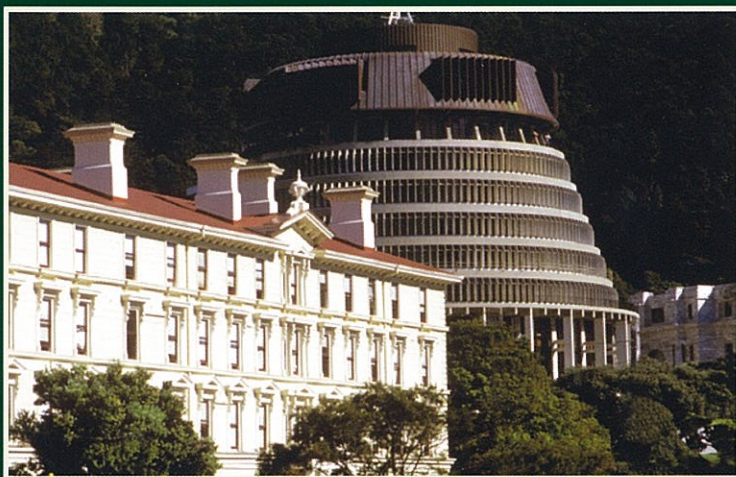


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SPECIAL CONFERENCE ISSUE  
FROM PROFESSING TO ADVISING TO JUDGING:  
CONFERENCE IN HONOUR OF SIR KENNETH KEITH

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Rt Hon Peter Blanchard

David Feldman

Claudia Geiringer

Gary Hawke

Ben Keith

Dean Knight

Janet McLean

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**Victoria**

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
o te Upoko o te Ika a Māui*



FACULTY OF LAW

*Te Kauhanganui Tātai Ture*

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# CONTENTS

## SPECIAL CONFERENCE ISSUE

### FROM PROFESSING TO ADVISING TO JUDGING: CONFERENCE IN HONOUR OF SIR KENNETH KEITH

#### Foreword

*Claudia Geiringer and Dean R Knight* .....vii

#### The Role of Constitutional Principles in Protecting International Peace and Security Through International, Supranational and National Legal Institutions

*David Feldman*..... 1

#### "Crown Him with Many Crowns": The Crown and the Treaty of Waitangi

*Janet McLean*.....35

#### The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*

*Claudia Geiringer*.....59

#### Seeing the World Whole: Understanding the Citation of External Sources in Judicial Reasoning

*Ben Keith*.....95

#### A Murky Methodology: Standards of Review in Administrative Law

*Dean R Knight*..... 117

#### Lawyers in the Policy Process

*Gary Hawke* ..... 161

#### The Early Experience of the New Zealand Supreme Court

*Rt Hon Peter Blanchard*..... 175

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# THE PRINCIPLE OF LEGALITY AND THE BILL OF RIGHTS ACT: A CRITICAL EXAMINATION OF *R v HANSEN*

Claudia Geiringer\*

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*This article uses the Supreme Court decision in R v Hansen [2007] 3 NZLR 1 to explore the relationship between rights-mandated interpretation under section 6 of the New Zealand Bill of Rights Act 1990 and value-oriented interpretation at common law. It suggests that the New Zealand case law, including Hansen, evinces a particular conception of that relationship — a conception that can be contrasted with the more robust vision of the interpretive effect of section 3 of the Human Rights Act 1998 (UK) that is found in some recent House of Lords authority. The article then suggests that some aspects of the five-step methodology set out by the Supreme Court in Hansen for interpreting legislation in light of section 6 are inconsistent with the Court's underlying vision of the role of section 6 and of its relationship with common law interpretive techniques. The five-step methodology may, therefore, need to be revisited.*

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The title of the conference for which these articles were produced — "From Professing to Advising to Judging" — highlighted the eclectic nature of Sir Kenneth Keith's career in the law and the breadth of the connections that he has formed during it. Those connections reach beyond the strict confines of the legal community — a fact that was for me underscored by my involvement in organising the conference and by the unprecedented level and type of interest we had in it. This in turn reminded me of a familial debt that I had almost forgotten. When my father, a member of the International Physicians for the Prevention of Nuclear War, was pursuing his dream of bringing the question of the legality of the use of nuclear weapons before the International Court of Justice, Sir Kenneth gave advice, encouragement and inspiration unstintingly from the sidelines.<sup>1</sup> I well

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\* Senior Lecturer, Victoria University of Wellington Faculty of Law. Thanks for their helpful comments, whether at the conference or after (but with the usual conferral of immunity from all responsibility), go to Professor David Feldman, Sir Kenneth Keith, Dean Knight, Hon Justice McGrath, Professor Michael Taggart, Hanna Wilberg and an anonymous NZJPIL reviewer.

<sup>1</sup> Dr Erich Geiringer, 1917–1995, was heavily involved in the "World Court Project", an ultimately successful attempt to persuade organs of the United Nations to seek an advisory opinion from the International Court of Justice on the legality of the use of nuclear weapons.

remember at the time how chuffed Erich was to be able to bend the ear of such an authority. Sir Kenneth's appointment to the "World Court" itself would have had special resonance for Erich had he still been alive and I can imagine the delight he would have taken in it. I also know how pleased he would have been that one of his own descendants has participated in this celebration of Sir Kenneth's career.

Turning from the familial to the personal, in terms of advice and encouragement Sir Kenneth has been as unstinting to the daughter as to the father. Additionally, however, he has had a direct intellectual impact on my career in the legal academy through the foundation that his judicial and extra-judicial writings have provided for scholarly reflection. Indeed, it would be fair to say that the slender edifice of my early legal scholarship was erected almost entirely on the substantial foundations of Justice Keith's jurisprudence.<sup>2</sup> For that, I owe him a considerable intellectual debt. It perhaps goes without saying that Sir Kenneth has tolerated and even encouraged these meanderings with great forbearance and in an enduring spirit of academic fellowship.

Sir Kenneth's retirement from the New Zealand judiciary has forced upon me a variation in my intellectual diet. The Supreme Court judgment on the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) that provides the departure point for this paper is not one to which he made a direct contribution. To suggest that Sir Kenneth made a contribution to bill of rights jurisprudence more generally, however, would be like suggesting that Richard Taylor made a contribution to the Lord of the Rings trilogy.<sup>3</sup> The role of Peter Jackson in this particular drama must, in all fairness, be accorded to another,<sup>4</sup> but Sir Kenneth's distinctive fingerprints have been left all over the clay. He is, if we are to think in such terms, one of the "founding fathers".<sup>5</sup>

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2 See especially Claudia Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66 ["Tavita and All That"]; Claudia Geiringer "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in Rick Bigwood (ed) *Public Interest Litigation* (LexisNexis, Wellington, 2006) 179; Claudia Geiringer "International Law through the Lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300 ["International Law through the Lens of Zaoui"].

3 Richard Taylor's name is synonymous with that of Weta Workshop, the facility that provided the full range of special (including digital) effects for the Lord of the Rings trilogy including, most famously, the creation and animation of the creature "Gollum". He won four academy awards for his contribution to the trilogy.

4 Naturally, Sir Geoffrey Palmer, then Minister of Justice.

5 The then Professor of Law at Victoria University of Wellington acted as an expert advisor to the Ministry of Justice in the preparation of the draft bill of rights and White Paper on which the New Zealand legislation was based: Department of Justice *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) [*The White Paper*].

Sir Kenneth's drafting influence is particularly evident in the selection and definition of the substantive rights now contained in Part II of the Bill of Rights Act.<sup>6</sup> This is unsurprising as it is here that the relationship between the White Paper to which Sir Kenneth contributed and the enacted statute is most direct. In contrast, the General Provisions contained in Part I of the Bill of Rights Act — those provisions that dictate its status and effect — had to be overhauled following the failure of the White Paper's proposal for a fully constitutionalised bill of rights to win public approval. Some of them survived the redrafting process largely unscathed;<sup>7</sup> others were removed, substantially redrafted or newly inserted.<sup>8</sup> The result was an innovative but somewhat ambivalent compromise package that highlighted the role of the political branches in protecting rights, empowered the courts to enforce them up to a certain point, but denied the courts the ultimate sanction of refusing to apply objectionable legislation.

This latter feature, the express denial of a judicial power to strike down legislation effected by section 4 of the Bill of Rights Act, brought into sharp relief the constitutional significance of statutory construction as a technique for promoting legislative consistency with human rights norms.<sup>9</sup> Section 6 of the Bill of Rights Act explicitly embraces this technique. It stipulates that:

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.

Lord Steyn has described the corresponding provision in the Human Rights Act 1998 (UK) (the Human Rights Act (UK)) as the "linch-pin of the legislative scheme" and the "prime remedial

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6 For Sir Kenneth's contemporaneous vision of what a bill of rights should cover see, in addition to *The White Paper* (ibid), KJ Keith "A Bill of Rights for New Zealand? Judicial Review versus Democracy" (1985) 11 NZULR 307; KJ Keith "Professor Smillie's Alternative Bill of Rights" (1986) 6 Otago LR 208. For his more recent reflections on the New Zealand Bill of Rights Act 1990 [the Bill of Rights Act] see for example KJ Keith "'Concerning Change': The adoption and implementation of the New Zealand Bill of Rights Act 1990" (2000) 31 VUWLR 721 ["Concerning Change"].

