T783 TRAYLOR, J.M. The Human Rights Act 1998 (UK).

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THE HUMAN RIGHTS ACT 1998 (UK): LESSONS LEARNED FROM THE NEW ZEALAND BILL OF RIGHTS ACT 1990?

LLB (HONS) RESEARCH PAPER
PUBLIC LAW (LAWS 505)

FACULTY OF LAW

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ABSTRACT

This research paper compares two pieces of legislation, the Human Rights Act 1998 (UK) and the New Zealand Bill of Rights Act 1990. The aim of the research was to discover whether lessons had been learned from and improvements made on the perceived failures and successes of the New Zealand Bill of Rights Act 1990 or whether the same problems would exist under the new UK legislation.

The paper argues that much the same results have been achieved in the new legislation with only a few minor improvements in some areas. It also suggests that a better approach for the United Kingdom in achieving its aim of retaining parliamentary sovereignty while at the same time protecting fundamental rights and freedoms may have been to follow the approach of the Canadian Charter of Rights and Freedoms.

The text of this paper (excluding contents page and footnotes) comprises approximately 14,400 words.

I INTRODUCTION AND BACKGROUND

Constitutional reform is difficult for nations to undertake in peaceful times.[1]

> Around the world, new constitutions and bills of rights have generally accompanied cataclysmic events such as revolutions and civil wars, or other epochal moments in a nation's history such as grants of independence. In ordinary times, bills of rights struggle to capture the imagination of citizens immersed in the mundane routine of daily life.

The idea of 'fundamental rights' and of a 'fundamental' constitutional law, taking precedence over ordinary laws, became eclipsed at the end of the seventeenth century by the concept of absolute parliamentary sovereignty. According to traditional, post-seventeenth century English political and legal theory, since Parliament is sovereign, the subject cannot possess fundamental rights. There are no rights that are fundamental in the sense that they enjoy special constitutional protection against interference by Parliament. The surest and most effective safeguards of human rights, in the opinion of Albert Venn Dicey and Sir Ivor Jennings, are not the rigid legalism and paper guarantees of written constitutions and Bills of Rights but the benevolent exercise of administrative discretion by public officials, acting as platonic guardians of the public interest, accountable through their political masters to the legislature and the people. Until recently, the effective safeguards against the misuse of public powers were regarded as being not legally enforceable safeguards but malleable constitutional conventions; the sense of fair play of Ministers and the professional integrity of civil servants in exercising their broad powers; the vigilance of the Opposition and of individual Members of Parliament; the influence of a free and vigorous press and a well-informed public opinion; and the periodic opportunity of changing the government through free elections and secret ballots. It is this state of mind in the corridors of power that has

[1] P Rishworth "The Birth and the Rebirth of the Bill of Rights" in G Huscroft and P Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) 1.

underpinned the refusal by successive British governments to introduce legislation to incorporate the European Convention on Human Rights into UK law.

As explained by the Prime Minister, Tony Blair, in the Preface to the White Paper *Bringing Rights Home*, the Human Rights Act 1998 (HRA) is intended to "give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights ... Court in Strasbourg"[2]. The White Paper added that the aim of the legislation "is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home"[3].

As part of the debate in Britain over the introduction of a bill of rights and the compatibility of such a bill with parliamentary sovereignty, quite some attention has been paid to the New Zealand Bill of Rights. Lord Woolf of Barnes strongly praised the New Zealand Bill as a model worthy of serious consideration in the United Kingdom. His Lordship commented[4]

> But what about the sovereignty of Parliament? Some of those who are opposed to a Bill of Rights see it as a threat to that sovereignty. There are, however, different forms that a Bill of Rights can take. I have referred earlier to the New Zealand Bill (of Rights Act 1990). That Bill seems to me to provide an ideal precedent for a Bill of Rights in this country since it is in accord with our democratic and parliamentary traditions ...

Having quoted section 6 of the Bill of Rights about consistent interpretations being preferred, his Lordship continued,

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[2] *Rights Brought Home* (Cm 3782, 1997) p 1.
[3] *Rights Brought Home* (Cm 3782, 1997) para 1.19.
[4] Lord Woolf of Barnes, "Droit Public-English Style" [1995] PL 57 at 70-71.

> Subject to this, legislation is not affected. Parliament retains the right to state that it intends to exclude the fundamental rights, but if it fails to do this, those fundamental rights are part of any legislation passed by Parliament. This seems to be a satisfactory compromise to which all should be able to subscribe. My New Zealand colleagues say it works well. It is not subject to the excesses of which some complain in the case of the Canadian Charter of Rights.

A The White Paper Proposal for a Bill of Rights

The White Paper *A Bill of Rights for New Zealand* was released in April 1985, with an introduction by the then Minister of Justice, Mr Geoffrey Palmer. It was tabled and referred to the Justice and Law Reform Committee for consideration and receipt of public submissions. The proposed legislation was to be entrenched and clause 1 of the Bill declared it to be supreme law. "This Bill of Rights is the supreme law of New Zealand and accordingly any law (including existing law) inconsistent with this Bill shall, to the extent of the inconsistency be of no effect".

Public reaction to the Bill of Rights proposal was muted. Most New Zealanders were uninterested. But while that could have been anticipated, what really counted was the negative reaction of individuals and bodies who chose to make submissions. "There were, it seems, many more reasons to oppose a bill of rights than to support one"[5]. The principal ground of opposition was to the idea of a higher law bill of rights which would vest in judges the power to review and to strike down legislation for inconsistency.

By early 1987 it was clear that there was no great enthusiasm in any quarter for the White Paper draft. The Select Committee's Interim Report to that effect in July 1987, therefore came as no surprise[6]. The report began by noting that the Committee was disappointed with the level of debate. "It would be fair to say"

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[5] P Rishworth "The Birth and Rebirth of the Bill of Rights" in G Huscroft and P Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) 15.

said the Committee "that the concept of a Bill of Rights has not yet gripped the imagination of the wider public of New Zealand"[7].

By December 1987 it was well known that public opinion was against the proposed Bill of Rights. Around that time Mr Palmer indicated the possibility of introducing the Bill of Rights as an ordinary statute which would not be entrenched as supreme law. The Select Committee's final report on the White Paper proposal was tabled in October 1988. The Committee concluded that the Bill of Rights proposal should not lapse[8]. Nonetheless, it was considered necessary to adopt a fairly cautious approach. The Committee recommended the introduction of a Bill of Rights which was an ordinary statute, not supreme law, and not entrenched.

B The New Zealand Bill of Rights Bill

The Bill was drafted in 1989 and introduced in October of that year. The adjustments to reflect the statutory status of the Bill were, essentially, the deletion of the provisions about entrenchment, and the elevation of the White Paper's clause 23 about favouring consistent interpretations of legislation to nearer the beginning, to clause 5. The "reasonable limits" provision remained. A new clause 6 was added setting out the Attorney-General's role in reporting apparent inconsistencies in newly introduced bills. The remedies clause in the White Paper draft was deleted.

The New Zealand Bill of Rights Bill was introduced on 10 October 1989 by the Rt Hon Geoffrey Palmer who was by this time Prime Minister. It was referred to the Justice and Law Reform Committee and submissions were called for by early December 1989. When the Bill was reported back to the House,

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[6] Interim Report of the Justice and Law Reform Committee, *Inquiry into the White Paper: A Bill of Rights for New Zealand* (1987) AJHR 1 8A.
[7] Above n 1.

significant alterations had been made to the Bill. First, the word "only" had been added to clause 3, so making it clear that the Bill of Rights was to apply "only" to government and public actors. This pre-empted any argument that the Bill of Rights was intended to apply to private individuals and that the former clause 3 had merely served to make it clear that it applied to government as well. (As it turns out there is proving, nonetheless, to be some controversy about whether the Bill of Rights applies to private litigation in any event, on the grounds that it binds judges as to how they should decide that litigation)[9].

A second addition was a new clause 3A which became section 4 of the Bill of Rights as enacted. This clause was a response to a matter raised in submissions to the Select Committee suggesting that even as an ordinary statute, the effect of the Bill of Rights may well have been taken by the courts to override all inconsistent legislation. The new clause provided:

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

A consequential amendment was made to s5, which now read:

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

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[8] *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1988) AJHR I 8C.
[9] Andrew Butler, "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261.

