

IT'S INTERPRETATION, JIM, BUT NOT AS WE KNOW IT: *GHAIDAN V MENDOZA*, THE HOUSE OF LORDS AND RIGHTS-CONSISTENT INTERPRETATION

Claudia Geiringer*

One of the features of the “hybrid” model of human rights enforcement exemplified by the New Zealand Bill of Rights Act 1990 (“NZBOR”) and the Human Rights Act 1998 (UK) (“UKHRA”) is the premium that it places on statutory construction as a means of achieving legislative consistency with human rights norms.¹ The courts in New Zealand and the United Kingdom are not empowered to “strike down” objectionable legislation. Instead they are directed, so far as is possible, to ascribe meanings to legislation that are consistent with human rights standards.

The key question for the courts in applying such directions is how to determine when it is or is not “possible” to ascribe a rights-consistent meaning to the legislation. Although a definitive answer to that question has proved (unsurprisingly) elusive, a shared assumption to date has been that the line that is being drawn is between “interpretation” on the one hand and “legislation” on the other. The task assumed by the courts under the NZBOR and the UKHRA is to search for an “interpretation” of the relevant statutory provision that would bring it into conformity with human rights standards.

* Senior Lecturer, Faculty of Law, Victoria University of Wellington.

¹ This model has also variously been described as the “Commonwealth model”, the “parliamentary rights model” and “weak form review”: see, e.g. Janet L. Hiebert “Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes” (2005) 3 *NZJPIL* 63, 63; Mark Tushnet “Weak-Form Judicial Review: Its Implications for Legislature” (2004) 2 *NZJPIL* 7.

Beyond the margins of “interpretation”, however, lies the constitutionally impermissible territory of “judicial legislation”. That is a territory into which the courts (self-professedly) must not stray.²

Given this characterisation of the courts’ obligation as essentially interpretative, it is perhaps unsurprising that in New Zealand, the touchstone for determining whether a rights-consistent interpretation is or is not “possible” is the words of the statute. The ultimate question for the courts in New Zealand is: what do the words of the statute permit? If they permit a rights-consistent interpretation, that is the interpretation that must be adopted. If they do not, the courts must nevertheless apply the legislation in accordance with its terms.³

In the United Kingdom, however, a new model now seems to be emerging. In a series of cases culminating in the decision of the House of Lords in *Ghaidan v Mendoza*,⁴ the United Kingdom courts have cast doubt over the centrality of statutory language to the determination of whether a rights-compatible reading of legislation is “possible” in light of the UKHRA. The text is not, the Law Lords have said, determinative. Rather, the courts will be constrained only by the “underlying thrust” of the legislation and the limits of their institutional capacity.

This paper discusses *Ghaidan* and its implications. It suggests that the remarkable aspect of the *Ghaidan* methodology is that it simultaneously divorces the process of statutory “interpretation” under the UKHRA from the twin anchors of parliamentary intention and statutory text. In that light, it is suggested that the dichotomy between “interpretation” and “judicial legislation” is at very least under pressure and that the courts are in fact appropriating to themselves a significant if nevertheless subsidiary slice of legislative power.

2 See, e.g., *In re S (Minors) (Care Order: Implementation of Care Plan)*, *In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] 2 AC 291, para 39 (HL) Lord Nicholls; *Quilter v Attorney-General* [1998] 1 NZLR 523, 572 (CA) Tipping J.

3 See, e.g., *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 (CA) Tipping J [“*Moonen*”].

4 *Ghaidan v Mendoza* [2004] 2 AC 557 (HL) [“*Ghaidan*”].

The *Ghaidan* approach signals a significant divergence between New Zealand and United Kingdom jurisprudence as to the outer limits of the judicial role in achieving the rights-consistent interpretation of legislation. The explanation for this apparent divergence is not to be found in a comparison of the text of the NZBOR and the UKHRA. Rather, one must look elsewhere to the legislative history and to the wider constitutional context in which the New Zealand and United Kingdom courts operate.

I Background to the House of Lords Decision in *Ghaidan*

In 1983, Hugh Wallwyn-James was granted an oral residential tenancy of the basement flat at 17 Cresswell Gardens, London. He lived there for 18 years in a stable and monogamous relationship with his partner, Juan Godin-Mendoza.⁵

After Mr Wallwyn-James' death in January 2001, he landlord Ahmad Ghaidan brought proceedings against Mr Godin-Mendoza, claiming possession of the flat. Mr Godin-Mendoza argued that he had succeeded to the tenancy of the flat as Mr Wallwyn-James' "surviving spouse". The county court judge held that he had not. Mr Godin-Mendoza appealed.⁶

The appeal fell to be determined under paragraphs 2 and 3 of schedule 1 to the Rent Act 1977 (UK). Those paragraphs provided as follows:

2. – (1) *The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.*

(2) *For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant...*

3. – (1) *Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by*

⁵ See *Ghaidan*, above n 4, para 2.