7 For example section 3 (dictating who the Bill of Rights Act applies to) and section 5 (setting the standard for justified limitations).

8 Clause 1 of *The White Paper's* draft (dictating the Bill's supremacy) and clause 28 (entrenching it) fall into the first category (*The White Paper*, above n 5); section 6 of the Bill of Rights Act (the interpretive direction) into the second; and sections 4 (expressly preserving inconsistent legislation) and 7 (imposing a reporting obligation on the Attorney-General) into the third.

9 By virtue of section 4 of the Bill of Rights Act the courts cannot: (a) hold any provision of an enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective or (b) decline to apply any provision of an enactment, by reason only that the provision is inconsistent with any provision of the Bill of Rights Act. Although the word "enactment" comprehends both primary and secondary legislation, a regulation that is inconsistent with the Bill of Rights Act will be ultra vires unless its empowering section expressly authorises the inconsistency: *Drew v Attorney-General* [2002] 1 NZLR 58, para 68 (CA) Blanchard J [*Drew*].

measure".<sup>10</sup> While this may perhaps overplay the importance of primary legislation as the medium through which public power is exercised,<sup>11</sup> it is at least fair to say that by virtue of sections 4 and 6, statutory construction is the principal vehicle through which the constitutional relationship between Parliament and the courts under the Bill of Rights Act is to be negotiated. The meaning of section 6, and the power and effect of the interpretive principle that it embodies, are thus matters of considerable constitutional importance. It is perhaps for that reason that the instrument as a whole has sometimes been referred to, including by Sir Kenneth himself, as an "interpretive Bill of Rights".<sup>12</sup>

Against that background, the decision of the Supreme Court in *R v Hansen* (*Hansen*), handed down in February 2008, is of considerable interest as the first decision from the Supreme Court in which Bill of Rights Act methodology in general, and the operation of the interpretive principle in particular, have received extended consideration.<sup>13</sup> The *Hansen* Court tackled a series of key methodological issues in the application of the Bill of Rights Act, many of which have been the subject of extensive academic commentary over the last few years but have been, with respect, somewhat neglected by the judiciary. Although the result in the case was unanimous, the Supreme Court's approach to Bill of Rights Act methodology was not, and the competing viewpoints accordingly elaborated in it cannot but help to reinvigorate the debate over the nature and effect of the Bill of Rights Act.

This paper seeks to contribute to that debate through a critical analysis of the *Hansen* Court's approach to Bill of Rights Act-mandated interpretation under section 6 of the Bill of Rights Act. It begins by setting out and contextualising the methodological issues respecting the operation of section 6 that confronted the Supreme Court in *Hansen*, and by describing the Court's approach to those issues. It then develops a particular insight into the New Zealand approach to Bill of Rights Act-mandated interpretation, using the approach being developed by the United Kingdom courts under the Human Rights Act (UK) as a counterpoint. The paper suggests that New Zealand judges, by contrast with some United Kingdom judges, have not understood section 6 of the Bill of Rights Act as inviting a new and distinctive approach to statutory interpretation. Rather, they have treated section 6 as a legislative manifestation of the established common law principle that legislation is,

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<sup>10</sup> *Ghaidan v Mendoza* [2004] 2 AC 557, para 46 (HL) [*Ghaidan*].

<sup>11</sup> See Janet McLean's excellent article, "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] NZ Law Rev 421, 424.

<sup>12</sup> For example Sir Kenneth Keith "A Bill of Rights: Does It Matter? A Comment" (1997) 32 Tex Int'l LJ 393, 395; Keith "Concerning Change", above n 6, 742.

<sup>13</sup> *R v Hansen* [2007] 3 NZLR 1 (NZSC) [*Hansen*]. For a helpful analysis of the decision see Hanna Wilberg "The Bill of Rights and Other Enactments" [2007] NZLJ 112.

where possible, to be interpreted consistently with fundamental rights recognised by the common law.<sup>14</sup> The *Hansen* decision is consistent with that general orientation.

That being so, the paper proceeds to consider whether the details of the approach to section 6-mandated interpretation proposed in *Hansen* are consistent with this general orientation. It first examines the two-phase approach to statutory interpretation advanced by the majority in accordance with which an investigation into section 6-mandated meaning proceeds separately from and subsequent to an initial inquiry into "ordinary meaning". The paper suggests that in light of the general orientation just identified, this two-phase approach is incoherent.

The paper then considers the categorical rule propounded in *Hansen* that a section 6-mandated interpretive inquiry does not entitle the courts to stray outside the limits of statutory "purpose". There is certainly a respectable argument to be made that this rule is consistent with the view that section 6 is a legislative manifestation of the common law principle of legality. This paper, however, floats an alternative argument: that section 6 may on occasion entitle the courts to adopt constructions that are at odds with statutory purpose. Where fundamental values are perceived to be threatened, there is a long history of common law courts utilising presumptions of interpretation to promote literal or even strained meanings in disregard of statutory purpose. The democratic objection to the utilisation of such interpretive techniques is real. It is, however, significantly ameliorated by the codification of a bill of rights.

The paper concludes by offering some passing observations on the significance of the general orientation described above for the question that caused the greatest disagreement amongst the Supreme Court justices: the interrelationship of sections 5 and 6 of the Bill of Rights Act.

## **I R v HANSEN AND SECTION 6: THE ISSUES AT STAKE**

### **A The Limits of Permissible "Interpretation"**

The central question of Bill of Rights Act methodology at issue in *Hansen* was: how does one determine the limits of permissible "interpretation" under section 6 of the Bill of Rights Act? From a textual perspective, those limits are set by the language of section 6 itself,<sup>15</sup> but also by section 4 of the Bill of Rights Act. Section 4 denies the courts the power to:

- (a) Hold any provision of [an] enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) Decline to apply any provision of [an] enactment —  
by reason only that the provision is inconsistent with any provision of [the] Bill of Rights.

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14 The case law that supports this proposition is explored below: Part III Rights-Mandated Interpretation and the Common Law.

15 In particular the word "can" and the concept of giving "meaning".

By virtue of sections 4 and 6, Parliament has thus bolstered the courts' interpretive powers but has "reserved to itself all legislative functions".<sup>16</sup> How, though, is one to draw the line between these two sets of activities? Where does the constitutionally permissible territory of judicial "interpretation" end and the constitutionally impermissible territory of judicial "legislation" begin? That was the question at the heart of Mr Hansen's appeal.

Mr Hansen was convicted of possession of cannabis for the purpose of supply under section 6(1)(f) of the Misuse of Drugs Act 1975. His conviction rested on the presumption of supply found in section 6(6) of that Act. Section 6(6) provides that if a person is in possession of a specified amount of one of certain controlled drugs,<sup>17</sup> that person shall "until the contrary is proved" be deemed to be in possession of the drug for a dealing-related purpose (to supply, sell, administer, and so on).<sup>18</sup> Mr Hansen's appeal turned on the meaning to be given to the statutory phrase "until the contrary is proved". The established understanding is that these words impose a legal (or "persuasive") burden on the accused. Once the Crown has proved that the accused possessed the requisite quantity of a controlled drug, it is for the accused to establish (to the standard of balance of probabilities) that he or she *did not* have the drug for the alleged dealing-related purpose.<sup>19</sup>

It is common ground that this reverse burden gives rise to a *prima facie* breach of section 25(c) of the Bill of Rights Act: the presumption of innocence.<sup>20</sup> Mr Hansen's counsel therefore proposed an alternative interpretation. They said that the words "until the contrary is proved" can be read instead to impose an "evidential" burden on the accused. On this account if the accused is able to point to evidence that, if accepted by the jury, might create a reasonable doubt as to his or her purpose, the burden of proving the dealing-related purpose reverts to the Crown. Mr Hansen's counsel argued that section 6(6) of the Misuse of Drugs Act 1975 "can be given" and therefore, in terms of section 6 of the Bill of Rights Act, must be given this alternative construction.

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16 *Quilter v Attorney-General* [1998] 1 NZLR 523, para 572 (CA) Tipping J [*Quilter*]. See also *R v A* [2002] 1 AC 45, para 108 (HL) Lord Hope of Craighead.

17 At the time of Mr Hansen's alleged offending, the quantity of each drug sufficient to trigger the presumption was listed in section 6(6). Since June 2005, the trigger amounts for each drug have been contained in a schedule and can be amended by Order in Council: see Misuse of Drugs Act 1975, s 4 and sch 5 (inserted by the Misuse of Drugs Amendment Act 2005).

18 The word "deemed" in section 6(6) has since been replaced by the word "presumed" (the Misuse of Drugs Amendment Act 2005) but it is unlikely that this has altered the meaning of the legislation.