The Bill of Rights was reported back to the House on 17 July 1990. Mr Bill Dillon, Chairman of the Select Committee, canvassed the history of the proposal beginning with the 1985 White Paper, noting that the level of opposition to the new Bill had dropped dramatically.[10] Opposition member Paul East indicated that the Opposition remained opposed both to the White Paper proposal and to the "watered down" version before the House. Mr East called it a "Clayton's Bill of Rights"[11] because it was not enforceable; it was "meaningless". Further, the Opposition objected to the new Bill because it was "an attempt to introduce in the long term, by stealth, a full-scale Bill of Rights". "In other words", said Mr East, "the Bill is a Trojan Horse"[12].

The Second Reading Debate took place on 14 August 1990. The Rt Hon Geoffrey Palmer moved the second reading, and to pre-empt what he had regarded the first time round as misguided opposition speeches, he gave first a summary of what the Bill of Rights would not do (empower judges to strike down legislation, grant citizens the right to sue each other, empower judges to grant new remedies[13]). But the Bill of Rights was again attacked by the Opposition on the basis that it was a precursor to ultimate entrenchment of a Bill of Rights. That, argued Mr Graham, was inappropriate when people had rejected the White Paper proposal: a better interpretation of the peoples' view was that there should be no bill of rights at all.

The third reading debate took place on 21 August 1990. The Prime Minister again outlined its history and the fact that it had attracted much less opposition the second time round. It was he said "an extraordinarily useful addition to the constitutional structure". Again, Mr East attacked it as a "Clayton's Bill of

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[10] 1990 NZPD 2798, 2799.

[11] The term "Clayton's" was applied to the NZBORA 1990 on many occasions, notably by Paul East. It is a reference to an advertising slogan for Clayton's, a non-alcoholic drink: "the drink you have when you are not having a drink".

[12] 1990 NZPD 3460 (second reading debate) 3761 (third reading debate).

[13] But see *Simpson v Attorney-General (Baigent's Case)* – discussed later.

Rights" and a "Trojan Horse"[14], which was both an attempt to salvage something from the wreckage of the White Paper and a precursor to something stronger. And once again Mr Graham attacked the Bill as a measure demonstrably unwanted by the public. Since it would achieve nothing, its only significance lay in its serving to bring about an entrenched Bill of Rights, and as the people had rejected that type of Bill of Rights there was no mandate to enact even an ordinary one.[15]

The New Zealand Bill of Rights was then read for a third time, after a vote in favour of 36 to 28. It received the Royal Assent on August 28 1990, and by virtue of section 1 came into effect 28 days later, on 25 September 1990.

II PRE-ENACTMENT SCRUTINY

Pre-enactment scrutiny is an important issue for an "ordinary statute" Bill of Rights. It aims to provide an effective safeguard for ensuring that rights and freedoms are protected. Section 7 of the Bill of Rights requires the Attorney-General to "bring to the attention of the House of Representatives any provision in … [a] Bill that appears to be inconsistent with any of the rights and freedoms contained in …[the] Bill of Rights". In the case of Government Bills, the Attorney-General must alert the House to apparent inconsistency with the Bill of Rights on the introduction of the Bill. In relation to any other Bill, the Attorney-General must do so as soon as possible after introduction. The obvious intent is to highlight inconsistencies in proposed legislation at the earliest possible stage. In *Mangawaro Enterprises Ltd v Attorney-General,*[16] section 7 was described as a procedural "safeguard designed to alert members of Parliament to legislation which may give rise to an inconsistency and accordingly to enable them to debate the proposals on that basis"[17]. In that case

[14] 1990 NZPD 3761-3762.
[15] 1990 NZPD 3765-3766.
[16] [1994] 2 NZLR 451.
[17] [1994] 2 NZLR 451, 457.

the High Court rejected a challenge to legislation where the Attorney-General had failed to report the alleged inconsistency to Parliament. Section 7 can be seen as a particularly important safeguard in light of the decision not to press for entrenchment of the Bill of Rights.

The Attorney-General has established a procedure for scrutinising all legislative proposals in order to meet the requirements of section 7. Parliamentary Counsel are directed to send copies of all Government Bills to the Ministry of Justice to be vetted by an officer in the Legal Services Group. In the case of Bills promoted by the Ministry of Justice, those are sent to the Crown Law Office for vetting to avoid any perception of conflict of interest.

Where the Bill is not a Government Bill, the Ministry of Justice is required to examine it for consistency as soon as possible. The officer conducting the examination is required to report to the Attorney-General and the Chief Parliamentary Counsel on whether or not the Bill contains any provisions which appear to be inconsistent with the Bill of Rights. So far, the Attorney-General has followed the advice of his officials, and has not added any comment to the reports of apparent inconsistency he has received from them. Where the officials have advised that there is no apparent inconsistency, the Attorney-General has often claimed legal professional privilege to prevent release of the advice. Reports of apparent inconsistency issued by the Attorney-General, in contrast, are publicly available documents, tabled in the House and later published in the Appendices to the Journal of the House of Representatives. Requests for access to the underlying advice from officials is routinely granted.

The Attorney-General must bring to the attention of the House any provision in a Bill which "appears" to be inconsistent with the Bill of Rights. The practice of the Attorney-General has been to report when it appears that any infringement of a right cannot be justified in terms of section 5, which authorises such reasonable limitations on rights as are justifiable in a free and

democratic society. The possibility exists, however, that the Attorney-General might incorrectly interpret a right or fail to apply the section 5 balancing test properly, so that no report is made when it should have been, or a potentially inconsistent provision might simply be overlooked in the legislative process.

The requirement in the Human Rights Act 1998 (UK) of a statement of compatibility or otherwise in relation to every Bill is an improvement on the New Zealand procedure. Section 19 of the Human Rights Act states:

> (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –
>
> (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ('a statement of compatibility') ; or
>
> (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill
>
> (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

A major difference between the New Zealand pre-enactment scrutiny and that in the Human Rights Act is in the identity, qualifications and responsibilities of the person assessing compatibility. In New Zealand the Attorney-General is not only the Chief Law Officer of the Crown, but also almost invariably a member of Cabinet[18]. According to convention the Attorney-General is a lawyer and, notwithstanding membership of Cabinet, in theory and practice must exercise independent judgement in matters such as section 7 review. The involvement of the Chief Law Officer has advantages and disadvantages. On the positive side is the expertise and independent-mindedness the Chief Law Officer brings to the task, which adds greatly to the moral persuasiveness of those views on the House. On the negative side is the undignified sight – as has occurred in New Zealand – of the House disregarding or rejecting the view of the Attorney-General on inconsistency. It is relevant to note that the Parliamentary Select

[18] Huscroft, "The Attorney-General, the Bill of Rights, and the Public Interest" in G Huscroft and P Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) 133.

Committee which recommended proceeding with the Bill of Rights proposal as an ordinary statute, also recommended the creation of a special select committee to examine all bills and regulations for consistency with the Bill of Rights. Geoffrey Palmer championed instead the Attorney-General's role. Placing the role of monitoring for consistency in the hands of a member of the Executive branch was described as "akin to leaving the fox to guard the henhouse"[19].

Under the Human Rights Act the Minister in charge of a Bill in either House must make a statement of compatibility or otherwise in relation to every Bill. It is clear from section 19(1)(b) that, while the Minister is required to express a personal view on (in)compatibility, it is ultimately for the Government to decide whether to proceed with any Bill. However, the absence from the Human Rights Act of a consistent, expert and independent voice on (in)compatibility may be a problem, especially in view of the opinion that "the existing [British] arrangements for ensuring that legislation complies with the European Convention are uncertain, unsatisfactory and ineffective"[20].

Without any indication of how the existing processes are to be strengthened to give Ministers and Ministries competent, non-partisan and independent advice, there appears to be a real risk of the inadequacies of the present system continuing. If this is the case, the benefits of pre-enactment scrutiny will fail to materialise. The New Zealand experience so far has been that, despite the best efforts of the Attorney-General, apparently infringing legislation has been introduced on occasion without attracting section 7 comment. Nevertheless, the custom of giving reasoned reports to the House is now affirmed in the new Standing Orders. No doubt, this is implicitly required by section 19 of the Human Rights Act also. A ministerial statement of (in)compatibility without further elaboration would hardly fulfill the statutory purpose.

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[19] Huscroft, "The Attorney-General, the Bill of Rights, and the Public Interest" in G Huscroft and P Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995)

[20] D Kinley, "The European Convention on Human Rights: Compliance Without Incorporation" (Dartmouth, Aldershot, 1993) 134.