⁶ See *ibid*, above n 4, paras 2-3.

the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.

Mr Godin-Mendoza undoubtedly qualified for an assured tenancy under paragraph 3 of schedule 1 as a member of Mr Wallwyn-James' "family".⁷ The conditions of an assured tenancy were, however, considerably less favourable than those of a statutory tenancy and accordingly, Mr Godin-Mendoza wanted to bring himself within the definition of "spouse" in paragraph 2.⁸ In order to succeed, Mr Godin-Mendoza had to convince the court that he was "a person who was living with the original tenant as his or her wife or husband" for the purposes of paragraph 2(2). This sub-paragraph had been inserted into the legislation in 1988 in order to extend the protection that was offered to married couples under sub-paragraph 1 to de facto couples.⁹

Mr Godin-Mendoza faced two, significant impediments. The first was the seemingly gendered language of paragraph 2(2): "wife or husband". The second was a decision of the House of Lords on the exact point handed down only three years earlier. In *Fitzpatrick* the House of Lords unanimously rejected an argument that a same-sex partner could bring himself or herself within the scope of paragraph 2(2). Their Lordships held that the phrase "his or her wife or husband" connoted a relationship between a man and a woman and that the purpose of paragraph 2(2) was to extend the protection given to married couples under paragraph 2(1) to de facto but nevertheless heterosexual couples.¹⁰

Fitzpatrick had, however, been decided prior to the entry into force on 2 October 2000 of the UKHRA. That Act incorporates into United Kingdom law the rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention").¹¹ Sections 3 and 4 of the UKHRA detail its effect on primary

⁷ That point had been established in the earlier House of Lords decision of *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 ["*Fitzpatrick*"], discussed below.

⁸ See *Ghaidan*, above n 4, para 5.

⁹ See *Ghaidan*, above n 4, paras 90-91 and 128.

¹⁰ *Fitzpatrick*, above n 7.

¹¹ The United Kingdom has been a party to the Convention since March 1951.

legislation.¹² The UKHRA does not give the courts the power to “strike down” primary legislation that is held to violate Convention rights. However, section 3 of the Act creates an obligation that is generally supposed to be of an interpretative character. It says:

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

This section –

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

Section 3(1) thus directs the United Kingdom courts to “read and give effect” to legislation compatibly with Convention rights “so far as is possible to do so”. Implicitly, section 3(1) contemplates both cases of “possibility” and cases of “impossibility”, that is, cases where it is *not* possible to read and give effect to legislation compatibly with Convention rights. This is confirmed by subsection (2), which says that section 3 does not affect the “validity, continuing operation or enforcement” of incompatible primary legislation.

Section 4 of the UKHRA reinforces the proposition that there are limits to what is “possible” under section 3(1). It says that if a court is satisfied that a provision in primary legislation is incompatible with a Convention right, it may “make a declaration of that incompatibility”.¹³ Such a declaration does not affect the “validity, continuing operation or enforcement” of the provision in respect of which it is given and is not binding on the parties to the proceedings in which it is made.¹⁴ The principal formal consequence of a declaration of incompatibility is that where one has been made, a fast track procedure is available to Ministers of the Crown to amend the offending legislation by way of executive order if they consider that there are compelling reasons to do so.¹⁵

¹² UKHRA, ss 3 & 4 also dictate its effect on subordinate legislation but that is not relevant here.

¹³ UKHRA, s 4(2).

¹⁴ UKHRA, s 4(6).

¹⁵ UKHRA, s 10.

Given the House of Lords decision in *Fitzpatrick*, the success of Mr Godin-Mendoza's case hinged on the application of section 3(1) of the UKHRA.¹⁶ Specifically, his case depended on affirmative answers to two questions. Did the exclusion of same-sex partners from the protection offered to "spouses" by paragraph 2 of schedule 1 violate Convention rights? If so, then in the light of section 3(1) of the UKHRA, was it "possible" to read and give effect to paragraph 2 so as to include same-sex partners within its ambit?