19 See for example *R v Phillips* [1991] 3 NZLR 175 (CA) [*Phillips*].

20 Section 25(c) provides: "Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: ... The right to be presumed innocent until proved guilty according to law". Whether that *prima facie* breach is, or is not, justified in terms of section 5 of the Bill of Rights Act was contested on the appeal.

This proposition faced something of an obstacle in the form of *R v Phillips* (*Phillips*) — a Court of Appeal decision released shortly after the Bill of Rights Act came into force in which the same proposition had been summarily rejected.<sup>21</sup> In a brief and unanimous judgment authored by then President Cooke, the Court of Appeal held that the suggested interpretation was "strained and unnatural" and that, notwithstanding section 6 of the Bill of Rights Act, the Court would not be justified in adopting it.<sup>22</sup>

What nevertheless gave the issue its piquancy (and what presumably tempted the Supreme Court to grant leave to appeal) was the fact that in 2001, ten years after *Phillips*, the House of Lords had accepted an almost identical proposition in reliance on section 3(1) of the Human Rights Act (UK). Section 3(1) is the functional equivalent of section 6 of the Bill of Rights Act. It provides that:

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.

In *R v Lambert* (*Lambert*), their Lordships held unanimously that in light of section 3(1), the phrase "if he proves" should no longer be interpreted as imposing a legal burden on an accused but should, instead, be interpreted as imposing an evidential burden.<sup>23</sup> Interestingly from a New Zealand perspective, this outcome had been foreshadowed two years earlier in *R v Director of Public Prosecutions, ex parte Kebilene* (*Kebilene*) by none other than the illustrious author of *Phillips* himself, by then Lord Cooke of Thorndon.<sup>24</sup>

The contrast between *Lambert* and *Phillips* was arguably symptomatic of a more general divergence that seemed to some to be emerging between the New Zealand and United Kingdom courts as to the proper limits of rights-mandated interpretation under their respective human rights instruments. In accounting for this apparent divergence it had become almost fashionable for the Law Lords to point to the "comparative weakness" of the language of section 6 of the Bill of Rights Act.<sup>25</sup> Indeed, that was the conceit relied upon by Lord Cooke in *Kebilene*. In justifying his suggestion that once the Human Rights Act (UK) came into force a departure from the *Phillips*

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<sup>21</sup> *Phillips*, above n 19.

<sup>22</sup> *Ibid*, 177.

<sup>23</sup> *R v Lambert* [2002] 2 AC 545 (HL) [*Lambert*]. See also *Sheldrake v Director of Public Prosecutions; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264 (HL) [*Sheldrake*].

<sup>24</sup> *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 373 (HL) [*Kebilene*]. See also *ibid*, 370 Lord Steyn.

<sup>25</sup> *Ibid*, 373–374 Lord Cooke; *R v A*, above n 16, para 44 Lord Steyn; *Ghaidan*, above n 10, para 44 Lord Steyn. See also Lord Irvine of Lairg "Activism and Restraint: Human Rights and the Interpretative Process" [1999] 4 EHRL Rev 350, 365 fn 67.

approach was "distinctly possible", Lord Cooke remarked that section 3(1) read as a whole conveyed "a rather more powerful message" than its New Zealand counterpart.<sup>26</sup>

As a number of New Zealand commentators have, however, observed the language of the two sections does not obviously support Lord Cooke's observation.<sup>27</sup> Whereas section 6 of the Bill of Rights Act mandates the adoption of rights-consistent meanings if they "can be given", section 3(1) of the Human Rights Act (UK) requires their adoption "so far as it is possible to do so". If the notion of "possibility" conveys a different meaning from the word "can", the subtlety of that distinction is beyond both this author and the drafters of the Oxford English Dictionary.<sup>28</sup> It has not been suggested that the terms "compatible" (used in section 3(1) of the Human Rights Act (UK)) and "consistent" (used in section 6 of the Bill of Rights Act) are, in context, anything other than synonymous; and it is difficult to make much of the distinction between giving "meaning" to an enactment (the Bill of Rights Act) and "reading and giving effect" (the Human Rights Act (UK)). Further, just as the boundaries of what "can" be done in reliance on section 6 of the Bill of Rights Act are reinforced by section 4, the limits of what is "possible" under section 3(1) of the Human Rights Act (UK) are reinforced by section 3(2) of that Act. It says that section 3(1) "does not affect the validity, continuing operation or enforcement of any incompatible primary legislation".<sup>29</sup>

None of this is to say that there is no difference in the force of the two interpretive directions; rather that if there is such a difference, it must derive from a source or sources external to the language in which the provisions themselves are cast.<sup>30</sup> It follows that the existence, nature and

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26 *Kebilene*, above n 24, 373–374 Lord Cooke. This passage was relied upon by the Court of Appeal in *Hansen* to justify its decision to hold to the *Phillips* line: *R v Hansen* (2005) 22 CRNZ 83, paras 39–42 (CA) Judgment of the Court.

27 See for example John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981, 998 ["Interpretation of Statutes"]; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) para 7.4.5; 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.

28 The Oxford English Dictionary Online [www.oed.com](http://www.oed.com) (accessed 25 June 2008) defines "can" in its relevant sense as "6. a. Expressing possibility: To be permitted or enabled by the conditions of the case; *can you..?* = is it possible for you to..?"

29 See also Human Rights Act 1998 (UK) [Human Rights Act (UK)], s 6(2).

30 One might look, for example, to the respective legislative schemes (including the express power to grant declarations of incompatibility found in the Human Rights Act (UK), s 4), to the distinctive legislative histories (including the reliance placed by drafters of the Human Rights Act (UK) on principles of interpretation developed in the context of European Community law) and to the constitutional and supra-national contexts (including the ability of aggrieved claimants from the United Kingdom to pursue their cases before the European Court of Human Rights). See *Hansen*, above n 13, para 156 and fn 193 Tipping J; paras 238–246 McGrath J; *Ghaidan*, above n 10, paras 39 and 42–46 Lord Steyn. See also Claudia Geiringer "It's Interpretation, Jim, But Not As We Know It: *Ghaidan v Mendoza*, the House of Lords and Rights-Consistent Interpretation" in Paul Morris and Helen Greatrex (eds) *Human Rights Research: Victoria*

extent of any such difference is contestable and thus susceptible to re-evaluation in light of changes in judicial philosophy and temperament.

It did not seem out of the question that such a change in philosophy might manifest in *Hansen*. Prior to *Hansen*, the Supreme Court had not had the opportunity to examine in any detail the meaning and effect of section 6 of the Bill of Rights Act, indeed, even at Court of Appeal level there had been little extended discussion of its role and constitutional significance for quite some time.<sup>31</sup> The apparent divergence in New Zealand and United Kingdom approaches to rights-mandated interpretation was highlighted somewhat acutely in *Hansen* by obvious similarities in the factual and legal matrix of that case and of the House of Lords case of *Lambert*. By granting leave to appeal, the Supreme Court seemed to be signalling an interest in examining the issue. The question was whether the Supreme Court would affirm previous New Zealand case law or whether, inspired by the House of Lords, it would decide to flex its constitutional muscle and to evolve a stronger interpretive principle?

### ***B The Interrelationship of Sections 5 and 6***

What makes *Hansen* even more interesting from the perspective of Bill of Rights Act methodology is that in the course of resolving the key issue set out above, the Supreme Court was forced to tackle a subsidiary question: that of the interrelationship of sections 5 and 6 of the Bill of Rights Act. Section 5 provides:

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.

In essence, the Supreme Court was faced with two competing readings of section 6. The first is that section 6 requires the interpreter to strive to find a meaning of legislation that achieves consistency with the prima facie rights and freedoms contained in Part II of the Bill of Rights Act. On this approach section 5 is irrelevant to the interpretation process. The alternative reading is that section 6 is not engaged unless the "ordinary" (non-Bill of Rights Act influenced) interpretation of the relevant legislation would limit a right or freedom in a manner that has not been demonstrated to be justified in a free and democratic society. On this account, section 6 is qualified by reference to section 5. In *Moonen v Film and Literature Board of Review*, the Court of Appeal had adopted the first account of section 6, although it is not clear that the choice of approaches had been clearly put

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*University of Wellington* (Victoria Human Rights Programme, Wellington, 2005) 101, 118–120 ["It's Interpretation, Jim"].

<sup>31</sup> Section 6 had played a crucial role in *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC) [*Zaoui (No 2)*], a unanimous decision authored by Justice Keith himself, but the decision did not contain any sustained analysis of section 6's operation and effect.

to it.<sup>32</sup> Ever since then, the Crown had been trying to convince the appellate courts to revisit the issue.<sup>33</sup> In *Hansen*, the Supreme Court did so.

## II THE SUPREME COURT'S DECISION

Although the result in *Hansen* was unanimous, all five justices issued separate opinions and there were significant differences of approach on a number of issues. Focussing on the issues set out above, the key threads can be summarised as follows.