Pre-enactment scrutiny is, however, not some sort of panacea. It is impossible to foresee many future Convention breaches by merely examining the general principles of the Convention and often broadly drafted proposed legislation. Nevertheless, pre-enactment scrutiny has its proper place in a Bill of Rights scheme, especially one which purports to preserve parliamentary sovereignty, and it is questionable whether the Human Rights Act makes adequate provision in this regard.

III INTERPRETATION

One of the principal objectives of an "ordinary statute" bill of rights is to direct judges (and others) how to interpret legislation. Both the Bill of Rights and the Human Rights Act do this. Section 6 of the Bill of Rights states:

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

Section 3 of the Human Rights Act directs:

> Interpretation of legislation
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in way which is compatible with the Convention rights.
>
> (2) This section –
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Subsection (2) makes it clear that this direction extends to future as well as existing legislation, but that it does not entail the power to invalidate, hold inoperative or refuse to enforce primary and subordinate legislation.

To similar effect is section 4 of the Bill of Rights, which was inserted to head off the predictable argument that the "ordinary statute" Bill of Rights would impliedly repeal any infringing legislation in force on the day the Bill of Rights came into force and the bolder argument that an "ordinary statute" affirming human rights could override post-Bill of Rights legislation which did not expressly exclude the Bill of Rights. Section 4 of the Bill of Rights states:

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

Up to this point the Bill of Rights and the Human Rights Act are more or less symmetrical. Unfortunately, it is not as simple as that. The White Paper entrenched version of the Bill of Rights preferred the model of limiting rights and freedoms in the Canadian Charter (setting out a single limitation provision applicable to all the rights and freedoms) to that of the European Convention (stating specific limitations attached to each right). The White Paper version also contained an interpretation provision, which is the forerunner to section 6 in the "ordinary statute" Bill of Rights. This provision has no counterpart in the Canadian Charter. In the White Paper entrenched version of the Bill of Rights the role of this provision was to affirm the standard constitutional presumption of constitutionality, which requires the courts to endeavour first to overcome apparent inconsistency by interpretative means, and only if that fails is the power to invalidate legislation exercised as a remedy of last resort. When the

White Paper entrenched version was abandoned and the "ordinary statute" Bill of Rights emerged, the generic limitation clause (section 5) and the interpretation clause (section 6) were put together side by side. The interrelationship between the two provisions was and still is a little uncertain. The principal uncertainty was whether the phrase "the rights and freedoms in this Bill of Rights" referred to the absolute rights provided in Part II of the Bill of Rights (ss8-27) or those rights as reasonably limited by the prior application of section 5 (which also employed the phrase "the rights and freedoms in this Bill of Rights"). This was compounded by the late introduction of section 4 and the consequential amendment to section 5, making it "subject to section 4 of the Bill of Rights". This has created the so-called sections 4-5-6 puzzle. The Court of Appeal discussed the issue in the *Noort case* and more recently in *Moonen v Film and Literature Board of Review.*

A The Noort *Case*

This case concerned s23(1)(b) of the Bill of Rights Act 1990: the right of arrested and detained persons to consult and instruct lawyers and to be advised of that right. In the *Noort* situation the appellant was stopped by a Ministry of Transport enforcement officer and requested to undergo a breath screening test pursuant to section 58A of the Transport Act 1962. The test was positive. The appellant was then required to accompany the enforcement officer to the police station to undergo an evidential breath test pursuant to section 58B of the Transport Act 1962. That test gave a reading well in excess of the statutory limit. The appellant declined the option of undergoing a blood test. He was charged and convicted of driving with excess breath alcohol.

In the *Curran* situation, the appellant was also asked to undergo a breath screening test. He refused. He was then required to accompany an enforcement officer to undergo an evidential breath test. He agreed to accompany the officer but at the testing station refused to undergo an evidential breath test. He was

then required to permit the taking of a blood specimen. He made a phone call to his father who advised him to give a specimen. The appellant apparently then agreed to give a blood specimen, but the enforcement officer had formed the opinion that the appellant had refused and charged him (under section 58E(1) of the Transport Act) with the offence of refusing to permit the taking of a blood specimen. Both appellants argued that the right to counsel under section 23(1)(b) of the Bill of Rights had been breached.

The ultimate issue was whether the provisions in the Transport Act ousted or limited the right to a lawyer. The Act did neither of these things expressly; it said nothing about access to legal advice at all. But the Crown's argument was that its "operating requirements", that is, the need to get the tests done quickly so that they were close to the time of driving and to get officers back on the roads on patrol, implied that access to legal advice was intended by the legislation to be abrogated. The result of the case in the Court of Appeal was clear: detained persons must be told of their right to a lawyer and afforded a reasonable opportunity to contact one, generally by telephone. There was some limitation on the right: only a reasonable time could be allowed before testing was resumed, and this would preclude attendances of lawyers in person in all but atypical cases where the contacted lawyer was nearby.

But the reasoning of the five judges differed significantly, and those differences revolved around the interplay between ss 4, 5, and 6 of the Bill of Rights. The case showed that these sections did not sit well together, and that this was not a mere technical problem but one raising important issues about the relationship intended between the Courts and Parliament. Richardson J and Hardie Boys J took the view that:[21]

> ... s4 falls for consideration only where following the application of s5 and s6 there is a necessary inconsistency between the other statute and the particular provision of the

[21] [1990-92] 1 NZBORR 97, 158.

> Bill of Rights even as modified in its application by s5 and after seeking to apply s6, in which case the other statute prevails over the Bill of Rights to the extent of the remaining inconsistencies.
>
> The Part I sections, particularly ss 4, 5, and 6, must be read as a whole. Only then, I think, is the true significance of s5, otherwise a difficult provision, apparent. It is plainly Parliament's intention that the rights and freedoms affirmed by the Bill should be upheld unless there is clear legislative intention to the contrary. The direction given by s6 may not always be sufficient for this purpose. Section 6 is directed to the meaning of the other enactment, and does not permit any limitation or qualification of the Bill's rights and freedoms. It rather treats them as absolutes, and so, on its own, could allow quite wide scope for the application of s4. Yet there must be many a statute which can be read consistently with the Bill's rights and freedoms if it is accepted that the statute has imposed some limit or qualification upon them; in other words, that although the statute cannot be given a meaning consistent with the Bill's rights and freedoms in their entirety, it can be given a meaning consistent with them in a limited or abridged form. It is obviously consistent with the spirit and purpose of the Bill of Rights Act that such a meaning should be adopted rather than that s4 should apply so that the rights and freedoms are excluded altogether.

Cooke P, however, took a different approach:[22]

> Section 5 of the Bill of Rights is a provision of substance stating when the rights and freedoms contained in the Bill may acceptably be made subject to limits. However, it does not appear on its face to lay down a rule for interpreting other enactments. Further, since s5 is subject to s4 of the Bill of Rights, if an enactment is inconsistent with any provision of the Bill of Rights, that enactment prevails and the Courts are not concerned with s5. Section 5 is not of legitimate concern to the Courts once an enactment is clearly inconsistent with any of the freedoms set out in Part II of the Bill of Rights … no question under s5 arises for consideration.
>
> Section 6 of the Bill of Rights is one of the key features of the Bill of Rights, in that it means that in interpreting an enactment a meaning consistent with the Bill of Rights is to be preferred to any other meaning. In the context of s6, a strained meaning cannot

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[1990-92] 1 NZBORR 97, 164.
[22] [1990-92] 1 NZBORR 97, 143.
[1990-92] 1 NZBORR 97, 145.

be given to the other enactment; the enactment must be capable of reasonably being given a meaning consistent with the Bill of Rights. Moreover, as regards the interrelationship between ss 5 and 6, the question under s6 is not whether a meaning consistent with the whole of the Bill of Rights (including s5) is open, but rather whether a meaning consistent with the rights and freedoms mentioned in Part II is open.

B The Moonen *Case*

This case concerned the relationship between freedom of expression and censorship of objectionable publications under the Films, Videos and Publications Classification Act 1993 ("the Act"). The appellant (Mr Moonen) appealed to the High Court from the decision of the Film and Literature Review Board determining that a book called *The Seventh Acolyte Reader* and various photographs were objectionable in terms of the Act. He argued that the definition of "objectionable" in s3 of the Act violated the freedoms of thought and expression contained in ss 13 and 14 of the Bill of Rights Act 1990. The Film and Literature Review Board, which initially reviewed the decision not to allow publication of the appellant's book, relied on the High Court decision in *News Media Limited v Film and Literature Board of Review*[23] which stated that:[24]

> Bill of Rights considerations do not take matters further. ... The restrictive provisions of the Films, Videos, and Publications Classification Act 1993 are inconsistent with that s14 freedom, to the extent of the limits they place upon it, and are predominant by virtue of s4. Thus despite s14, censorship within the law prevails and the interpretation directions of s6 do not arise.

