionality Test

Proportionality as a ground of review should be available in any judicial review case where there is a prima facie limitation of a right or freedom protected by the Bill of Rights. [250] As noted above, the decision-makers power must be exercised consistently with the Bill of Rights,[251] unless the act limiting the right is insulated by section 4. However, given that most discretions are broadly drawn, it is unlikely that many empowering sections will grant the decision-maker either an explicit or an implied power to make *unjustified* limitations to fundamental rights and freedoms. Therefore, to be lawful the limitation must be section 5 justified, which involves an analysis of the limitation to ensure it is "prescribed by law"[252] and "demonstrably justified in a free and democratic society", the latter requiring the application of the principle of proportionality. The burden of proof is on the authority seeking to establish the lawfulness of a limitation.[253]

B Proportionality: A sub-species of Irrationality?

Objections raised to the acceptance of proportionality as a head of review also stem from a belief that proportionality is already incorporated into the irrationality head of review, in the doctrine of *Wednesbury* unreasonableness.[254] For example, Thomas J in *Waitakere City Council v*

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[250] *Moonen*, above, 16 – 17 paras 16 – 19.

[251] The decision-maker will be caught by either s 3(a) or 3(b) making their acts subject to the Bill of Rights. In addition unless the empowering enactment explicitly, or by necessary implication, authorises the decision-maker to act inconsistently with the Bill of Rights then a s 6 reading of the empowering enactment will mean that the power must be exercised consistently with the Bill of Rights (a conclusion buttressed by s 3).

[252] The requirements of this limb are not considered in this paper.

[253] White Paper *A Bill of Rights for New Zealand* (1985) AJHR A6, para 10.29; *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 Richardson J (CA); *R v Shayler* [2003] 1 AC 247, 281 paras 59 and 61 Lord Hope of Craighead (HL(E)).

[254] *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606, 636 (HC); The Rt Hon Lord Hoffman "The influence of the European Principle of Proportionality upon UK Law" in Evelyn

Lovelock saw proportionality as an aspect of unreasonableness, though the unreasonableness test threshold advocated was lower than the traditional *Wednesbury* test.[255]

Proportionality mandates a review where the threshold of successful review is materially lower than the traditional *Wednesbury* test, or even the heightened scrutiny test under *Smith*. The arguments that "[i]rrationality is a higher level concept that includes lack of proportionality as one of its forms"[256] does not withstand close analysis without abandoning the traditional formulation of *Wednesbury* unreasonableness. This argument is even less persuasive in the human rights context given the content of the principle of proportionality and the analytical steps and criteria that must be satisfied to insulate the decision from proportionality review. As discussed above in Part III(D), Lord Ackner correctly distinguished the principle of proportionality from this *Wednesbury* application of a concept of proportionality.[257]

Nor does a lower threshold *Wednesbury* review ensure the court will reach the same decision as it would in applying the principle of proportionality in human rights cases. Of course it is always possible that in a given case a decision that would fail the proportionality requirements would also fail a high intensity-low threshold *Wednesbury* review, that outcome cannot be assured, as the House of Lords has accepted.[258] It is for this reason that the use of the correct analytical approach has been stressed.[259]

Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, 1999) 107, 108-109.

[255] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 406-418 per Thomas J (CA).

[256] Lord Hoffman, above, 109.

[257] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 762 Lord Ackner (HL(E)).

[258] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 446 para 28 per Lord Steyn (HL(E)).

[259] *R v Secretary of State for the Home Department, ex parte Daly*, above, 446 para 28 per Lord Steyn (HL(E)); *R v Shayler* [2003] 1 AC 247, 285 para 75 Lord Hope of Craighead (HL(E)).

C *Judicial Review and Proportionality: Constitutional Issues*

1 *Proportionality: review on the merits?*

Resistance to proportionality stems from the kinds of concerns noted in *Brind*, that it represents a shift towards the review of the merits of a decision in judicial review.[260] The court in *Daly*, despite endorsing the principle of proportionality, emphasised that this was not a shift to review on the merits, that "the respective roles of judges and administrators are fundamentally distinct and will remain so".[261] Subsequent decisions suggested that the margin of appreciation the court allows the decision-maker preserves the exercise as a review.