First, a majority of three judges (Blanchard, Tipping and McGrath JJ) with a vigorous dissent from the Chief Justice, concluded that the interpretive direction in section 6 of the Bill of Rights Act is qualified by reference to section 5. Section 6 only requires the courts to seek a Bill of Rights Act-consistent meaning if the ordinary meaning limits a prima facie right or freedom in a manner that cannot be demonstrably justified by reference to section 5.<sup>34</sup> At the heart of the majority's approach in this respect is the conception of the New Zealand instrument as a "bill of reasonable rights" and a concern that the interpretive direction in section 6 should not be invoked to limit or subvert Parliament's deliberate and demonstrably justified policy choices.<sup>35</sup> The Chief Justice, on the other hand, argued that the majority's approach was inconsistent with the language of section 6 and the scheme and purpose of the Bill of Rights Act, and that it risks the erosion of fundamental rights.<sup>36</sup>

Secondly, in order to give effect to this understanding, the same three judges agreed on a series of steps that will generally be helpful when conducting an exercise of statutory interpretation in light of the Bill of Rights Act.<sup>37</sup> The inquiry begins with consideration of the meaning of the legislation in light of the traditional principles of statutory interpretation (ie, discounting the effect of the Bill of Rights Act). One then asks whether this "natural", "intended" or "ordinary" meaning gives rise to a prima facie breach of a right or freedom contained in Part II of the Bill of Rights Act and, if so,

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

33 For example *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754, para 12 (CA) Richardson P for the Court.

34 *Hansen*, above n 13, paras 57–59 Blanchard J; paras 89–91 Tipping J; paras 186–189 McGrath J.

35 See for example *ibid*, paras 90–91 Tipping J; para 186 McGrath J.

36 *Ibid*, paras 6 and 15–24 Elias CJ. Where Anderson J sits on this point is not, at least to me, entirely clear. The tenor of his remarks seems to support the Chief Justice's (see *ibid*, para 266) but in practice, he adopts a methodology similar to that set out by the majority (see *ibid*, paras 269–290).

37 *Ibid*, paras 57–62 Blanchard J; paras 88–94 Tipping J; para 192 McGrath J. Each of their Honours placed slightly different qualifications around the circumstances in which this methodology would be appropriate, a point that is returned to below: see Part IV A The Two-Phase Approach to Statutory Interpretation. See also *ibid*, paras 269–290 Anderson J, applying in practice a similar methodology.

whether it also falls foul of the standard of demonstrable justification contained in section 5.<sup>38</sup> It is only if the answer to both these questions is in the affirmative that the interpretive direction in section 6 of the Bill of Rights Act is engaged. At that point, one must revisit the meaning of the legislation by asking whether it "can be given" a meaning that would be consistent, or more consistent, with the right or freedom.<sup>39</sup> If so, one must adopt it. If not then by virtue of section 4, one must apply the "ordinary" meaning.

On the facts of *Hansen* itself, a differently constituted majority of McGrath, Tipping and Anderson JJ (with Blanchard J in the minority on this point) concluded that the ordinary meaning of the legislation (imposing a persuasive onus on the accused) creates a prima facie breach of section 25(c) of the Bill of Rights Act that is not demonstrably justified in terms of section 5.<sup>40</sup> As a result of this conclusion, and in accordance with the methodology set out above, section 6 of the Bill of Rights Act was engaged. Accordingly, with the exception of Blanchard J, all of the judges proceeded to consider whether an alternative, rights-consistent interpretation was available. Specifically, was the phrase "until the contrary is proved" capable of being construed to impose an evidential rather than a legal burden on the accused?<sup>41</sup>

This final inquiry required their Honours to address the key constitutional issue identified above: the limits of permissible interpretation under section 6 of the Bill of Rights Act. Their Honours did give extended consideration to the meaning and effect of section 6 and did consider the implications of House of Lords' jurisprudence on section 3(1) of the Human Rights Act (UK).<sup>42</sup> Ultimately, however, all four justices declined to follow *Lambert* and instead affirmed the approach taken by the Court of Appeal in *Phillips*.<sup>43</sup>

Their Honours disagreed amongst themselves as to whether there is any material difference between section 6 of the Bill of Rights Act and section 3(1) of the Human Rights Act (UK). Tipping and McGrath JJ considered that despite the similarities in wording, section 3(1) can be distinguished

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38 All of the judges in *Hansen* gave some guidance as to how a section 5 inquiry is to be conducted but that is outside the scope of this paper. See Wilberg, above n 13.

39 Ibid, para 60 Blanchard J; paras 90 and 92 Tipping J; para 192 McGrath J. Logically the search even at this point is for a meaning that does not *unreasonably* limit the rights and freedoms in terms of section 5, but that is not spelt out by their Honours.

40 Ibid, para 149 Tipping J; para 234 McGrath J; para 281 Anderson J. Compare *ibid*, para 83 Blanchard J. Elias CJ made no finding on this point given her conclusion that section 5 was irrelevant to the question of statutory interpretation before the Court. However, she did express doubts as to whether the right to be presumed innocent could ever be justifiably limited: *ibid*, para 41 Elias CJ.

41 Ibid, para 39 Elias CJ; paras 149–166 Tipping J; paras 255–257 McGrath J; paras 281–290 Anderson J.

42 Ibid, para 39 Elias CJ; paras 149–166 Tipping J; paras 255–257 McGrath J; paras 281–290 Anderson J.

43 Ibid, para 39 Elias CJ; paras 149 and 159–166 Tipping J; paras 256–257 McGrath J. See also *ibid*, para 56 Blanchard J — comments that are consistent with his colleagues' conclusions on this point.

on the basis of its legislative history and the distinctive constitutional context and supranational environment in which it operates.<sup>44</sup> Elias CJ and Anderson J, on the other hand, could see no material difference between the two provisions "whether in terms of essential meaning or ... relative potency".<sup>45</sup>

Regardless of their views on this point, none of the judges exhibited any real appetite for evolving a stronger approach to section 6 in light of House of Lords jurisprudence. Instead, the Supreme Court's decision in *Hansen* affirmed, clarified and solidified previous Court of Appeal authority on the limits of section 6. Three points can be particularly highlighted in this respect.

First, the New Zealand courts have stressed a constraint of "reasonableness" to what is permitted by section 6. "Can be given" in section 6 means "can reasonably be given".<sup>46</sup> Section 6 does not authorise the courts to adopt meanings that are "untenable" or that are not "properly open".<sup>47</sup> The Supreme Court in *Hansen* affirmed this requirement. Thus, Tipping J adverted to the difficulties in finding helpful synonyms to gloss the language of section 6 but concluded that the concepts of "reasonably possible" or "its equivalent, tenable" come as close as possible to capturing the limits of permissible interpretation under section 6.<sup>48</sup> He contrasted the position in this respect with the position in the United Kingdom where "the concept of possibility has not been treated, at least in some cases, as a reasonable possibility".<sup>49</sup> Anderson J likewise considered that the interpreter's duty is to adopt meanings dictated by section 6 "if it is reasonably possible to do so".<sup>50</sup> He concluded variously that the interpretation argument advanced by the appellant was not "reasonably possible",<sup>51</sup> was "untenable",<sup>52</sup> and was "strained and unnatural".<sup>53</sup>

This reference to "straining" the statutory language reinforces a second feature of the pre-*Hansen* case law: a concern with the limits of linguistic meaning as the primary determinant of what

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44 Ibid, para 156 and fn 193 Tipping J; paras 238–246 McGrath J.

45 Ibid, para 287 Anderson J. See also *ibid*, para 13 Elias CJ. It presumably follows that Elias CJ and Anderson J considered the result reached by the House of Lords in *Lambert* to be incorrect.

46 *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272 (CA) Cooke P [*Noort*]. See also *Police v Smith and Herewini* [1994] 2 NZLR 306, 313 (CA) Cooke P.

47 *Quilter*, above n 16, 581 Tipping J; *Moonen*, above n 32, paras 16–17 Tipping J for the Court; *R v Poumako* [2000] 2 NZLR 695, para 83 (CA) Thomas J [*Poumako*].

48 *Hansen*, above n 13, paras 157–158 and fn 191 Tipping J.