In the High Court, Gendall J also followed the decision in the *News Media* case, and the appellant appealed to the Court of Appeal with the principle submission to the effect that the Board and the High Court had been led astray by erroneous observations of the Full Court in the *News Media* case. The Court of Appeal

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[23] Unreported, High Court, Wellington Registry, AP 197/96.

used this case as an opportunity to express its views on the correct application of ss 4, 5, and 6 of the Bill of Rights. The Court set out a five-step approach.

Step One: After determining the scope of the relevant right or freedom, identify the different interpretations of the words of the other Act which are properly open. If only one meaning is properly open that meaning must be adopted.

Step Two: If more than one meaning is available, identify the meaning which constitutes the least possible limitation on the right or freedom in question. It is that meaning which s6 of the Bill of Rights, aided by s5, requires the Court to adopt.

Step Three: Having adopted the appropriate meaning, identify the extent, if any, to which that meaning limits the relevant right or freedom.

Step Four: Consider whether the extent of any such limitation, as found, can be demonstrably justified in a free and democratic society in terms of s5. If the limitation cannot be so justified, there is an inconsistency with the Bill of Rights; but, by dint of s4, the inconsistent statutory provision nevertheless stands and must be given effect. In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s5, it is desirable first to 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. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore the limitation must be justifiable in the light of the objective. Of necessity value judgments will be involved. Ultimately,

[24] Above n 23, 15.

whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical, or otherwise.

Step Five: After the Court has made the necessary determination under s5, it must indicate whether the limitation is or is not justified. If justified, no inconsistency with s5 arises, although there is, a limitation on the right of freedom concerned. If that limitation is not justified, there is an inconsistency with s5 and the Court may declare this to be so, although bound to give effect to the limitation in terms of s4.

The Court of Appeal then considered the *News Media* case. First they considered the statement that "despite s14 (of the Bill of Rights Act 1990), censorship within the law prevails and the interpretation directions of s6 do not arise". The Court concluded that censorship within the law will prevail but the existence and extent of such censorship may indeed be matters to which s6 is relevant. The censorship provision must be interpreted so as to adopt such tenable construction as constitutes the least possible limitation on freedom of expression. The Court of Appeal concluded that there was a likelihood by reason of the Board's reference to, and its being bound by the decision of the Full Court in *News Media*, that the Board erroneously regarded Bill of Rights considerations as having no part to play.

Under section 4 of the Human Rights Act if a court is satisfied that a provision is incompatible with a Convention right it may make a declaration of that incompatibility. However, a declaration under the section does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given. Unlike the Human Rights Act, there is no specifically conferred power in the Bill of Rights authorising a judge to issue a "declaration

of incompatibility" where there is an irreconcilable conflict between the Bill of Rights and another statute. Emeritus Professor F.M. Brookfield, however, has suggested that, where a court has no alternative but to apply section 4 and uphold legislation which it thinks unreasonably limits a right, the court might nonetheless make a formal declaration that the right has been unreasonably limited in terms of the section 5 criteria. Cooke P expressed a slight reservation about this in *Temese v Police*[25] saying the Court could be seen by some "to be gratuitously criticising Parliament by intruding an advisory opinion". He went on to say, however, that "possibly that price ought to be paid", but it was unnecessary to discuss the matter further in that case.

The Court of Appeal in the *Moonen case* appear to have resolved this issue. It seems that section 5 provides the basis for a declaration by the Court similar to that contemplated by section 4 of the Human Rights Act. Step Five in the Court of Appeal's approach to the application of the Bill of Rights stated that: After the Court has made the necessary determination under section 5, it must indicate whether the limitation is or is not justified. If justified, no inconsistency with section 5 arises, although there is a limitation on the right or freedom concerned. If the limitation is not justified, there is an inconsistency with section 5 and the Court may declare this to be so, although bound to give effect to the limitation in terms of section 4.

The Court of Appeal stated:[26]

> It might be said that the potentially difficult and detailed process involved under s5 is somewhat academic when the provision in question is bound to be applied according to its tenor by dint of s4. Section 5 would have had more than persuasive effect if the Court had been given the power, as in Canada, to declare legislation invalid. That was deliberately not done in New Zealand and the late introduction of s4 into the Bill of Rights was not accompanied by any express recognition of the remaining point of s5.

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[25] (1992) 9 Criminal Reports of NZ 425.

[26] *Moonen v Film and Literature Board of Review* (17 December 1999) unreported, Court of Appeal, CA42/99, 11.

That section was, however, retained and should be regarded as serving some useful purpose, both in the present statutory context and in its other potential applications. That purpose necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be justified in a free and democratic society.

It seems that the interpretation sections of the two Acts achieve the same results but in different ways. Section 3 of the Human Rights Act appears to be equivalent to sections 4 and 6 of the New Zealand Bill of Rights Act. At first glance it appears that the United Kingdom legislation provides an additional provision, that is, the ability for courts to make statements of incompatibility. However, the New Zealand Court of Appeal in the *Moonen* case has established that section 5 of our Act gives New Zealand courts this right.

IV REMEDIES

The White Paper draft proposal for a Bill of Rights for New Zealand contained a remedies clause. Clause 25 stated:

> Enforcement of guaranteed rights and freedoms – Anyone whose rights of freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In the commentary to this clause it was noted that "in the great bulk of the situations covered by this Bill, the law and the courts will be able to provide a remedy from their present armoury" and that "Article 25 accordingly has a residual role".

The provision encapsulates an important principle in our law – where there is a right, there is a remedy. What Article 25 does mean is that if a

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court finds that a person's rights or freedoms under the Bill have been infringed, but there is no existing or adequate remedy available, the court will be able to grant any remedy which it considers appropriate and just in the circumstances.

However, in the final version of the Bill, which became our current Act, the wide remedies clause was omitted.

A Simpson v Attorney-General (Baigent's Case)

In *Simpson v Attorney-General (Baigent's Case)*[27] a majority of the Court of Appeal (Cooke P, Casey J, Hardie Boys J and McKay J; Gault J dissenting) held that a breach of the New Zealand Bill of Rights Act 1990 gives rise to a new civil cause of action in public law which lies directly against the Crown and may attract a remedy in the form of an award of monetary compensation.

1 The Background

The case involved a claim for damages arising out of the unlawful execution of a valid search warrant by the police. The plaintiffs alleged that the police had continued unreasonable and in bad faith, to search Mrs Baigent's house after they realised that her address had been mistakenly specified in the warrant and that the police target (a suspected drug dealer) had no connection with the premises. Mrs Baigent was not at home when the warrant was executed. However the pleadings alleged that Mrs Baigent's son and a neighbour both told the police that they had the wrong address. The son produced his passport as proof of his identity and telephoned his sister, who was a barrister. The sister told the detective constable that he had the wrong address and that the search was unlawful. It was alleged that the detective replied: "We often get it wrong, but while we are here we will have a look around anyway". The plaintiffs sued

[27] [1994] 3 NZLR 667.

the Attorney-General on behalf of the Crown, claiming damages pursuant to a number of causes of action: negligence by the police in procuring the issue of the search warrant; trespass to land and to goods; abuse of process (or misfeasance in a public office); and infringement of the right conferred by section 21 of the Bill of Rights Act 1990 to be "secure against unreasonable search or seizure".

2 The Decision

The Court of Appeal was unanimous in holding that while the action for negligence must fail (malice being an essential element of an action for procuring the issue of a search warrant), the remaining tort actions should be reinstated. The Court held that neither the particular statutory immunities in favour of the police nor section 6(5) of the Crown Proceedings Act protects action taken in bad faith, and since the alleged facts supported an arguable case of bad faith the remaining tort actions based on the vicarious liability of the Crown should stand.

But the real importance of the case lies in the decision of the majority of the Court to reinstate the independent civil claim for infringement of the right conferred by section 21 of the Bill of Rights Act 1990. Since the Crown's liability is characterised as a direct liability in public law founded on the Bill of Rights itself rather than a vicarious liability in tort for the acts of individual Crown servants or agents, it is unaffected by any statutory immunities from suit enjoyed by individuals, and is untouched by section 6(5) of the Crown Proceedings Act.