The first of these questions is not the focus of this paper. Suffice to say that both the Court of Appeal and subsequently, the House of Lords concluded that article 14 of the Convention (the prohibition of discrimination) read in conjunction with article 8 (the right to respect for a person's home) would be violated if Mr Godin-Mendoza was not treated as a "spouse" for the purposes of paragraph 2.¹⁷

On the second question the Court of Appeal held unanimously that it was "possible" to read and give effect to paragraph 2 of schedule 1 so as to include same-sex partners within its ambit. The leading judgment was delivered by Buxton LJ. He held that his duty under section 3(1) of the UKHRA could be discharged by reading the words "*as his or her wife or husband*" in paragraph 2(2) to mean "*as if they were his or her wife or husband*". In his view, this wording opened the door to same-sex relationships that enjoyed "marriage-like characteristics" but kept it shut on "lesser" relationships (for example, that of siblings).¹⁸

His Honour was not deterred by the fact that the words "husband" and "wife" are, in their "natural meaning", gender-specific. He pointed out that the words "husband" and "wife" are also, in their natural meaning, limited to persons who are lawfully married. In paragraph 2(2), however, their meaning was clearly not so constrained. Thus, "Parliament having swallowed the camel of including unmarried partners within the protection given to married

¹⁶ For a recent restatement of the restrictive rules governing the circumstances in which the House of Lords will depart from its previous decisions, see: *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (HL).

¹⁷ *Ghaidan v Godin-Mendoza* [2003] Ch 380 (CA); *Ghaidan*, above n 4.

¹⁸ *Ghaidan v Godin-Mendoza* [2003] Ch 380, para 35 (CA) Buxton LJ.

couples, it is not for this court to strain at the gnat of including such partners who are of the same sex as each other.”¹⁹

I pause to note that Buxton LJ’s brief reasoning usefully highlights the innate flexibility of the language of paragraph 2(2). His Honour’s conclusion that the word “as” in paragraph 2(2) means “as if they were” is hardly controversial. The phrase “person who was living with the original tenant as his or her wife or husband” in paragraph 2(2) is clearly intended to denote a person who, though *not* the husband or wife of the original tenant, was living with them “as if they were.”²⁰ In other words, the word “as” is intended to connote a relationship of analogy between an actual husband or wife, and a person covered by the paragraph.

On this analysis, the key question is *how analogous* must the relationship be? Which of the characteristics of husband-ness or wife-ness can be dispensed with for the analogy still to hold? Or to put it conversely, which characteristics are so essential to husband-ness or wife-ness that they cannot be dispensed with? The point made by Buxton LJ is that once it is accepted that a person can live “as” another’s husband or wife even though a key formal characteristic of that relationship – the acquisition of a marriage license – is missing, it is only a short step to accept that the analogy can remain intact even though another formal characteristic – the opposite sex nature of the relationship – is also absent. That being the case, section 3(1) of the UKHRA surely compels the result that a person who lives with another in an intimate, sexual relationship of intended permanence is living “as” that person’s husband or wife, regardless of the respective genders of the two participants. On this analysis, that result can be reached without any great violence being done to the language in which paragraph 2(2) is expressed.

On appeal, the House of Lords upheld the decision of the Court of Appeal on this point by a majority of four to one.²¹ If their Lordships had confined their reasoning to a process of linguistic analysis similar to that adopted by Buxton

¹⁹ *Ghaidan v Godin-Mendoza* [2003] Ch 380, para 35 (CA) Buxton LJ.

²⁰ See *Oxford English Dictionary Online*, definition of “As”: “10. a With the subordinate clause abbreviated: In the same way as, as if, as it were”, and similarly, “11. With the subordinate clause reduced to its subject or object: a. After the manner of, in the likeness of, the same as, like.”

²¹ *Ghaidan*, above n 4.

LJ, there would perhaps be little in the decision to remark on. However, in three separate but concurring opinions, their Lordships set out a rather different methodology. They said that the words of the statute do not dictate whether or not a Convention-compatible reading is “possible” under section 3(1) of the UKHRA. Instead, the limits of “possibility” are bounded only by the “underlying thrust” of the legislation and by the limits of the courts’ institutional capacity.

II Ghaidan in the House of Lords: The Majority Opinions

Of the four Law Lords in the majority – Lord Nicholls, Lord Steyn, Lord Rodger and Baroness Hale – all but the last delivered a separate opinion on the correct methodology under section 3(1) of the UKHRA.²² There was, however, substantial agreement on the essential principles. In particular, the following points can usefully be stressed.