49 Ibid, para 150 Tipping J.

50 Ibid, para 289 Anderson J.

51 Ibid, para 290 Anderson J.

52 Ibid, para 288 Anderson J.

53 Ibid, para 290 Anderson J.

is or is not "reasonably possible" in terms of section 6. As Cooke P said in *Ministry of Transport v Noort*, "a strained interpretation would not be enough".<sup>54</sup> Consistently with that, McGrath J in *Hansen* stressed that section 6 is confined to meanings that are "available on the language of the text being interpreted". The text remains the "primary reference in ascertaining meaning" and there is no authority to go beyond meanings that "the language being interpreted will bear".<sup>55</sup> Blanchard J echoed the language of section 5(1) of the Interpretation Act 1999, observing that section 6 can only dictate a meaning that is "genuinely open in light of both its text and its purpose".<sup>56</sup>

The Chief Justice sounded a slight note of dissonance, positing that section 6 entitles the court to adopt meanings that "linguistically may appear strained".<sup>57</sup> In her view, modern interpretive techniques accept that "linguistic" interpretation can be displaced by context, and that where fundamental rights are affected, "apparent meaning yields to less obvious meaning under common law presumptions protective of bedrock values".<sup>58</sup> She also stipulated that textual "ambiguity" is not a prerequisite to the application of section 6.<sup>59</sup> Ultimately, however, Elias CJ, like the other judges, concluded that the meanings that are available under section 6 must be "tenable on the text and in light of the purpose of the enactment".<sup>60</sup>

The coupling in both the Chief Justice's and Blanchard J's judgments of text and purpose echoes the language of section 5(1) of the Interpretation Act 1999, which sets out the default rule that legislation is to be interpreted "from its text and in the light of its purpose". Prior to *Hansen*, the relationship between section 5(1) and section 6 of the Bill of Rights Act was at best uncertain. Some judges had held that a rights-consistent interpretation under section 6 cannot be given if there is "clear legislative intention to the contrary" but authority on this point was not unanimous.<sup>61</sup> Further, the use of the term legislative "intention" in such cases tended to obscure the issue. Parliament, not

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54 *Noort*, above n 46, 272 Cooke P. See also *Police v Smith and Herewini*, above n 46, 313 Cooke P; *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 674 (CA) Cooke P [Baigent]; *Quilter*, above n 16, 542 Thomas J; *Poumako*, above n 47, para 83 Thomas J.

55 *Hansen*, above n 13, para 237 McGrath J.

56 *Ibid*, para 61 Blanchard J.

57 *Ibid*, para 12 Elias CJ.

58 *Ibid*, para 13 Elias CJ.

59 *Ibid*.

60 *Ibid*, para 25 Elias CJ.

61 *Noort*, above n 46, 287 Hardie Boys J; *Quilter*, above n 16, 541–542 Thomas J; *Poumako*, above n 47, para 80 Thomas J. Compare *Poumako*, above n 47, para 37 Gault J.

being sentient, is not capable of forming an intention and accordingly, it is not always clear precisely what is meant by references to it doing so.<sup>62</sup>

It is therefore helpful that the most considered judgment on this point in *Hansen*, that of McGrath J, was cast in the less opaque language of "statutory purpose".<sup>63</sup> Having begun by stressing the centrality of the text,<sup>64</sup> his Honour emphasised that this does not permit the interpreter to put aside purpose and context and to revert to literal meaning as the sole determinant of what is or is not possible under section 6. In his Honour's view, purpose and context are essential aspects of any true search for legislative meaning.<sup>65</sup> McGrath J acknowledged that section 6 of the Bill of Rights Act, together with the traditional common law presumptions, complement the principle of purposive interpretation. In his view, however, they are subservient to it, a conclusion that in his mind is confirmed by section 5(1) of the Interpretation Act 1999:<sup>66</sup>

Section 6 ... adds to, but does not displace, the primacy of s 5 of the Interpretation Act ... and it does not justify the court taking up a meaning that is in conflict with s 5. That would be contrary to s 4 [of the Bill of Rights Act]. Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation. To qualify as a meaning that can be given under s 6 what emerges must always be viable, in the sense of being a reasonably available meaning on that orthodox approach to interpretation ...

McGrath J's observations on this point received implicit support from the references to purpose in the Chief Justice's and Blanchard J's judgments, set out above. Blanchard J additionally invoked the language of "intention", positing that the courts' job is to give effect to what appears to be the "overall Parliamentary intention".<sup>67</sup> He accepted that this intention must be taken to be a compound one, "involving the specific intention to be discerned from the provision in issue read in light of the general overriding directions in ss 4–6".<sup>68</sup> However, where the specific intention is "plainly within the contemplation of the legislators", it must be respected.<sup>69</sup>

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<sup>62</sup> It is for this reason that some, including the Law Commission, have preferred not to use this term. See for example New Zealand Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, Wellington, 1990) para 73; *Hansen*, above n 13, para 14 Elias CJ.

<sup>63</sup> *Hansen*, above n 13, paras 248–252 McGrath J.

<sup>64</sup> *Ibid*, para 237 McGrath J.

<sup>65</sup> *Ibid*, paras 249–250 McGrath J.

<sup>66</sup> *Ibid*, para 252 McGrath J. See also *ibid*, paras 250–251 McGrath J.

<sup>67</sup> *Ibid*, para 61 Blanchard J.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

Tipping J likewise held that section 6 "cannot be used to give a meaning to an enactment which is clearly contrary to the meaning which Parliament understood its words to convey"<sup>70</sup> and contrasted a meaning that is "reasonably possible" with one that "defeats Parliament's purpose".<sup>71</sup>

*Hansen*, then, affirmed two themes in the New Zealand case law as to the line between permissible "interpretation" and impermissible "legislation" under section 6 and clarified a third. First, the meanings adopted under section 6 must be "reasonable" ones that are "properly open". Secondly, in determining what is or is not "reasonable" in this respect, the interpreter is constrained by the statutory language. Thirdly and finally, he or she is also constrained by the statutory purpose (or, perhaps, by Parliament's "intention", whatever that might mean).

### **III RIGHTS-MANDATED INTERPRETATION AND THE COMMON LAW**

*Hansen* reflects a commitment from the still new Supreme Court to exploring the implications of section 6 of the Bill of Rights Act and to clarifying the approach that should be taken to interpreting statutes in light of it. For that approach to be principled and coherent, however, it must necessarily be grounded in broader conceptions of what it means to have a bill of rights and of how the Bill of Rights Act interrelates with the wider legal and constitutional matrix in which it was enacted.

In this article, I want to pursue one important aspect of this wider conception: the relationship between the Bill of Rights Act and common law principles promoting legislative consistency with fundamental norms. My suggestion is that the New Zealand case law reflects a particular vision of that relationship: it envisages the Bill of Rights Act as a legislative *manifestation* of (as opposed to departure from) common law approaches to value-oriented interpretation. This point can be developed both by reference to the New Zealand case law and, as a point of contrast, by reference to the position in the United Kingdom under the Human Rights Act (UK).

#### **A The Bill of Rights Act and the Common Law "Principle of Legality"**

In essence, section 6 of the Bill of Rights Act affirms a value-oriented approach to statutory interpretation. In deducing legislative meaning, courts and other interpreters are to strive to adopt constructions that are consistent with values derived from a source external to the statute itself: those enunciated in Part II of the Bill of Rights Act and affirmed in its Long Title as "fundamental".

As is well known, value-oriented interpretation is also a feature of common law method. Thus, for example, Professor John Burrows' *Statute Law in New Zealand* sets out a non-exclusive list of nine "fundamental principles" that the common law courts strive to protect when interpreting statutes including the liberty of the subject, freedom of property, the right to a fair hearing, privacy,

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<sup>70</sup> Ibid, para 156 Tipping J.

<sup>71</sup> Ibid, para 158 Tipping J.

freedom of speech and solicitor–client privilege.<sup>72</sup> The deployment of such common law principles (or as they have sometimes been called, "presumptions") in the interpretive process long outdates the enactment of the Bill of Rights Act.<sup>73</sup> Their fortunes have, however, waxed and waned over time.<sup>74</sup> For example, during the late 20<sup>th</sup> century the ascendancy of purpose-oriented approaches to statutory interpretation created a legitimacy crisis for the common law principles of interpretation and led to a general decline in reliance on them.<sup>75</sup> On the other hand, the last decade has witnessed something of a counter-trend, with judges in New Zealand and the United Kingdom embracing a common law "principle of legality": a strong presumption that Parliament does not intend to legislate contrary to fundamental human rights.<sup>76</sup> In *R v Secretary of State for the Home Department, ex parte Simms*, Lord Hoffmann famously described the effect of this principle of legality in the following terms:<sup>77</sup>

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

The affinity between section 6 of the Bill of Rights Act and value-oriented interpretation at common law is self evident. There are, however, a number of issues surrounding the precise relationship between section 6 and the common law principles of interpretation that remain to be resolved.<sup>78</sup> The particular concern of this article is with just one of these issues: the relative potency

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72 JF Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) Chapter 11.

73 See for example John Willis "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1, 17 referring albeit with disapproval to the deployment of a common law "bill of rights".

74 For helpful discussions of the principal trends during the 20<sup>th</sup> and early 21<sup>st</sup> century see Burrows "Interpretation of Statutes", above n 27; JJ McGrath, "Reading Legislation and Ivor Richardson" (2002) 33 VUWLR 1017. The significance of these trends is considered further below: Part IV B Purpose versus Principle: the Age-Old Conflict.

75 Burrows "Interpretation of Statutes", above n 27, 983–984; McGrath, above n 74, 1019–1027 and 1038.

76 See for example *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 573–575 (HL) Lord Browne-Wilkinson; 587–590 Lord Steyn; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 130 (HL) Lord Steyn [*Simms*]; 131 Lord Hoffmann; *R v Pora* [2001] 2 NZLR 37, para 53 (CA) Elias CJ [*Pora*].