3 The Majority's Reasoning

The rights and freedoms affirmed by the Bill of Rights are basic human rights which are "fundamental to a civilised society". The courts are therefore

justified in adopting a "straightforward and generous", "liberal, purposive", "rights-centred" approach to interpretation of the Bill.

The purpose of the Bill is revealed by its long title which declares that the Act is:

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

Judicially enforceable remedies are necessary in order to ensure that the affirmed rights are "protected" and "promoted". This conclusion is reinforced by reference to the International Covenant, Article 2(3) of which requires each state party to ensure that persons whose rights are violated "shall have an effective remedy". Traditional common law remedies would often prove ineffective because the Bill does not impose "duties" capable of founding a tort action for breach of statutory duty, and some of the rights receive no recognition at all under existing private law doctrine. In any event, common law remedies "will often be so uncertain or ringed about with Crown immunity as to render them of little or no value". While the courts could always make a declaration that rights have been infringed, such a remedy would be "toothless", and reduce the Bill to "no more than legislative window-dressing". The rights affirmed by the Bill are "intended to have substance and to be effective", and this requires provision of adequate judicial remedies to redress violations.

The omission of an express remedies provision was "probably not of much consequence". The legislative history of the Bill of Rights Act was equivocal and of little value. It did not indicate an intention by Parliament to confine the courts to existing common law remedies. The best interpretation was that Parliament was content to leave it to the courts to provide appropriate remedies

for breach of the protected rights and "inclusion of a statement to that effect in the Act was unnecessary".

The "fundamental" nature and international dimension of the affirmed rights are more important than the legal form in which they are declared. Consequently the reasoning of foreign courts interpreting entrenched constitutional guarantees of human rights is fully applicable to the New Zealand Bill of Rights Act. Hardie Boys J concluded:[28]

> Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred ... is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning.

Although in New Zealand the courts have got around the fact that the Bill of Rights contains no remedies provision, and New Zealand citizens now appear to be able to claim monetary compensation from the Crown for breaches of the Bill of Rights, the scope of the remedy is still very uncertain. In *Upton v Green*[29] Tompkins J considered an argument that the plaintiff's rights under section 25 of the Bill of Rights (in particular, the right to be presumed innocent until proven guilty, to present a defence, and to the observance of the principles of natural justice) had been infringed when he was sentenced to three months' imprisonment without having an opportunity to address the Court and make submissions before the sentence was imposed. Tompkins J held that for a person to be sentenced to imprisonment without having been given an opportunity to be heard was a clear breach of these rights.

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[28] [1994]3 NZLR 667, 702.
[29] Unreported, 10 October 1996, High Court Christchurch, CP 91/94.

Tompkins J referred to *Baigent* and asked whether public law compensation should be awarded. His Honour said "the plaintiff is entitled to compensation if he can demonstrate that the events that occurred, resulting from the denial of his right, justify an award of compensation". His Honour added that in the case before him the issue was whether, and if so to what extent, the events that occurred, that is the sentence to three months' imprisonment, may have been otherwise if he had been heard. He added that if the result would have been the same, the plaintiff is entitled to a declaration, but no case for compensation will have been made out. This comment seems to suggest that a mere breach of the Bill of Rights that causes no damage will not sound in compensation; in such a case compensation will not be an appropriate remedy.

Tompkins J concluded that although he could not reach any clear conclusion on whether, if the plaintiff had been fairly and fully heard, the result would have been different, there was a reasonable possibility that a lesser sentence would have been imposed.

In *Whithair v Attorney-General*[30] Eichelbaum CJ was asked to decide whether damages lay for a breach of a right in the Bill of Rights in the absence of any pleading of conscious violation of, or reckless indifference to, the plaintiff's rights under the Act. The Chief Justice rejected the argument that there was or should be such an additional requirement. His Honour could see no principled basis for circumscribing the damages remedy with some additional requirement. Thus, on the case law to date one must conclude that if there is no other effective and appropriate remedy for breach of the Bill of Rights, damages should in principle lie regardless of absence of fault.

The absence of a generic fault requirement does not, however, mean that the defendant's state of mind will be irrelevant. Although much remains to be worked out, one can surmise that the more repugnant the defendant's state of

[30] [1996] 2 NZLR 45.

mind, the greater the damages which will be awarded. The starting point may be that a rights-centred approach to infringement does not require a "guilty state of mind", such that damages are (subject to the Court's discretion to refuse relief) available for a breach per se but if (additional) damages are awarded for reasons of deterrence, then questions of fault must be addressed.

One of the many questions concerning the *Baigent* compensation remedy that still remains is whether the Crown is the only appropriate defendant and if it transpires that personal injury was suffered in circumstances where the government or public body breached the Bill of Rights, an important question becomes whether section 14 of the Accident Rehabilitation and Compensation Insurance Act 1992 precludes an action for public law compensation under the Bill of Rights.

Article 13 of the European Convention on Human Rights which provides that everyone whose rights and freedoms are violated shall have "an effective remedy before a national authority" is not one of the Convention rights protected under the Human Rights Act. That is because the Human Rights Act "gives effect to article 13 by establishing a scheme under which Convention rights can be raised before our domestic courts"[31]. This 'scheme' is section 8 of the Act which provides:

> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

[31] The Lord Chancellor, Lord Irvine of Lairg, at the committee stage of the Bill in the House of Lords, 583 HL Official Reports (5th series) col 475 (18 November 1997).

(b) the consequences of any decision (of that or any other court) in respect of that act the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining –

(a) whether to award damages, or

(b) the amount of an award

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention

…

"The courts must take account of the large body of Convention jurisprudence when considering remedies … Obviously, in doing so, they are bound to take judicial notice of Article 13, without specifically being bound by it"[32]. Therefore, when courts and tribunals consider the scope and effect of remedies under the Human Rights Act 1998, they should proceed by reference to the principle that the Act is intended to implement the Article 13 guarantee of an "effective" national remedy. In deciding the criteria of an "effective" national remedy, courts and tribunals should have regard to the Strasbourg jurisprudence and the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention. Those principles amount to little more than equitable assessments of the facts of the individual case. They are as follows:[33]

(1) There is no right to compensation. Compensation is awarded only if 'necessary' to 'afford just satisfaction' to the injured party. The E Ct HR adopts an equitable assessment and decides whether compensation is appropriate in the circumstances.

(2) In relation to pecuniary loss, the E Ct HR sometimes states that it 'cannot speculate' as to whether the adverse consequences of which complaint is made would have occurred but for the breach of the Convention, or that it 'does not find it established that there existed a causal link between the matter found to constitute a violation and any loss or damage', and so it awards no compensation under this head.

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[32] Above n 5.

[33] Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights* (1995) p682-688.

But the court is prepared to award compensation for pecuniary loss when it is satisfied that it is necessary to do so.

(3) Similarly, in relation to non-pecuniary loss, the E Ct HR sometimes states that it 'cannot speculate' as to whether the adverse consequences of which complaint is made would have occurred but for the breach of the Convention, or that, in any event, ' in the circumstances , the finding of a violation constitutes sufficient just satisfaction'. On other occasions, the court is persuaded to award 'a just and equitable amount of compensation' for distress, disruption, lost opportunities of being released from detention, and other types of damage.

(4) The E Ct HR has awarded interest on compensation where this is necessary to avoid unfair diminution in its value, but has not awarded exemplary damages.

The fact that the Human Rights Act has an express remedies section is an improvement on the New Zealand position. It has been argued that having a remedies clause written into this type of legislation is restrictive and relying on the common law allows more flexibility. However, in the United Kingdom there is still significant flexibility as the remedies section has been drafted in very broad terms and regard must be had for the jurisprudence of the European Court of Human Rights when considering remedies.

V HORIZONTAL EFFECT ON PRIVATE COMMON LAW LITIGATION

Despite the Human Rights Act's silence as to its possible impact on private law, a superficial examination appears to suggest that its basic scheme precludes direct horizontal effect. Section 6(1) states that "It is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights". That the Act is intended to bind public authorities only appears to be confirmed by section 7 and 8, which deal with proceedings and remedies only in relation to actions against such bodies. This basic intention was made clear by the Lord Chancellor during the Second Reading of the Bill when he said: "We decided first of all that a provision of this kind (making it unlawful to contravene a Convention right) should apply only to public authorities … and not to private individuals … The Convention had its origins

in a desire to protect people from the misuse of public power by the state, rather than from the actions of private individuals".[34]

But may a degree of indirect horizontal effect arise? A number of commentators have argued that some measure of horizontal effect must arise because the courts (and tribunals) are stated to be public authorities for the purposes of the Act[35] and are therefore themselves bound to apply Convention standards in giving judgment even in cases involving only private individuals.