III The key issue – sorting the sheep from the goats

Their Lordships identified the key issue under section 3(1) as being how to determine the limits of what is “possible”. The scheme of sections 3 and 4 of the UKHRA envisages that there is “a Rubicon which courts may not cross.”²³ What is not, however, spelled out is “the test to be applied in separating the sheep from the goats.”²⁴

IV Parliamentary intention is not the touchstone

In investigating the line between the possible and the impossible, Lord Nicholls and Lord Steyn held that the courts were not constrained by the intention of the Parliament that enacted the legislation.²⁵ Lord Nicholls distinguished the required approach in this respect with the orthodox approach to statutory interpretation, which involves “seeking the intention reasonably to be attributed to Parliament in using the language in question.” In contrast, section 3 may require a departure from that parliamentary

²² Baroness Hale was content to agree with the opinions of Lord Steyn and Lord Rodger on the scope and application of section 3: *Ghaidan*, above n 4, para 145.

²³ *Ghaidan*, above n 4, para 49 Lord Steyn. See, also paras 108-109 Lord Rodger.

²⁴ *Ghaidan*, above n 4, para 27 Lord Nicholls. See, also para 104 Lord Rodger.

²⁵ *Ghaidan*, above n 4, para 30 Lord Nicholls; para 40 Lord Steyn. Lord Rodger is less clear on this point: see, e.g. para 121.

intention, the key question being how far and in what circumstances. This is because there is another and countervailing parliamentary intention to which full weight needs to be given: “the intention reasonably to be attributed to Parliament in enacting s[ection] 3.”²⁶

V Nor is the statutory text

Remarkably, their Lordships held that the language of the statutory provision at issue is not the touchstone in deciding what is or is not “possible” under section 3(1). This holding had a number of dimensions to it. First, their Lordships expressed concern about excessive concentration, in a literal or technical way, on the linguistic features of the statute. Rather, section 3 requires a “broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved”.²⁷

Secondly, their Lordships stressed the proposition that “ambiguity” in the statutory language is not a prerequisite to the operation of section 3(1).²⁸

Thirdly, their Lordships inferred that section 3(1) might thus have a role *even if the statutory language is not capable of bearing two possible meanings*.²⁹ Thus, Lord Nicholls opined:³⁰

[O]nce it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of s 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of s 3 something of a semantic lottery...From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a convention-compliant meaning does not of itself make a convention-compliant interpretation under s 3 impossible.

²⁶ *Ghaidan*, above n 4, para 30. See, also para 40, Lord Steyn.

²⁷ *Ghaidan*, above n 4, para 41 Lord Steyn. See, also para 49 Lord Steyn; para 123 Lord Rodger.

²⁸ *Ghaidan*, above n 4, para 29 Lord Nicholls; para 44 Lord Steyn.

²⁹ *Ghaidan*, above n 4, para 29 Lord Nicholls; para 44 Lord Steyn.

³⁰ *Ghaidan*, above n 4, paras 31-32.

Lord Rodger similarly suggested that attaching decisive importance to the language of any particular provision would reduce the exercise of construction under section 3(1) to an “entertaining parlour game for lawyers”, with the outcome depending on the linguistic choices of the drafter and the interpretative prowess of the judge rather than the merits of the case. What matters, he said, is not the particular phraseology chosen by the draftsman but the “substance” of the measure which Parliament has enacted.³¹

Fourthly, their Lordships considered that section 3(1) empowered the courts, if necessary, to *change the meaning* of the legislation.³²

Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant. In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

VI Two limits on what is “possible”

Their Lordships’ view that text is not the touchstone in determining whether a Convention-compliant reading of legislation is “possible” begs the question. If not the words, then what? How, then, is one to sort the “sheep from the goats”?

Their Lordships identified two, overlapping limits on what is “possible” under section 3(1): the general thrust of the legislation and courts’ institutional capacity.

As to the first, their Lordships held that section 3(1) does not authorise the courts to adopt a meaning that is inconsistent with what they variously described as “a fundamental feature of legislation,”³³ “the underlying thrust of the legislation,”³⁴ “the grain of the legislation”³⁵, “a cardinal principle of

³¹ *Ghaidan*, above n 4, paras 110 and 123.

³² *Ghaidan*, above n 4, para 32 Lord Nicholls. See, also para 124 Lord Rodger.

³³ *Ghaidan*, above n 4, para 33 Lord Nicholls; para 115 Lord Rodger.

³⁴ *Ghaidan*, above n 4, para 33 Lord Nicholls.

³⁵ *Ghaidan*, above n 4, para 33 Lord Nicholls.

the legislation”,³⁶ and “the very core and essence, the pith and substance of the measure”³⁷.