However, the denial of a shift to merits review is at odds with earlier observations in *Daly* that review under proportionality may require an assessment of the balance that the decision maker has made and to the relative weight accorded to interests and considerations of the decision maker.[262] Such an exercise will clearly push the review over the line from process review to merits review. The allowance of a margin of appreciation does not change the exercise from a merits review to a review of the process of decision making; arguably what it does do is allow the process to be distinguished from an appeal where no such allowance would be made, with the court coming to its own conclusions of fact on the basis of evidence presented. Even with a margin of appreciation the court must still turn its mind to the merits of the case in order to carry out the necessary analytical steps of the proportionality test,[263] it must

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[260] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 749 Lord Bridge of Harwich, 750 Lord Roskill, 762 – 763 Lord Ackner (HL(E)).

[261] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, para 28 per Lord Steyn (HL(E)).

[262] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, para 27 per Lord Steyn (HL(E)).

[263] For example, *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139, para 39 Dyson LJ (CA): "The Secretary of State must show that he has struck a fair balance between the individual's right to respect for family life and the prevention of crime and disorder. *How much weight he gives to each factor will be the subject of careful scrutiny by the court. The court will interfere with the weight accorded by the decision-maker if, despite an allowance for the appropriate margin of discretion, it concludes that the weight accorded was unfair and unreasonable.* In this respect, the level of scrutiny is undoubtedly more intense than it is when a decision is subject to review on traditional Wednesbury grounds, where the court usually refuses to examine the weight accorded by the decision-maker to the various relevant factors" [emphasis added].

carry out a "close and penetrating examination of the factual justification"[264] for the limitation.

As discussed above the courts have in fact been involved in merits review through the *Wednesbury* unreasonableness head of review.[265] So the mere fact that proportionality involves a degree of merits review, which will vary in intensity with the width of the margin of appreciation afforded the decision-maker, is not in itself constitutionally novel, or dangerous. Lord Ackner in the House of Lords was reluctant to accept proportionality as a head of review until Parliament had incorporated the Convention.[266] With the incorporation of the Convention by Parliament in the Human Rights Act the House of Lords did not hesitate to take that step. In New Zealand Parliament enacted the Bill of Rights, and with it a limitations provision that requires the use of the principle of proportionality by the courts to determine the lawfulness of limitations on the rights and freedoms protected.[267] Any reluctance on the part of the courts to embrace proportionality as a head of review where rights and freedoms protected by the Bill of Rights are at issue is misplaced. It is the courts *duty* to take the step and fulfil its constitutional role in determining the lawfulness of limits in accordance with the Bill of Rights.

2 *Proportionality and the separation of powers*

Underlying the proposition that proportionality represents too great a move to merits review is the concern that applying the proportionality approach would lead the courts to exceed their proper constitutional role, in effect undermining the proper separation of powers. There are two main responses to this: firstly, the courts are carrying out the intention of Parliament in applying the proportionality test, which is explicitly mandated by section 5 of the Bill of Rights; and secondly, the margin of appreciation that the courts afford the decision maker maintains the exercise as a review, rather than an appeal, and

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[264] *R v Shayler* [2003] 1 AC 247, 281 para 61 Lord Hope of Craighead (HL(E)).
[265] See Part II(B) above.
[266] *R v Secretary of State for the Home Department, ex parte Brind*, above, 762 – 763 Lord Ackner.
[267] The White Paper recognised that the assessment of limits the affirmed rights and freedoms by the courts under section 5 involved a *substantive* test, see White Paper *A Bill of Rights for New Zealand* (1985) AJHR A6, para 10.30.

keeps the review within acceptable constitutional boundaries. Ultimately, section 4 of the Bill of Rights preserves Parliamentary sovereignty and allows Parliament to override the courts assessment of whether a limitation is justified under section 5.

The English Court of Appeal in *Mahmood* noted that the challenge under the Human Rights Act is striking the right balance between judicial scrutiny and democratic legitimacy.[268] As critics of strong judicial review are fond of noting, the courts are not elected and there needs to be recognition by the courts of the legitimacy of democratic decisions made by the legislature. This tension between the role of the courts in review and the legitimacy of democratic decision making processes can be overstated. While the broad discretion that an administrative official acts under may have resulted from a democratic decision making process, by the passage of legislation, the use of that discretion to limit fundamental rights and freedoms by an unelected official is no more "democratic" than the review of that official's acts by an unelected judge. Many administrative powers granted under regulations are another step removed from the direct democratic decision making process of primary legislation. In any event, it is clearly the constitutional role of the court to determine the law, and where fundamental rights have been implemented into the law it becomes their constitutional role to determine the lawfulness of any limitations to those rights.