To see what the possible effect may be it is helpful to look at the issue in relation to the New Zealand situation. The New Zealand Bill of Rights Act 1990, like the Human Rights Act, includes the judiciary as a public authority which is subject to the Act. Section 6 of the Human Rights Act states: (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right … (3) In this section 'public authority' includes – (a) a court or tribunal … . Section 3 of the New Zealand Bill of Rights Act states: This Bill of Rights applies only to acts done – (a) by the legislative, executive, or judicial branches of the government of New Zealand …
Andrew Butler argues that the New Zealand Bill of Rights Act does apply to private common law litigation for three reasons:[36]

> First, the Bill of Rights applies to the common law, since the common law is an act of the judicial branch of the government of New Zealand, under section 3(a). Second, the Bill of Rights requires that a common law rule be set aside if it is inconsistent with any of the rights and freedoms contained in the statute. Third, the Bill of Rights does not suggest any exemption from compliance with its guarantees for private common law litigation.

This approach appears to have been given tentitive support by Elias J in *Lange v Atkinson*[37] when she stated:

[34] HL Deb vol 582 col 1232 3 November 1997.
[35] Section 6(3)(a)

> In my view, the New Zealand Bill of Rights Act protections are to be given effect by the Court in applying the common law … The application of the Act to the common law seems to me to follow from the language of s3 which refers to acts of the judicial branch of the Government of New Zealand, a provision not to be found in the Canadian Charter.

Arguments in favour of exempting private common law litigation from Bill of Rights scrutiny tend to centre around comparison with the Canadian Charter which the Supreme Court found did not apply to the common law[38]. However, as was recognised by Elias J in *Lange v Atkinson*, section 32 of the Canadian Charter, quite unlike section 3(a) of the New Zealand Bill of Rights, contains no mention of the judiciary.

As the wording of the Human Rights Act is very similar to that in the Bill of Rights in this regard, there is a strong argument to suggest that private common law litigation will be subject to the Act and consequently the Convention rights. This view is somewhat strengthened by the fact that the Government resisted and amendment put forward by Lord Wakeham, chair of the Press Complaints Council, which would have had the effect of excluding the courts from the definition of 'public authority' when "the parties to the proceedings before it [did] not include any public authority"[39]. Also of significance is the statement of the Lord Chancellor made in response to the amendment: "… it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention, not only in cases involving public authorities, but also in developing the common law in deciding cases between individuals …".[40]

VI THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

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[36] Andrew Butler, "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261, 262.

[37] [1997] 2 NZLR 22.

[38] *Retail, Wholesale & Department Stores Union v Dolphin Delivery Ltd* 32 DLR (4th) 176, (1986).

[39] HL Deb vol 583 col 771 24 November 1997, Amendment No 32.

[40] HL Deb vol 583 col 783 24 November 1997, Amendment No 32.

Unlike our Bill of Rights which requires that wherever possible an enactment should be given a meaning that is consistent with the rights and freedoms contained within the Act itself, the Human Rights Act requires that legislation should be read and given effect in a way that is consistent with the Convention rights wherever possible. The Act itself does not contain the rights and freedoms to be protected.

The Act does not make the Convention part of English law in the sense that it is per se justiciable, the Convention will not override domestic legislation. Lord Irvine LC said[41]:

> The ECHR under this Bill is not made part of our law. The Bill gives the European Convention on Human Rights a special relationship ... but it does not make the Convention directly justiciable as it would be if it were expressly made part of our law.

Section Three provides:

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

That is to say, the scheduled rights which are most, though not all, of those to be found in the Convention and its protocols. The Convention rights incorporated by the Act are as follows:

Article 2: Right to Life

Article 3: Prohibition of Torture or Inhuman or Degrading Treatment or Punishment

Article 4: Prohibition of Slavery and Forced Labour

Article 5: Liberty and Security of the Person

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[41] *Bringing Home the ECHR*: DLJ 1997 1, 2.

Article 6: Right to a Fair Trial

Article 7: Freedom from Retrospective Criminal Offences and Punishment

Article 8: Right to Respect for Private and Family Life

Article 9: Freedom of Religion

Article 10: Freedom of Expression

Article 11: Freedom of Assembly and Association

Article 12: Right to Marry and Found a Family

Article 14: Prohibition of Discrimination in Enjoyment of Convention Rights

First Protocol:

Article 1: Protection of Property

Article 2: Right to Education

Article 3: Right to Free Elections

A Section Three

Section Three is "the pivotal provision"[42]. It requires domestic courts and tribunals to construe legislation, where possible, in a manner consistent with the Convention rights:[43]

> This rule of construction is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law taking into account Convention rights.

Lord Cooke of Thorndon said[44]:

> The clause will require a very different approach to interpretation on that to which the United Kingdom courts are accustomed. Traditionally the search has been for the true

[42] Lord Sleyn *Incorporation and Devolution – a Few Reflections on the Challenging Scene* (1998) EHRLR Issue 2.
[43] White Paper *Rights Brought Home: The Human Rights Bill* CM3782 para 2.8.
[44] Hansard HLDeb Vol 582, 1272.

meaning: now it will be possible for a meaning that would present a declaration of incompatiblity.

By contrast, Lord Wilburforce said: "Clause 3 does not really represent a very great advance on what is already the position under English law"[45]. "Convention rights are to be a compelling, even if not overriding, aid to interpretation." The words 'so far as it is possible to do so' are critical. They seem to supply a far stronger direction to courts than the domestic rule that any ambiguous domestic legislation should be construed so as to achieve compatibility with relevant Treaty obligations[46]. This approach is strengthened by the capacity of the courts to make a declaration of incompatibility when satisfied that a provision of primary legislation or subordinate legislation is incompatible with Convention rights (section 4).

B Section Two

Section 2 of the Act provides:

> (1) A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account any –
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
>
> (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
>
> (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
>
> (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
>
> whenever made or given, so far as, in the opinion of the court or tribunal it is relevant to the proceedings in which that question has arisen.

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[45] Hansard HLDeb Vol 582, 1280.

[46] *Garland v British Rail* [1983] 2 AC 751; *Quazi-Quazi* (1980) AC 744, 808; *Ex p. Brind* [1990] 1 AC 748.

By section 2 of the Act, in carrying out the interpretive exercise, the domestic courts and tribunals are required to take account of relevant judgments, decisions, declarations and opinions of the various Strasbourg institutions. There is no hierarchy of the Strasbourg institutions in terms of potency. Lord Irvine LC said, "It is entirely appropriate that our courts should draw on the wealth of existing jurisprudence on the Convention"[47]. The key phrase is 'take account of'. The judgments are relevant, not compelling, aids to interpretation.[48]. English courts could accordingly take a narrower or more generous approach. An amendment to make Strasbourg judgments binding was rejected in the House of Lords, precisely because it was recognised that this might impede the development of English citizens' freedoms[49]. "With the expansion of the European Union there are now a number of judges from jurisdictions which in the past have not been famous for their defence of human rights"[50].

Scepticism has been expressed about the utility of the Convention jurisprudence:[51]

> It may be said, and will be said, that the courts will have the benefit of decisions of the European Court itself and Commission – and of the new Court when it is set up under protocol 11. Clause 2 of the Bill says that account must be taken of any of their decisions. That will help a little, but one must not be too hopeful about it. Cases are dealt with by the European Court on a case-by-case basis in relation to particular facts and it is properly reluctant to go beyond individual cases. Some assistance may be got there. Even so, the judges in our country will be left with difficult decisions on these difficult and ambiguous phrases.

[47] Hansard, HLDeb 1997 Vol 582, 1299.
[48] Lammy Betten *The Human Rights Act 1998 – What it Means* (Kluwer Law International, The Netherlands, 1999) 33.
[49] Hansard, 1997, Vol 583, 1268 – 71.
[50] Hansard, 1997, Vol 583, 1260.
[51] Hansard HLDeb 1997, Vol 582, 1281.