77 *Simms*, above n 76, 131 Lord Hoffmann.

78 Professor Paul Rishworth raises a number of such issues in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 38–39. See also *ibid*, 123–124.

of section 6 vis-à-vis common law techniques of value-oriented interpretation. It is helpful in this respect to contrast two potential ways of thinking about the section 6.

The first is that section 6 is essentially cut from the same cloth as the common law techniques of value-oriented interpretation. Its role is to legitimise the utilisation of these techniques in relation to a particular class of values, as defined in Part II of the Bill of Rights Act.

The second potential way of thinking about section 6 is that it introduces "an important and far-reaching new approach to the construction of statutes".<sup>79</sup> On this account, section 6 augurs a significant departure from common law understandings about the role of value-oriented interpretation and justifies an approach that is distinctive from, and more potent than, the common law approach.

Some incipient attraction to the latter approach can be seen in Cooke P's observation, made in the early decision of *Ministry of Transport v Noort*, that section 6 "lays down a rule of interpretation comparable in importance to — perhaps of even greater importance than — ... the common law presumption ... in *Morris v Beardmore*".<sup>80</sup> The President immediately qualified this statement, however, by the suggestion that "can be given" in section 6 means "can reasonably be given" and that "a strained interpretation would not be enough".<sup>81</sup>

Nine months earlier in *R v Rangi*, Casey J had already articulated the alternative, more unitary approach.<sup>82</sup> Writing for a unanimous Court of Appeal in a case involving the "basic principle of criminal law" that the onus of proof remains on the Crown, His Honour noted that this common law principle was "reflected" in the Bill of Rights Act and then invoked the two sources of value (common law and statutory) simultaneously to justify his conclusion that the relevant legislation should not be interpreted as reversing the onus of proof.<sup>83</sup>

It is this perhaps narrower vision of section 6 of the Bill of Rights Act as "reflective" of traditional common law approaches to value-oriented interpretation that predominates in the subsequent case law. Thus in *Simpson v Attorney-General [Baigent's Case]*, Gault J said that the operative provisions of the Bill of Rights Act "probably go little further than the common law presumption of statutory interpretation that where possible statutes are not to be interpreted as

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79 *Lambert*, above n 23, para 78 Lord Hope, speaking of the Human Rights Act (UK), s 3(1).

80 *Noort*, above n 46, 272 Cooke P.

81 *Ibid.*

82 *R v Rangi* [1992] 1 NZLR 385 (CA) Casey J for the Court.

83 *Ibid.*, 388–389 Casey J for the Court.

abrogating the common law rights of citizens".<sup>84</sup> In *Ngati Apa Ki Te Waipounamu Trust v The Queen*, Elias CJ observed of the rights contained in sections 20 and 27 of the Bill of Rights Act:<sup>85</sup>

Such basic rights cannot be overridden by general or ambiguous words in a statute ... This principle of legality, recognised by the common law, has been expressly enacted by s 6 of the New Zealand Bill of Rights Act 1990 ...

Similarly in *R v Pora* the Chief Justice observed that:<sup>86</sup>

By s 6 the New Zealand Parliament has adopted a general principle of legality ... Such principle was applied as a principle of the common law before the United Kingdom Human Rights Act 1998...

In *Hansen* itself, the relationship between section 6 and the common law principle of legality was touched on by McGrath J. He began by acknowledging the traditional role played by common law presumptions in the interpretative process and by pointing to the fact that their significance had lessened with the modern emphasis on purposive interpretation.<sup>87</sup> Against that background, he observed:<sup>88</sup>

Section 6 should however be seen as requiring that judges apply the presumption that legislation is to be interpreted in accordance with fundamental rights, as part of the statutory reassertion of the importance of New Zealand's commitment to human rights in the interpretation exercise.

Elias CJ also referred expressly to the relationship between the Bill of Rights Act and the common law principle of legality. In defending her view that section 6 may indeed entail interpretations that appear linguistically to be strained, she noted:<sup>89</sup>

Nor is this heretical ... Where fundamental rights are affected, particularly those protected by international covenants to which New Zealand is a party, apparent meaning yields to less obvious meaning under common law presumptions protective of bedrock values. The common law had, I think, already evolved beyond requiring ambiguity before interpreting legislation to conform wherever possible with human rights instruments and fundamental values of the common law. In any event, s 6 of the New Zealand Bill of Rights Act now makes it clear that textual ambiguity is not required ...

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84 *Baigent*, above n 54, 712 Gault J dissenting in part.

85 *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, para 82 (CA) Elias J [*Ngati Apa*]. Section 20 provides for the right of minorities to enjoy their culture and section 27 provides for the right to natural justice.

86 *Pora*, above n 76, para 53 Elias CJ. See also *ibid*, paras 54–55 Elias CJ; paras 157–158 Thomas J; *Drew*, above n 9, para 67 (CA) Blanchard J for the majority.

87 *Hansen*, above n 13, paras 250–251 McGrath J.

88 *Ibid*, para 251 McGrath J.

89 *Ibid*, para 13 Elias CJ.

The overarching message conveyed by these dicta is that section 6 represents a continuation of, rather than a departure from, common law conceptions of the role of fundamental values in statutory interpretation. This juxtaposition is admittedly somewhat oversimplified. Even on the former view, the Bill of Rights Act may well be seen to have a legitimising effect on the deployment of the common law "principle of legality" (as reflected in McGrath J's observation in *Hansen* quoted above) and may stimulate an evolution in thinking about its operation (as reflected in Elias CJ's observation). The point for present purposes, however, is that section 6 of the Bill of Rights Act has not been seen to represent a significant break from common law method.

As I have suggested elsewhere, this unitary approach to value-oriented interpretation has embraced a further principle of construction: the common law principle that legislation ought to be interpreted consistently with international law.<sup>90</sup> In other jurisdictions such as the United Kingdom, this principle is seen to give rise only to a weak presumption that is conditional on "ambiguity" in the old fashioned sense of a patent ambiguity identified on the face of the statute.<sup>91</sup> One of the significant consequences of this narrow approach is that the principle of consistency with international law cannot be invoked in administrative law cases to constrain powers that have been conferred in broad or open-ended terms.<sup>92</sup> During the last decade, however, in a unique jurisprudence spearheaded by Justice Keith himself, the New Zealand appellate courts have rejected any ambiguity requirement and have elevated the principle of consistency with international law to a strong presumption of status and influence seemingly equivalent to section 6 of the Bill of Rights Act and to the common law principle of legality adverted to above.<sup>93</sup>

This trend is manifested with particular clarity in the two pieces of litigation to reach the Supreme Court in relation to Mr Ahmed Zaoui.<sup>94</sup> In the first, the Supreme Court invoked the international law presumption in tandem with the common law principle that clear statutory wording is required to take away the inherent jurisdiction to grant bail.<sup>95</sup> In the second, the Court invoked the international law presumption in tandem with section 6 of the Bill of Rights Act.<sup>96</sup> In neither

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90 Geiringer "*Tavita and All That*", above n 2; Geiringer "*International Law through the Lens of Zaoui*", above n 2, 315–318.

91 For example *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL) [*Brind*].

92 Ibid, 747–748 Lord Bridge; 760–761 Lord Ackner. See Geiringer "*Tavita and All That*", above n 2, 75–77.

93 See especially *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) [*Sellers*]; *Zaoui (No 2)*, above n 31. See Geiringer "*Tavita and All That*", above n 2, 75–82; Geiringer "*International Law through the Lens of Zaoui*", above n 2, 315–318.

94 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (NZSC); *Zaoui (No 2)*, above n 31.

95 *Zaoui v Attorney-General*, above n 94, para 44 Judgment of the Court.

96 *Zaoui (No 2)*, above n 31, paras 90–91 Keith J for the Court.

case did the Court draw any distinction between the relative force and effect of these three sources of influence on the interpretive process.

### **B The Position in the United Kingdom**

The apparent convergence in the approach taken by the New Zealand courts to interpretation of legislation in conformity with the Bill of Rights Act, in conformity with common law principles and in conformity with international law can helpfully be contrasted with the more compartmentalised and stratified approach taken by the United Kingdom courts. As already discussed, the United Kingdom courts have held (most infamously in *R v Secretary of State for the Home Department, ex parte Brind*) that the principle that legislation is to be interpreted consistently with international law only gives rise to a weak presumption that must be triggered by an ambiguity.<sup>97</sup> That narrow view of the effect of the international law presumption has, to my knowledge, never been entirely abandoned, notwithstanding recent House of Lords jurisprudence that evinces increasing receptivity to the invocation of international law in general.<sup>98</sup>

This restrictive approach to the international law presumption sits in stark juxtaposition to case law during the late 1990s requiring clear statutory language to override fundamental human rights recognised by the common law.<sup>99</sup> The judicial embrace of this common law "principal of legality" has in practice significantly confined the impact of the *Brind* rule. International law is not, however, coextensive with human rights and thus, *Brind* lives on unless or until it is expressly overturned.<sup>100</sup>

Turning to the Human Rights Act (UK), the approach taken to rights-consistent interpretation under section 3(1) of the Human Rights Act (UK) is somewhat unsettled and contradictory. What can be said is that there is a line of House of Lords authority that suggests that section 3(1) marks a significant break from common law conceptions of the role of fundamental values in the interpretive process. The poster child for this approach is *Ghaidan v Mendoza* in which a 4–1 majority in the House of Lords eschewed each of the three features of the New Zealand case law on section 6 of the Bill of Rights Act that have been identified above.<sup>101</sup> First, their Lordships expressly rejected the

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<sup>97</sup> *Brind*, above n 91, 747–748 Lord Bridge; 760–761 Lord Ackner.