The margin of appreciation, also called the doctrine of deference or respect, recognises that in some cases the courts are not in the best position, as a matter of law and legal principle, to make a decision. In those instances a wider margin of appreciation is granted to the decision-maker, the legislative or executive branch as the case may be, though the courts must be careful to assess the correct margin of appreciation. The margin of appreciation granted, which will vary with the right at issue and the context of the case, preserves the nature

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[268] *R (Mahmood) v Home Secretary* [2001] 1 WLR 840, 854 – 855 Laws J (CA): "Much of the challenge presented by the enactment of the [Human Rights Act] consists in the search for a principled measure of scrutiny which will be loyal to Convention rights, but loyal also to the legitimate claims of democratic power… The Human Rights Act 1998 does not authorise the judges to stand in the shoes of Parliament's delegates, who are decision-makers given their responsibilities by the democratic arm of the state. The arrogation of such a power to judges would usurp those functions of government which are controlled and distributed by powers whose authority is derived from the ballot box. It follows there must be *a principled distance* between the court's adjudication in a case such as this and the Secretary of State's decision, based on his perception of the case's merits".

of the proportionality review as a review rather than an appeal. In particular, it is important that the courts do not allow themselves to grant too wide a margin of appreciation and slip back into a *Wednesbury* approach to the review.[269] To do so would be to abdicate their constitutional duty, and the legal duty imposed on the courts by the Bill of Rights Act. The margin of appreciation is far narrower in a proportionality review under section 5 than in traditional judicial review. The court will consider all relevant issues, such as economic issues, administrative issues, social issues, moral and ethical issues, and legal issues.[270] The mere fact that a decision has a policy element is not a legitimate basis to grant such a wide margin of appreciation that the review process is meaningless; to do so would be to deny the plaintiff their right to an effective remedy, and would constitute a breach of New Zealand's international obligations.

The domestic use of the margin of appreciation is a matter of domestic decision making and constitutional arrangements. The international obligations imposed by the Convention and the ICCPR are imposed on the state, and generally it is up to the individual state to determine how those obligations will be met in the domestic context.[271] Ultimately, where there is recourse to an international body, that body will determine whether the state has met its obligations. Under the ICCPR the Human Rights Committee has stated that it does grant a margin of appreciation to states. That does not mean that the New

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[269] Lord Woolf "European Court of Human Rights: On the Occasion of the Opening of the Judicial Year" (2003) 3 EHRLR 257, 260: "It is, however, of the greatest importance to make clear that, by recognising the need for respect, the British judges are not slipping backward and recreating their pre-Human Rights Act approach, the Wednesbury approach. Our courts are not approaching the issue of respect by merely asking whether a decision reached was one to which the decision-maker could reasonably come. The court instead applies the doctrine of respect in the context of considering the proportionality of the balance struck by the decision-maker. As Lord Steyn pointed out in *Daly*, this requires the reviewing national court to assess the balance struck by the decision-maker from the point of view of proportionality, to assess the relative weight accorded to the relevant interests and to inquire whether a limitation on a Convention right was necessary in a democratic society. In other words, the court has to ask itself whether there is a pressing social need justifying the decision and whether the response was proportionate to the legitimate aim that was being pursued. The doctrine of deference can only come into play by extending a degree of respect, and no more, to the national authorities when considering the issue of proportionality." This article is a speech by Lord Wolf, Lord Chief Justice of England and Wales, to the European Court of Human Rights on the United Kingdom experience under the Human Rights Act.

[270] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 Richardson J (CA); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 – 17 (CA).

[271] Andrew Z Drzemczewski *European Human Rights Convention in Domestic Law: A Comparative Study* (Clarendon Press, Oxford, 1983) 22; Mark Janis, Richard Kay, Anthony Bradley (eds) *European Human Rights Law: Text and Materials* (Clarendon Press, Oxford, 1995) 433; Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Arlington (Va), 1993) 53 – 54.

Zealand courts cannot, in their review of an executive action limiting a right, grant a margin of appreciation to the legislature or the decision maker as a matter of domestic constitutional arrangements. What it does mean is that the courts must be careful to ensure that they do not grant too wide a margin of appreciation, or else they will fail to ensure the individual an effective remedy and will themselves be in breach of New Zealand's international obligations.