This notion that the courts cannot turn the scheme of the legislation “inside out”³⁸ overlaps with the second point, which is that the courts cannot make decisions for which they are not institutionally equipped.³⁹ Some cases, their Lordships held, call out for legislative deliberation. This might be the case, for example if the exercise of making the legislation Convention-compatible would involve the substitution of a detailed, statutory scheme,⁴⁰ or if a policy choice needs to be made between different methods for achieving Convention-compliance,⁴¹ or if the decision would have far-reaching practical repercussions that the courts are not well-equipped to evaluate.⁴²

VII Lord Millett’s dissent

The key point of contrast in Lord Millett’s dissenting opinion is with respect to the role of statutory language in policing the operation of section 3(1). Lord Millett agreed with the majority that the operation of section 3 “does not depend critically upon the form of words found in the statute”, but rather on identifying the “essential features of the legislative scheme.”⁴³ At the same time, his Lordship stressed that for section 3(1) to apply, a Convention-compatible reading must be possible “by a process of interpretation alone”.⁴⁴ This, his Lordship held, means that the limits on the application of section 3 are in part at least linguistic.⁴⁵ The court “must take the language of the

³⁶ *Ghaidan*, above n 4, para 114 Lord Rodger.

³⁷ *Ghaidan*, above n 4, para 111 Lord Rodger.

³⁸ *Ghaidan*, above n 4, para 110 Lord Rodger.

³⁹ *Ghaidan*, above n 4, para 33 Lord Nicholls.

⁴⁰ *Ghaidan*, above n 4, para 39 Lord Steyn; para 110 Lord Rodger.

⁴¹ *Ghaidan*, above n 4, para 33 Lord Nicholls; para 115 Lord Rodger.

⁴² *Ghaidan*, above n 4, para 34 Lord Nicholls; para 115 Lord Rodger.

⁴³ *Ghaidan*, above n 4, para 77.

⁴⁴ *Ghaidan*, above n 4, paras 63 and 66.

⁴⁵ *Ghaidan*, above n 4, para 72.

statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible.”⁴⁶

VIII Implications of the *Ghaidan* approach

The UKHRA has only been in force for five years and, accordingly, jurisprudence under it is relatively undeveloped. Nevertheless, the approach to section 3(1) that is enunciated by the House of Lords in *Ghaidan* is not unheralded. The key features of that approach had been articulated, although not as clearly, in previous House of Lords jurisprudence on section 3(1) and, in particular, in the opinion of Lord Steyn in *R v A*.⁴⁷

The significance of the *Ghaidan* decision lies, however, in the detailed and explicit account that is given by the Law Lords of their approach to section 3(1) and in its apparent confirmation that some of the more contested aspects of Lord Steyn’s reasoning in *R v A* hold the support of a number of his fellow Law Lords.

There is no doubt much that could be said about the coherence and constitutional legitimacy of the *Ghaidan* approach. In this paper, however, I confine myself to drawing out the implications of the approach, first on its own terms and, secondly, for New Zealand.

IX It’s interpretation, Jim, but not as we know it

The Law Lords in *Ghaidan* rejected first Parliamentary intention and then linguistic construction as the touchstones of what is “possible” under section 3(1). On their own, neither of these propositions is hugely remarkable. The particular significance of *Ghaidan* lies, in my view, in their combined effect.

Consider, first, their Lordships’ dismissive view as to the centrality of the statutory text in evaluating whether a Convention-compatible interpretation is “possible”. Taken at face value, there is nothing remarkable in the proposition that the courts should not be slaves to linguistic construction. That proposition is consistent with modern, purposive theories of statutory

⁴⁶ *Ghaidan*, above n 4, para 67. See also para 57, stressing the constitutional limitations on the courts’ role.

⁴⁷ *R v A* [2002] 1 AC 45 (HL).

interpretation which stress the need to make sense of the meaning of a statute by examining the words in their wider context.⁴⁸

The touchstone of this modern, purposive approach to statutory interpretation is, however, Parliamentary intention.⁴⁹ It is important to recognise in this respect that Parliamentary intention is a somewhat artificial construction. Parliament, as a body of individuals, has no collective mind. Thus the search for “Parliamentary intention” is in a sense, nothing more nor less than the search for statutory purpose – for the instrumental design behind the text of the legislation. The most reliable expression of that statutory purpose is the words that Parliament has adopted. They are, after all, the only true expression of Parliament’s collective will.⁵⁰ However, the modern, “purposive” approach to statutory interpretation mandates a contextual approach in which the words are considered in the light of the statute as a whole and in light of the wider context in which the provision was enacted.⁵¹

In *Ghaidan*, however, the House of Lords rejects *both* a focus on text *and* a focus on purpose. This creates something of a puzzle as to what their Lordships might mean when they say that the interpretative possibilities created by section 3(1) are limited by the “underlying thrust” of the legislation. Considered in isolation, that proposition might sound as a restatement of the modern, purposive approach to statutory interpretation. The purposive approach has, however, been explicitly rejected by their Lordships. The intention of Parliament in enacting the relevant legislation must, they said, give way to the intention of Parliament in enacting the UKHRA.⁵²

That the “underlying thrust” approach is not consonant with the purposive approach is manifestly evident from their Lordships’ analysis of the statutory

48 See, e.g., John Burrows “The Interpretation Act 1999” in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 211, 216.