<sup>98</sup> See for example *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 (HL). There are, however, no United Kingdom equivalents to *Zaoui (No 2)* (above n 31) and *Sellers* (above n 93) in which the international law presumption has been invoked directly and successfully to constrain administrative action. See Geiringer "International Law through the Lens of *Zaoui*", above n 2, 318.

<sup>99</sup> See Part III A The Bill of Rights Act and the Common Law "Principle of Legality".

<sup>100</sup> In New Zealand, for example, the key cases in which the role of the presumption in the constraint of administrative action have been considered have included a case about civil aviation (*New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA)) and a case about maritime law (*Sellers*, above n 93).

<sup>101</sup> *Ghaidan*, above n 10. Of the four Law Lords in the majority Lord Nicholls, Lord Steyn and Lord Rodger each handed down substantive opinions on the scope and application of section 3(1). Baroness Hale only

notion that "possibility" in section 3(1) of the Human Rights Act (UK) is glossed by a requirement of "reasonableness" and contrasted section 3(1) in this respect with "the New Zealand model".<sup>102</sup> Secondly, their Lordships posited that the statutory language is not determinative of whether a rights-compatible reading of legislation is "possible" in light of that section. The operation of section 3(1) does not "depend critically upon the particular form of words adopted" and is not inhibited by the "mere fact the language under consideration is inconsistent with a Convention-compliant meaning".<sup>103</sup> Rather, section 3(1) empowers the courts, if necessary, to change the meaning of the legislation.<sup>104</sup>

Section 3 enables language to be interpreted restrictively or expansively. But section 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 section 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.

Thirdly, their Lordships also held that section 3(1) may require a departure from "the intention reasonably to be attributed to Parliament in using the language in question".<sup>105</sup> That 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 section 3".<sup>106</sup>

If text and purpose are not the touchstones of what is "possible" in light of section 3(1) then the question becomes how the line between possibility and impossibility is to be determined. The *Ghaidan* court identified two, overlapping limits to the operation of section 3(1): the underlying thrust of the legislation and the courts' institutional capacity. As to the first, their Lordships held that section 3(1) does not authorise a court to adopt a meaning that is inconsistent with what they variously described as "a fundamental feature" of the legislation,<sup>107</sup> "the underlying thrust" of the

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gave very brief reasons on the point but recorded her agreement with the reasons given by her three colleagues.

<sup>102</sup> Ibid, para 44 Lord Steyn. The dissenting Law Lord, Lord Millett, seems to have agreed with the majority on this point: see *ibid*, para 67.

<sup>103</sup> Ibid, paras 31–32 Lord Nicholls. See also *ibid*, para 44 Lord Steyn; paras 110 and 123 Lord Rodger.

<sup>104</sup> Ibid, para 32 Lord Nicholls. See also *ibid*, para 124 Lord Rodger. For further evidence of this rejection of text as the primary conveyor of what is or is not "possible" see *ibid*, para 35 Lord Nicholls and para 129 Lord Rodger, where their Lordships articulated the outcome of the case without any attempt to construe the statutory language at issue.

<sup>105</sup> Ibid, para 30 Lord Nicholls.

<sup>106</sup> Ibid. See also para 40 Lord Steyn.

<sup>107</sup> Ibid, para 33 Lord Nicholls; para 115 Lord Rodger.

legislation,<sup>108</sup> the "grain" of the legislation,<sup>109</sup> the "cardinal principle" of the legislation,<sup>110</sup> and "the very core and essence, the 'pith and substance' of the measure".<sup>111</sup> As to the second, their Lordships held that the courts cannot make decisions for which they are not institutionally equipped.<sup>112</sup> This might be the case, for example if making the legislation Convention-compatible would involve the substitution of a detailed statutory scheme,<sup>113</sup> if a policy choice needs to be made between different methods for achieving Convention-compliance,<sup>114</sup> or if the decision would have far-reaching practical repercussions that the courts are not well-equipped to evaluate.<sup>115</sup>

*Ghaidan* is doubtless something of a high watermark in the United Kingdom jurisprudence on section 3(1). The approach enunciated in it is, however, consistent with a thematic thread running through many other House of Lords decisions both before and since that emphasises the potency of the section 3(1) obligation. Thus, section 3(1) had been described at various times as a "strong interpretive obligation",<sup>116</sup> a "very strong and far reaching obligation",<sup>117</sup> an "emphatic adjuration by the legislature",<sup>118</sup> an "important and far-reaching new approach to the construction of statutes",<sup>119</sup> "uncompromising and very important,"<sup>120</sup> and a rule "quite unlike any previous rule of statutory interpretation".<sup>121</sup> A number of the specific features of the *Ghaidan* approach set out above had been articulated, although not as clearly, in previous House of Lords jurisprudence and in

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<sup>108</sup> Ibid, para 33 Lord Nicholls.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid, para 114 Lord Rodger.

<sup>111</sup> Ibid, para 111 Lord Rodger.

<sup>112</sup> Ibid, para 33 Lord Nicholls.

<sup>113</sup> Ibid, para 49 Lord Steyn; para 110 Lord Rodger.

<sup>114</sup> Ibid, para 33 Lord Nicholls.

<sup>115</sup> Ibid, para 34 Lord Nicholls; para 115 Lord Rodger. For a more detailed exploration of the *Ghaidan* decision see Geiringer "It's Interpretation, Jim", above n 30.

<sup>116</sup> *Kebilene*, above n 24, 366 Lord Steyn, cited in *R v A*, above n 16, para 162 Lord Hutton; *Dabas v High Court of Justice, Madrid* [2007] 2 AC 31, para 76 (HL) Lord Brown.

<sup>117</sup> *Sheldrake*, above n 23, para 28 Lord Bingham.

<sup>118</sup> *R v A*, above n 16, para 44 Lord Steyn, echoing *Kebilene*, above n 24, 373 Lord Cooke. See also *R v A*, above n 16, para 162 Lord Hutton.

<sup>119</sup> *Lambert*, above n 23, para 78 Lord Hope.

<sup>120</sup> *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2001] 2 AC 277, 300 (HL) Lord Cooke.

<sup>121</sup> *R v A*, above n 16, para 108 Lord Hope.

particular, in the opinion of Lord Steyn in *R v A*.<sup>122</sup> The approach has been adopted and applied in at least some subsequent House of Lords authority.<sup>123</sup>

The strong interpretive approach articulated in *Ghaidan* may well explain the different outcomes in *Hansen* and *Lambert* respectively,<sup>124</sup> and certainly explains the apprehension of at least some of the *Hansen* judges that the approach of the United Kingdom courts is "more adventurous" than their New Zealand counterparts.<sup>125</sup> This vision of section 3(1) as an obligation of "unusual and far-reaching character"<sup>126</sup> would appear to demarcate value-oriented interpretation as mandated by section 3(1) from value-oriented interpretation at common law.<sup>127</sup> Section 3(1) may well "subsume" the common law approach (as suggested by Waller LJ in *R (McLellan) v Bracknell Forest Borough Council*) but it does not cohere with it.<sup>128</sup>

On the other hand not all United Kingdom case law on section 3(1) of the Human Rights Act (UK) is consistent with the strong interpretive approach articulated in *Ghaidan*. In particular, in *R v Commissioners of Inland Revenue, ex parte Wilkinson (Wilkinson)*, issued only one year after *Ghaidan*, Lord Hoffmann speaking for a unanimous court reasserted the importance of text and purpose as constraints on the interpretive possibilities available in light of section 3(1) and even invoked the antipodean gloss of reasonableness.<sup>129</sup> By virtue of section 3(1), he said, the European Convention on Human Rights and Fundamental Freedoms forms a significant part of the background against which all statutes are to be interpreted and creates a "strong presumption" that Parliament did not intend a statute to bear a meaning that would be incompatible with Convention rights. The process is still, however, one of interpretation in the sense of "the ascertainment of what ... Parliament would reasonably be understood to have meant by using the actual language of the

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<sup>122</sup> Ibid, paras 43–44 Lord Steyn.