As the number of member states adhering to the Convention expands, the new Strasbourg Court, established under Protocol 11, will have a built-in tendency to compromise. "A domestic court, more homogenous in its personnel, can sound a clearer note"[52]. In order to understand how the Convention rights are likely to be construed by the domestic courts and tribunals in the UK, it is necessary to understand how those rights have been interpreted and applied by the Strasbourg institutions.

C Reliance on the Vienna Convention

The basic principle of interpretation applied by the Strasbourg institutions is one grounded in a 'purposive approach'[53]. As a treaty, the ECHR is interpreted in accordance with the Vienna Convention on the Law of Treaties. Jacobs and White note, however, "although the ECHR is an international treaty, it has a special character which goes beyond merely setting out the rights and obligations of contracting states"[54].

Article 31 of the Convention provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[55]. The words 'in the light of its object and purpose' are at the heart of the purposive approach. Whereas the usual starting point for statutory interpretation of UK enactments is that the legislator intended the words of a statute to be given their plain and natural meaning (the literal approach), the Strasbourg institutions approach the construction of the Convention rights by first considering their aim[56].

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[52] Lammy Betten *The Human Rights Act 1998 – What it Means* (Kluwer Law International, The Netherlands, 1999) 35.
[53] *Golder Judgment of 7th May 1974*, Series A, No. 18.
[54] *The European Convention on Human Rights* 2ed, Oxford University Press 1997, Principles of Interpretation Ch. 3, 22.
[55] Series A 1978, Vol 29, para 46.
[56] Lammy Betten *The Human Rights Act 1998 – What it Means* (Kluwer Law International, The Netherlands, 1999) 37.

D The Object and Purpose of the ECHR

The first indication of 'object and purpose' is to be found in the Preamble to the Convention which reaffirms:

> … a profound belief in those Fundamental Freedoms, which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other hand by a common understanding and observance of the Human Rights upon which they depend.

A second indication is the jurisprudence in which such object and purpose have been assessed. They were identified as "the protection of individual human rights"[57] and as the maintenance and promotion of "the ideals and values of a democratic society"[58].

E The Public Order of Europe

The ECHR's 'object and purpose' is also the basis for the conception of the ECHR as "an instrument of European public order (ordre public) for the protection of individual human beings"[59]. This signifies that in the interpretation and application of the ECHR the overriding consideration is not that it creates "reciprocal engagements between contracting states" but that it imposes "objective obligations" upon them for the protection of human rights in Europe[60], with the ECHR evolving as Europe's constitutional Bill of Rights.

The practical application of the purposive approach is best illustrated by the method adopted in *Golder* , the Court's first judgment in a case against the UK. In that case the Court considered Article 6(1) which provides a "right to a fair

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[57] *Soering v UK*, July 7 (1989) Series A, No.161, 11, EHRR 439.
[58] *Kjeldsen, Busk Madsen and Pederson v Denmark* December 7 (1976) Series A, No. 23; 1 EHRR 711.
[59] *Loizidou* Series A, No. 310, 1995.
[60] *Ireland v UK* (1978) Series A, No. 25; 1992 EHRR 25.

and public hearing". It was decided that, notwithstanding the lack of express clear wording, this Article did not mean only that where domestic law provided a hearing it had to be fair and public but also that it conferred a right to a hearing, and indeed of access to a court through a lawyer[61].

The purposive principle also permits the meaning of the Convention rights to adapt and change according to the social norms of the Member States. This concept was articulated by the European Court in *Tyrer v U*[62] in classing the Convention as "a living instrument which … must be interpreted in the light of present day conditions". In *Tyrer* the Court considered whether three strokes of the birch imposed by an Isle of Man juvenile court on a 15-year-old boy constituted degrading punishment contrary to Article 3 of the Convention. The Court expressly had regard to and was influenced by "the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe". The standards concerned were the Member States current standards, not those that existed at the time the Convention was drafted. In terms of the intention of the drafting states, the emphasis is therefore upon their general intention in 1950 (to protect human rights) rather than any particular intention (e.g. as to the meaning of inhuman or degrading treatment) that they may have had. This approach described as "dynamic and evolutive" permits the Convention to protect rights which have evolved over time as a result of developed social and cultural attitudes.

F Dynamic or Evolutive Interpretation

The Strasbourg institutions have, however, imposed limitations on the organic nature of the Convention. Whilst it is legitimate to construe the Convention rights in accordance with the object and purpose of the Convention and with regard to contemporary standards, it is not possible to go so far in this process

[61] Publ. ECHR (1987) Series A, No. 18.
[62] (1978) Series A, No. 26, para 31.

so as to create a new right under the Convention which was not intended to be incorporated as a right at the time the Convention was drafted. This limitation is illustrated by *Johnston v Ireland*[63] where the Court decided that the right to marry enshrined in Article 12 does not include a corresponding, but crucially different, right to divorce, despite the fact that the right to divorce is now well recognised in most of the Member States. As Judge Bernhardt said "Treaty interpretation must not amount to Treaty revision. Interpretation must therefore respect the language of the Treaty concerned"[64].

1 Standards in European national law

The main difficulty faced by the Strasbourg institutions by interpreting the Convention as a "living instrument" whereby regard is had to contemporary standards is in deciding what amounts to such a standard so as to justify protection under the Convention[65]. Any consensus in the law of the contracting parties has a considerable impact on the interpretation of the ECHR[66] because the ECHR reflects European values that are followed by states at the national as well as the international level. In the absence of a European consensus, the tendency is to adopt a lowest common denominator approach or to accommodate variations in state practice through the principle of proportionality and the margin of appreciation doctrine. The result is that a state's conduct may escape condemnation if it accords with that of a number of European states[67] or where European practice is widely varied[68]. State conduct that is out of step with that of most other states is clearly at risk.

(a) General principles

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[63] December 18 (1986) Series A, No. 112; EHRR 203.
[64] Bernhardt 'Thoughts on the interpretation of human rights treaties' in *Studies in Honour of Wiarda* ed Maatscher & Pezold Kluwer 1991, at 295.
[65] *Marckx v Belgium* June 3 (1979) Series A, No. 131; 2 EHRR 330.
[66] *James v UK* February 21 (1986) Series A, No. 98; EHRR 123.
[67] *EHL v Austria* (1987) Series A, No. 117; 10 EHRR 255.

The principles as well as the precedents of the Strasbourg organ will also necessarily be applied, indeed more so since the doctrine of precedent as such is alien to Strasbourg and to civilian systems generally:[69]

> The courts will no doubt strive as far as is judicially possible to save legislation from having to be declared incompatible, and hence to be amended by future further legislation. The courts will do so by construing present and future legislation as intended to provide the necessary safeguards to ensure fairness, proportionality and legal certainty as required by the Convention.

(b) Fairness

There must be procedural safeguards surrounding limitations on freedoms laid down in the Convention – although these may be influenced by Article 13, which is excluded from scheduled rights[70].

(c) Proportionality

Whereas a few rights in the ECHR are absolute (e.g. freedom from torture and freedom from slavery) most are not. Limits may in effect set to absolute rights in the course of defining them. In deciding whether a restriction upon a non-absolute right is permissible, the principle of proportionality is applied. Reliance upon this principle is most evident where the ECHR expressly allows restrictions upon a right. Thus, under the second paragraphs of Articles 8-11, a state may restrict the right concerned to the extent that this is 'necessary in a democratic society' for specified public interest reasons (e.g. national security). This formula has been interpreted as meaning that the restriction must be "proportionate to the legitimate aim persued"[71]. One expression of proportionality is found in *Seoring v U*:[72]

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[68] *H v Norway* Appl. No. 17004/90 (1992).
[69] Lord Lester, Hansard, HLDeb 1997, Vol 582, 1240.
[70] See later section, "Remedies".
[71] *Handyside v UK* 3 December 1976 Series A, No. 24; 1 EHRR 737.
[72] (1989) Series A, No. 161; 11 EHRR 439.

> … inherent in the whole of the Convention is a search for the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's human rights.

(d) Legal certainty

The law, especially that which limits rights, must be accessible, clear and predictable in its application.[73]

(e) Effective interpretation

The principle of effective interpretation is articulated in *Artico v Italy*[74], a case where a lawyer provided by way of legal aid was totally ineffective: "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".