49 See, e.g., John Burrows “The Changing Approach to the Interpretation of Statutes” (2002) 33 VUWLR 981, 988.

50 See, e.g., Burrows, above n 49, 987.

51 See, e.g., Burrows, above n 49, 985; John McGrath “Purpose, *Hansard*, Rights and Language” in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 227, 229.

52 *Ghaidan*, above n 4, para 30 Lord Nicholls; para 40 Lord Steyn.

scheme at issue in *Ghaidan* itself. Lord Nicholls postulated that the social policy underlying the extension of security of tenure in 1988 to survivors of de facto, opposite-sex relationships was “equally applicable” to survivors of de facto, same-sex relationships. On the basis of that essentially normative conclusion, he held that the “underlying thrust” of the Rent Act 1977 did not preclude a Convention-compatible interpretation.⁵³

Lord Rodger regarded it of significance that the House of Lords in *Fitzpatrick* had accepted that same-sex relationships fall within the concept of “family” in paragraph 3 of schedule 1. From this, he inferred that there was no “cardinal principle” underlying the Act as a whole that would require same-sex couples to be treated differently from opposite-sex couples and, accordingly, the only obstacle to doing so was the language of paragraph 2.⁵⁴

Lord Rodger thus inferred the absence of an “underlying thrust” that would preclude a Convention-compatible interpretation of paragraph 2(2) from the fact that the legislation as a whole did not exude any grand scheme to discriminate systematically against same-sex couples. In contrast, the *raison d’être* of the purposive approach would be to deduce the instrumental design underlying paragraph 2(2) itself. This would be inferred from an examination of the language used in paragraph 2(2) viewed in its wider statutory context and in light of extrinsic considerations such as legislative history.

In that light, the contrast between paragraph 2(2) and 3 would if anything reinforce the implication that the scope of protection under paragraph 2(2) was purposefully more limited. There is no reason why Parliament cannot purposefully discriminate in one part of a statute and purposefully not discriminate in another. Indeed, that sort of patchwork is consistent with the incremental way in which social benefits tend to be extended by successive governments.

Far from being a restatement of the purposive approach to interpretation, the “underlying thrust” approach thus embraces a Convention-compatible interpretation even in cases where the rights-violating purpose underlying a

⁵³ *Ghaidan*, above n 4, para 35.

⁵⁴ *Ghaidan*, above n 4, paras 125-128.

statutory provision is patently clear, so long as that rights-violating purpose is not integrally tied to the wider scheme of the legislation.⁵⁵

This apparent disregard for Parliamentary intention is not, in itself, extraordinary. Indeed, the dominant, purpose-oriented approach to statutory interpretation has always been in tension with a competing, values-oriented approach, which manifests itself in particular through a series of background presumptions that the courts apply when construing legislation.⁵⁶ The most relevant of these, the presumption that broadly expressed powers are subject to fundamental human rights recognised by the common law, has enjoyed a recent resurgence in common law jurisdictions under the appellation: the principle of legality.⁵⁷

Presumptions of interpretation of this kind are, however, rebuttable. And the key point for the purposes of this discussion is that in deciding whether a common law presumption has been rebutted, the touchstone is the statutory language. Thus, Lord Hoffmann has said that the principle of legality can be overridden by “express language or necessary implication to the contrary.”⁵⁸

To repeat, then, the extraordinary feature of the *Ghaidan* methodology is that it hinges *neither* on Parliamentary intention, *nor* on text. That is evident not only in their Lordships’ rhetoric but in their actual disposition of the case on appeal. In particular, neither Lord Nicholls nor Lord Rodger saw any need to tie their “interpretative” solution to the language in which paragraph 2(2) was cast.⁵⁹ Lord Nicholls simply held that “the application of s 3 to para 2 had the effect that para 2 should be read and given effect to as though the survivor or such a homosexual couple were the surviving spouse of the original tenant”.

⁵⁵ See, though, *Ghaidan*, above n 4, Lord Rodger, para 121, where he tries, in my view unintelligibly, to reconcile the “underlying thrust” approach with the purposive approach.

⁵⁶ See, e.g., Burrows, above n 49, 990.

⁵⁷ See, e.g. *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131 (HL) Lord Hoffmann; *R v Pora* [2001] 2 NZLR 37, 50-51 (CA) Elias CJ.