VII CONCLUSION

Section 5 of the Bill of Rights requires the application of the principle of proportionality to determine the lawfulness of any limits to rights and freedoms affirmed by the Bill of Rights. A consequence of this is that where limitations to rights and freedoms affirmed by the Bill of Rights are at issue in judicial review, the courts must apply proportionality as a head of review. This is the position in the United Kingdom since the entry into force of the Human Rights Act. The acceptance of proportionality as a head of review will not represent a breach of the courts constitutional limits. The courts have a clear legal duty to determine the lawfulness of limitations to rights and freedoms affirmed by the Bill of Rights, and to do so by the criteria laid out in section 5. The allowance of a margin of appreciation preserves the nature of the exercise as a review, though that margin is narrower than under traditional judicial review and the courts must be careful not to allow too wide a margin.

The shift to proportionality review is supported by consideration of New Zealand's international obligations under the ICCPR, both with respect to permissible limitations and the obligation to provide an effective remedy. Judicial review restricted to the traditional heads of review, even following a "heightened scrutiny" *Wednesbury* standard, cannot meet the requirements under section 5 to determine the lawfulness of limits to rights and freedoms, and will not meet New Zealand's obligation to provide an effective remedy under the ICCPR.

Why has the step not been taken in New Zealand, given how quickly the shift to proportionality review was taken in the United Kingdom after the Human Rights Act entered into force? Though not within the scope of this paper to examine this question in detail there are several possible answers that can be

ventured and the answer is probably a combination of these. In New Zealand there was no education campaign for judges and practitioners about the Bill of Rights and its potential impact. In the United Kingdom there was an extensive education campaign and considerable academic writing on the Human Rights Act during the two year period after its enactment until its entry into force on 2 October 2000.[272] The United Kingdom's participation in the individual complaint system under the Convention, giving recourse to the ECHR for individuals, meant that judges and practitioners were reasonably aware of the ECHR's jurisprudence.[273] The individual complaint system to the Human Rights Committee under the ICCPR is arguably not as effective a system of international enforcement. The familiarity of judges and practitioners in New Zealand generally with Committee reports and views would probably not bear comparison with the situation in the United Kingdom with regard to the ECHR. From the point of view of the judiciary there has not been an effective international body supervising judicial decisions under the ICCPR in the New Zealand case, while the United Kingdom has one of the worst records at the ECHR. [274] This robust international supervision provides a motivation to the domestic courts to approach the Human Rights Act in a similarly robust manner, or else face the embarrassment of falling short at the ECHR. There is no such external motivation in New Zealand. Finally, there may be the perpetuation of an attitude that New Zealand has no need of a Bill of Rights, or that the Bill of Rights need not import international human rights standards into New Zealand law, as the common law provides a sufficient protection of individual rights. This is simply not correct, as Lord Wolf has said, "[a]lthough, prior to the present administration, no Government of the United Kingdom had been prepared to give its citizens the right to enforce human rights directly, *it was*

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[272] Lord Woolf "European Court of Human Rights on the Occasion of the Opening of the Judicial Year" (2003) 3 EHRLR 257, 258 - 259; for the breadth of the training programmes developed see Lord Hope of Craighead "The Human Rights Act 1998: the Task of the Judges" (1999) 20 Stat LR 185, 188 – 189.

[273] Lord Wolf, above, 259.

[274] Lord Irvine of Lairg "The Inaugural Irvine Human Rights Lecture: The Human Rights Act Two Years On: An Analysis" (Durham University, 1 November 2002) <http://www.lcd.gov.uk/speeches/2002/lc011102.htm> (last accessed 28 September 2003): "That is why, prior to the [Human Rights] Act, the European Court in Strasbourg found against the UK more times than against any other country except Italy."

wrongly assumed that UK citizens were just as well off under the common law as if they had such a right" [emphasis added].[275]

The New Zealand courts have noted that the Bill of Rights does more than preserve the status quo.[276] They have effectively recognised and accepted that the principle of proportionality is a part of the section 5 test in *Moonen*.[277] Yet there seems to still be a reluctance to endorse the full force of the Bill of Rights and to carry out the duty laid on the courts by section 3 to themselves act consistently with the Bill of Rights. Whatever the reason for this reluctance the developments in the United Kingdom, whose Human Rights Act is closer in structure and form to the Bill of Rights than the Charter, show clearly that there is nothing to fear from taking the necessary steps to give full effect to the Bill of Rights.

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[275] Lord Wolf, above, 258.
[276] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 270 Cooke P (CA).
[277] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 – 17 (CA).

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