(f) Margin of appreciation

In general terms, the margin of appreciation doctrine means that a state is allowed a certain freedom of evaluation, the exercise of which is subject to supervision at Strasbourg, when it takes legislative, administrative or judicial action in the area of a Convention right. The standard of review by Strasbourg institutions was expressed as follows in a classic passage in the *Handyside case*[75] in the context of a restriction upon freedom of expression in the interest of public morals:

> 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

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[73] *The Sunday Times v UK* (1980) Series A, No. 24; 1 EHRR 245.
[74] 13 May 1980 Series A, No. 37; 3 EHRR 1.
[75] 3 December 1976 Series A, No. 24; 1 EHRR 737.

an opinion on the exact extent of those requirements (of public morals) as well as on the 'necessity' of a restriction or 'penalty' intended to meet them …

> Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation. The Court, which with the Commission, is responsible for ensuring the observance of those states' engagements, is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.

The degree of discretion allowed to a state varies according to the context and depending on the nature of the rights and the nature of the restriction to be imposed. In *Informationsverein Lentia v Austria*[76] it was stated: "35. The contracting states enjoy a margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the circumstances".

A state is allowed a wide margin of appreciation in cases of restrictions upon rights involving national security or public morals; and generally where the law of the contracting parties varies widely; but an extremely narrow one in other areas. The doctrine of a margin of appreciation reflects the subsidiary role of the ECHR in protecting human rights. Member states enjoy the primary role in assessing the extent of Convention rights and the necessity for interference with those rights. The Commission and the Court are there to supervise their action, exercising a power of review that is akin to that of a federal constitutional court when it measures the conduct of legislative, executive and judicial organs of states within the federation against the standards of a national bill rights. In both contexts, the question is always how rigorous should be the supervision of state conduct.[77]

[76] (1993) 17 EHRR 93, 112.
[77] Lammy Betten *The Human Rights Act 1998 – What it Means* (Kluwer Law International, The Netherlands, 1999) 50.

It is accepted that the courts of Member states enjoy an advantage over an international court in adapting the law to suit the particular needs of society. Thus in *James v United Kingdom*[78], the judgment stated:

> **Margin of appreciation** 46. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of remedial action to be taken (see *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

The Human Rights Act has a special relationship with the European Convention on Human Rights which is very different to anything in the New Zealand context. As soon as the Act comes into force it will have a large, established body of jurisprudence that it can and must have regard to. This will greatly aid domestic judges, especially in the initial stages of interpreting the Act

VII PARLIAMENTARY SOVEREIGNTY

> Although it is purported to reconcile in 'subtle' form the protection of human rights with the sovereignty of Parliament, the Act also represents an unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental re-structuring of our 'political constitution'. As such it is unquestionably the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688 when the Bill of Rights proclaimed loudly that proceedings in Parliament ought not to be questioned or impeached in any court or any other place. In the words of Baroness Williams of Crosby, we have crossed our 'constitutional Rubicon', at least to the extent that the courts may now declare a statute incompatible with Convention rights.[79]

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[78] 8 EHRR 123, 142.
[79] "The Human Rights Act and Parliamentary Democracy" (1998) 62 MLR 79.

As mentioned earlier, as part of the debate in Britain over the introduction of a Bill of Rights quite some attention was paid to the New Zealand Bill of Rights Act 1990 as a praiseworthy model which protected fundamental human rights while at the same time retaining parliamentary sovereignty. It was also said to be "not subject to the excesses of which some complain in the case of the Canadian Charter of Rights".

Has Britain, in following the New Zealand model, chosen the best model for protecting human rights at the same time as protecting parliamentary sovereignty?

It has been argued that:[80]

> For those who support a bill of rights which is easy to operate, which enables Parliament to assert its sovereignty clearly and unambiguously with minimal potential for judicial frustration of its will, which demarcates the judicial role more satisfactorily, which augments domestic human rights protection in a meaningful way, and yet which operates within the parliamentary sovereignty paradigm, the Canadian Charter is the preferable option.

The Canadian Charter guarantees much the same set of substantive civil and political rights as does the New Zealand Bill. As in the New Zealand Bill there is a provision which permits Parliament to impose justifiable and reasonable limitations upon the rights and freedoms which it guarantees (see s1 of the Charter). There is no provision corresponding to s6 of the New Zealand Bill, though the Courts have tentatively begun to read statutes in a manner rendering them consistent with the Charter[81]. Importantly, there is also no provision corresponding to s4 of the New Zealand Bill. But the Canadian Charter does not oust parliamentary sovereignty. The relevant provision is s33, which reads:

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[80] Andrew Butler, "The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain" (1997) 17 OxJLS 323, 341.
[81] See Butler 'A Presumption of Statutory Conformity with the Charter' (1993) 19 Queen's LJ 209.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter[82]...

What are the advantages of this method of preserving parliamentary sovereignty over the New Zealand model?

First, the Canadian Charter model is user-friendly. The structure of a Charter argument is very straightforward. The challenger demonstrates that his or her rights have been prima facie infringed. The Government must then come forward with evidence and arguments showing that the legislation amounts to a reasonable limitation on the rights involved. The determination is left in the hands of the judges who can concentrate on the substantive merits of the case. Whether parliamentary sovereignty is a relevant factor is readily verifiable by checking the statute book for a declaration in terms of s33.

Second, the s33 procedure clearly places the responsibility for trumping rights and freedoms on political shoulders. Parliamentarians can decide to trump the Charter (or at least parts of it) but they must do so explicitly and accept the public relations consequences of their actions. At the same time, when Parliament is so minded, its intentions are not susceptible to frustration at the hands of the judges. The mechanism is clear, the procedure is straightforward, and little discretion lies in the hands of the judiciary as regards the recognition of the exercise of parliamentary sovereignty.

Third, the Canadian Charter provides a clear line demarcating the role of the Courts: their primary function is to act as guardian of human rights norms. They are not the primary guardians of parliamentary sovereignty: the

[82] Those provisions concern the fundamental freedoms of religion, expression, assembly and association (s2), and legal (ss7-14) and equality rights (s15). The rights sheltered from parliamentary trumping concern the vote and other democratic rights (ss3-5), mobility rights (s6), language rights (ss16-23) and enforcement rights (s24).

legislatures themselves are. Finally, under the Canadian model parliamentary sovereignty is preserved but at the same time challenges can be made against statute law. Only those statutes which contain the override clause will be exempt from domestic judicial review.

There have been signs from the New Zealand courts, and in particular from Lord Cooke, that the New Zealand Bill of Rights may not be successful in protecting parliamentary sovereignty in all situations and that the form which a bill of rights takes will not necessarily be determinative of whether the courts step in to protect individuals' fundamental human rights.

In two judgments Lord Cooke has suggested that persons have fundamental common law rights which run so deep that Parliament may not lawfully intrude upon them. As a general proposition that suggestion first appeared in *Fraser v State Services Commission* in 1994 where, noting that natural justice required that a public official be told of allegations against him and be allowed to respond, Lord Cooke observed, "This is perhaps a reminder that it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them"[83].

A few months later in *Taylor v NZ Poultry Board* a specific example of a fundamental common law right was given. The question was whether legislation should be interpreted to empower regulations requiring persons to answer questions even when their answers might incriminate them. In holding, as one of the two-judge majority, that the legislation did permit abridgment of the "right" not to be forced to incriminate oneself, Cooke J said:[84]

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[83] [1984] 1 NZLR 116.
[84] [1984] 1 NZLR 394.

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

In a 1984 conference address shortly after the Labour Government had commenced work on a proposed Bill of Rights he said:[85]

> If ever a Government indifferent at heart to basic rights were to hold office in this country, it could force through, possibly in a matter of hours and by the barest of majorities, legislation opposed to basic principles of justice. Orthodox theory has in the past been that the Courts could not intervene. I am not so sure; the authority of Parliament itself – supremacy as it is often called – ultimately turns on judicial recognition. But a Bill of Rights would at least give the Courts confidence in a crisis.

Although the Human Rights Act has made improvements on our Bill of Rights it may not have achieved its aim of protecting parliamentary sovereignty as effectively as it could have had it adopted the Canadian model.

VIII CONCLUSION

This research paper has shown that the Human Rights Act 1998 (UK), which was based almost entirely on our Bill of Rights Act, has not learnt from the problems we have faced under our Act and no significant improvements have been made.

To its advantage, the Human Rights Act does have the support of the jurisprudence of the European Court of Human Rights to help interpret the Act but the courts are bound to face many challenges as we have in New Zealand. It seems that the aim of retaining parliamentary sovereignty while at the same time protecting fundamental human rights and freedoms could have been better achieved by following the Canadian approach.

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[85] "Practicalities of a Bill of Rights" [1986] Aust Bar Rev 189, 201.

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