⁵⁸ *R v Secretary of State for the Home Department, ex parte Simms*, above n 57, 131.

⁵⁹ Lord Steyn was content in this respect simply to endorse the reasoning of the court below: *Ghaidan*, above n 4, para 51. See, also, para 38, describing the Court of Appeal’s decision as a “classic illustration” of the permissible use of section 3.

The precise form of words to be read in was, he said, of no significance.⁶⁰ Lord Rodger, said that in reliance on section 3(1) he would “interpret para 2(2) as providing that...a person, whether of the same or of the opposite sex, who was living with the original tenant in a long-term relationship shall be treated as the spouse of the original tenant”.⁶¹

This paper began by noting the common assumption that the line being drawn by the courts, in ascertaining whether a rights-consistent interpretation is or is not possible, is one between “interpretation” on the one hand and “judicial legislation” on the other. Perhaps unsurprisingly, given that the heading to section 3 of the UKHRA is “*Interpretation of legislation*”, their Lordships in *Ghaidan* persist in adopting this categorisation and in describing the section 3(1) obligation as one of “interpretation”.⁶²

It is, however, hard not to wonder whether the dichotomy between “interpretation” and “legislation” has ceased to adequately encapsulate what is at stake. At the risk of indulging in a “parlour game” of the kind decried by Lord Rodger,⁶³ the word “interpretation” implies search for inherent meaning. Judges bring extrinsic values to that process. Those values do not, however, displace it. Thus, although the judicial act of statutory interpretation has never been an entirely passive one, the twin anchors of parliamentary intention and statutory text have provided outer perimeters beyond which the courts cannot stray. If both those anchors are simultaneously cast adrift, the character of what remains has surely been fundamentally transformed.

The inverse proposition is that the *Ghaidan* methodology involves the judicial appropriation of a significant if subordinate piece of legislative power. The courts are empowered to “change the meaning of enacted legislation”, so long as that change of meaning does not displace a “cardinal principle” of the legislation or exceed the bounds of judicial competence.

Whether or not the appellation “interpretation” can properly be applied, what I think is clear is that their Lordships’ approach to section 3(1) signals a

⁶⁰ *Ghaidan*, above n 4, para 35.

⁶¹ *Ghaidan*, above n 4, para 129.

⁶² *Ghaidan*, above n 4, para 30-33 Lord Nicholls; paras 41, 43, 45-47 and 49-50 Lord Steyn; paras 112-113 and 120-122 Lord Rodger.

⁶³ *Ghaidan*, above n 4, para 123.

significant shift in the constitutional relationship between Parliament and the courts. This is admittedly a question of degree rather than kind. New Zealand and the United Kingdom are, in any event, in a period of flux with respect to questions of constitutional balance, with the last decade witnessing a heightened enthusiasm by the courts for the embrace of normative values as a restraining influence on the political branches.⁶⁴ Even in New Zealand, we are doubtless in the midst of a perhaps subtle but nevertheless fundamental re-conceptualisation of the way in which power is shared between the branches of government.

Nevertheless, the *Ghaidan* methodology makes the constitutional reconfiguration more explicit and takes it one step further. By explicitly affirming the proposition that the courts can “change the meaning” of legislation in order to achieve a rights-consistent outcome, the courts have crossed *a* Rubicon and have entered a zone previously reserved to Parliament. The border between the permissible and the impermissible; the possible and the impossible has been, it would seem, recharted.

X Brief observations on the implications for New Zealand

In New Zealand, the functional equivalent of section 3(1) of the UKHRA is section 6 of the NZBOR. It provides:

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 6 is constrained by section 4, which says that no court shall, by reason only of an inconsistency with the NZBOR, hold any provision in an enactment to be impliedly repealed or revoked or to be in any way invalid or ineffective, or decline to apply any provision.

The *Ghaidan* decision signals a marked divergence in judicial approaches to the NZBOR and the UKHRA.⁶⁵ In New Zealand, construction of linguistic meaning has remained at the heart of section 6 jurisprudence.⁶⁶ Not only that,

⁶⁴ See, e.g., Philip A Joseph “Constitutional Review Now” [1998] NZLR 85.

⁶⁵ Compare *R v Hansen* (29 August 2005) CA 128/05 and *R v Lambert* [2002] 2 AC 545 (HL).

⁶⁶ For recent examples, see *Hopkinson v New Zealand Police* [2004] 3 NZLR 704; *R v Hansen*, above n 65.

the weight of judicial authority has stressed a constraint of “reasonableness” on interpretation in light of section 6. “Can be given”, Lord Cooke emphasised in *MOT v Noort*, means “can reasonably be given ... A strained interpretation would not be enough.”⁶⁷ More recently in *Moonen*, Tipping J described section 6 as a search for “tenable” meaning and enjoined those charged with the interpretation of legislation to identify the “different interpretations of the words of the other Act which are properly open”.⁶⁸

It has become almost fashionable for the Law Lords, in exploring the correct methodology under section 3(1) of the UKHRA, to contrast section 3(1) with the “comparative weakness” of section 6 of the NZBOR.⁶⁹ As others have suggested, however, that “comparative weakness” is not evident from the wording of the two sections.⁷⁰ In particular, the word “possible” in section 3(1) and the word “can” in section 6 NZBOR surely convey exactly the same meaning.⁷¹

If there are differences between the two provisions, they must thus derive not from the text but from external sources such as the legislative history and the underlying constitutional context. Some of that history and context is supplied by the European framework within which the United Kingdom now operates.⁷² As to legislative history, the language of section 3(1) derives from similar language describing the obligation on national courts under the EEC Treaty “as far as possible, to interpret national legislation in the light of the

⁶⁷ *MOT v Noort* [1992] 3 NZLR 260, 272. See, also *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 674 (CA) Cooke P.

⁶⁸ *Moonen*, above n 3, 16.

⁶⁹ *Ghaidan*, above n 4, para 44 Lord Steyn; *R v A*, above n 47, para 44 Lord Steyn; *R v Director of Public Prosecutions (ex parte Kebeline)* [1999] 4 All ER 801, 837 (HL) Lord Cooke. See, also *R v Hansen*, above n 65, para 39 where the same observation is made by the New Zealand Court of Appeal.

⁷⁰ See, e.g., Paul Rishworth “Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective” in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 251, 252.

⁷¹ See *Oxford English Dictionary Online*, definition of “Can”: “...6. a. Expressing possibility: To be permitted or enabled by the conditions of the case; *can you..?* = is it possible for you to..?”

⁷² See John Burrows “Statutory Interpretation New Style” [2005] NZLJ 156, 158.

wording and purpose of [EEC] directives” and the House of Lords was clearly influenced by the approach that had been taken to interpretation in that context.⁷³

As to constitutional context, the jurisdiction of the European Court of Human Rights is clearly relevant here. Ultimately, breaches of the Convention can be vindicated by an international court with powers of binding determination over the United Kingdom.⁷⁴ Thus in reality, Parliament *does not* have the final word on the application of Convention rights within the United Kingdom, the European Court does. That constitutional reality underpins inter-branch dialogue in the United Kingdom over the application of human rights and no doubt takes some of the constitutional sting out of the House of Lords’ seemingly aggressive approach.

More generally, the divergence in approaches to rights-consistent interpretation is suggestive of a more fundamental, contextual distinction. It is that the enactment of the NZBOR failed to bring with it any real sense of a new constitutional settlement having been reached as to the respective roles of Parliament and the courts in rights protection. Following the failure of Geoffrey Palmer’s proposal for an entrenched, supreme law bill of rights, the NZBOR in its revised, non-supreme, non-entrenched form was enacted with minimal consultation or debate on its interpretative or structural provisions and in the absence of broad based political support. Perhaps unsurprisingly, given that its own drafters saw the Bill as a pragmatic compromise necessitated by the failure to win support for the reform they in fact desired, there was little attempt by its drafters or sponsors to conceptualise the Bill as a positive constitutional model for rights enforcement in its own right, or to provide a coherent, theoretical justification for the particular division of responsibilities mandated by its implementing provisions. The consequence of this rather backhanded enactment process was that the NZBOR did not immediately bring with it any sense of a new and distinctive constitutional resolution having been reached on the question of rights enforcement.

⁷³ See *Ghaidan*, above n 4, para 45 Lord Steyn.

⁷⁴ In contrast, although New Zealand’s international human rights commitments are substantively equivalent to those of the United Kingdom, there is no binding, international judicial mechanism by which those commitments can be tested.

The enactment of the UKHRA was by contrast a much more self-conscious attempt to engage in a reapportionment of constitutional responsibility over human rights protection and accordingly the United Kingdom courts had, from the moment of the entry into force of the UKHRA, a constitutional mandate that the New Zealand courts are only acquiring gradually and as a matter of constitutional evolution.

If, as I have suggested, this provides a large part of the explanation for the divergence of approaches heralded epitomised by the *Ghaidan* decision, then the future direction of New Zealand jurisprudence will depend less on the apparent textual constraints of the NZBOR itself than on the resolution of underlying and contested questions of constitutional authority and constitutional legitimacy.