<sup>123</sup> See *Sheldrake*, above n 23, paras 24–28 Lord Bingham (with the support of Lords Steyn, Phillips, Rodger and Carswell), adopting key passages from both *R v A* (above n 16) and *Ghaidan* (above n 10); and perhaps most strikingly *Secretary of State for Work and Pensions v M* [2006] AC 91, para 117 (HL) Baroness Hale, in which her Lordship, in reliance on *Ghaidan* (above n 10) would have reached a result completely contrary to the language of the statute. As none of the other Law Lords in *Secretary of State for Work and Pensions v M* found a violation of a Convention right, they did not reach the section 3(1) issue.

<sup>124</sup> See also *Sheldrake*, above n 23, para 53 Lord Bingham, in which his Lordship, in reading down similar legislation to impose an evidential rather than a legal burden, was explicit about the need to disregard statutory purpose in order to reach the result.

<sup>125</sup> *Hansen*, above n 13, paras 150–156 Tipping J; paras 240–247 McGrath J.

<sup>126</sup> *Ghaidan*, above n 10, para 30 Lord Nicholls.

<sup>127</sup> But see *ibid*, para 104 where Lord Rodger, perhaps the most equivocal of the *Ghaidan* majority, described section 3(1) as "enacting" the principle of legality.

<sup>128</sup> *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129, para 76 (CA) Waller J.

<sup>129</sup> *R v Commissioners of Inland Revenue, ex parte Wilkinson* [2006] 1 All ER 529, para 17 (HL) [Wilkinson].

statute".<sup>130</sup> Further, section 3(1) does not require the courts "to give the language of statutes acontextual meanings".<sup>131</sup>

It is interesting to note that in articulating this rather less bold conception of the role of section 3(1), Lord Hoffmann expressly invoked the common law principle of legality.<sup>132</sup>

Just as the "principle of legality" meant that statutes were construed against the background of human rights subsisting at common law ... so now, section 3 requires them to be construed against the background of Convention rights. There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights.

The United Kingdom case law thus discloses two competing visions of the role of the Human Rights Act (UK) in statutory interpretation. The first sees section 3(1) as a "far-reaching new approach to the construction of statutes";<sup>133</sup> the second sees it as the inheritor of the common law approach to value-oriented interpretation.

It would be unwise to offer more than passing comment as to which of these two approaches is likely to triumph in the United Kingdom. It is certainly interesting to note in this respect that the only Law Lord to have sat on both *Ghaidan* and *Wilkinson*, Lord Nicholls, was content to concur in Lord Hoffmann's decision in the latter case. That implicit repudiation of the *Ghaidan* approach, together with Lord Steyn's retirement from the House of Lords, might well tempt one to conclude that the strong interpretive approach articulated in *Ghaidan* has had its day. On the other hand, the intuition that section 3(1) is an obligation of unprecedented character and far-reaching implications does appear to be shared by a number of Law Lords.<sup>134</sup> The difficulty that they face is in how to articulate the contours of an approach to section 3(1) that acknowledges its distinctive and constitutionally significant character but that does not offend the legislative proviso that section 3(1) "does not affect the validity, continuing operation or enforcement" of incompatible primary legislation.<sup>135</sup>

For present purposes it is enough to reiterate that New Zealand judges have not on the whole considered themselves to be faced with the same dilemma. Rather, they have assumed that section 6

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid. See also *Simms*, above n 76, 131–132 Lord Hoffmann.

<sup>133</sup> *Lambert*, above n 23, para 78 Lord Hope.

<sup>134</sup> Above nn 116–123.

<sup>135</sup> Human Rights Act (UK), s 3(2). See also Human Rights Act (UK), s 6(2).

is reflective of the traditional common law approach to value-oriented interpretation and have operated within whatever boundaries they perceive to be set by that approach.

#### **IV    *IMPLICATIONS OF THE BILL OF RIGHTS ACT / COMMON LAW CONVERGENCE***

There is clearly an important question to be answered as to whether the New Zealand courts ought to have conflated value-oriented interpretation under the Bill of Rights Act with value-oriented interpretation at common law. That question is, however, best addressed once the implications of this conflation are fully understood. The remainder of this article begins to tease out those implications by focussing on the cogency of the *Hansen* decision.

Recognition of an equivalency between value-oriented interpretation under the Bill of Rights Act and value-oriented interpretation at common law does not provide a magic key to describing the precise limits of the section 6 power. The common law presumptions are themselves slippery, contentious and elusive beasts that have been invoked with varying degrees of forcefulness depending on time, place, surrounding circumstance, the particular value that is being protected, and the proclivities of particular judges. Nevertheless the fact of an equivalency between Bill of Rights Act and common law method must in itself have some implications for the limits and possibilities of section 6. I explore this point below by reference to three aspects of the *Hansen* methodology: the two-phase approach to statutory interpretation proposed by the majority, the proposition that section 6-mandated interpretation does not entitle the courts to stray outside the limits set by statutory "purpose" and the interrelationship between sections 5 and 6 of the Bill of Rights Act.

##### **A    *The Two-Phase Approach to Statutory Interpretation***

To recapitulate, the majority in *Hansen* set out a series of steps that they agreed would generally be helpful when conducting an exercise of statutory interpretation in light of the Bill of Rights Act. Buried within this methodology is a two-phase approach to the core task of interpreting the statute. At the beginning of the exercise, consideration is to be given to the meaning of the legislation in light of traditional principles of statutory interpretation but discounting the effect of the Bill of Rights Act. If, on further analysis, the court considers that this "ordinary meaning" violates a protected right in a manner that is not demonstrably justifiable in terms of section 5 then the court is to revisit the meaning of the offending provision. On this second interpretive inquiry the court is to consider whether, bearing in mind section 6 of the Bill of Rights Act, the provision "can be given" a meaning that is consistent, or more consistent, with the protected right.<sup>136</sup>

Were value-oriented interpretation under the statutory code to be conceptualised as being distinct from and more potent than value-oriented interpretation at common law, this two-phase approach would make some degree of sense. For that reason, it is perhaps not surprising that the

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<sup>136</sup> See Part II The Supreme Court's Decision.

House of Lords has adopted a similar methodology under section 3(1) of the Human Rights Act (UK).<sup>137</sup> If, however, section 6 is seen to reflect and embody the common law principle of legality, the two-phase approach is surely redundant as the common law principle of legality ought to have been factored into the initial "ordinary meaning" inquiry.

None of the judges in *Hansen* addresses the role to be played by common law presumptions in the *Hansen* inquiry. McGrath J simply notes that the first step involves consideration of "whether the circumstances fall within the natural meaning of the statutory provision being applied" but does not stipulate which of the traditional techniques of statutory construction would be relevant to that determination.<sup>138</sup> Tipping J says:<sup>139</sup>

The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with rights and freedoms affirmed by the Bill of Rights should not be lightly attributed to Parliament.

This stipulation would seem obliquely to support the view that all relevant common law principles of interpretation are to be addressed during the initial inquiry.

It is certainly difficult to imagine that their Honours intended the initial inquiry to proceed in isolation from the common law context in which the courts have traditionally performed their interpretive role. That being so one might expect that common law presumptions relating to consistency with human rights as well as with international law would be factored into the initial inquiry. If they are, though, what precisely is the subsequent section 6-mandated inquiry supposed to add? The common law has developed to the point of requiring "express language or necessary implication" to trespass upon fundamental rights.<sup>140</sup> Conversely, the *Hansen* judges have said that Bill of Rights-mandated interpretation is confined to interpretations that are reasonably available on the text and in the light of the purpose of the legislation. It is difficult, therefore, to conceive of circumstances in which the subsequent section 6-mandated inquiry would deliver a different result from the earlier common law-consistent inquiry. If that is so then all but the first step of the *Hansen* inquiry is superfluous.

One must of course acknowledge that the class of values protected by the Bill of Rights Act is not identical to the class of values traditionally protected by the common law.<sup>141</sup> Nevertheless, the

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<sup>137</sup> See for example *Ghaidan*, above n 10, paras 5–7 Lord Nicholls; *ibid*, paras 54–56 Lord Millett; *Lambert*, above n 23 Lord Steyn; *Attorney-General v Scotcher* [2005] 3 All ER 1, para 31 (HL) Lord Rodger for the House; *Sheldrake*, above n 23, para 1 Lord Bingham. See Aileen Kavanagh "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998" (2006) 26 OJLS 179, 190.

<sup>138</sup> *Hansen*, above n 13, para 192 McGrath J.

<sup>139</sup> *Ibid*, para 89 Tipping J.

<sup>140</sup> See for example *Simms*, above n 76, 131 Lord Hoffmann.

<sup>141</sup> See Rishworth, above n 78, 38–39.

possibility that a right would attract the protection of section 6 of the Bill of Rights Act but not of the common law principles of interpretation is negligible for two reasons. First, the common law principle of legislative consistency with international law embraces the International Covenant on Civil and Political Rights from which the Bill of Rights Act was fashioned. Secondly, the judicial assertion over the last decade of a "principle of legality" requiring legislative consistency with fundamental rights has been accompanied by an apparent willingness to update the content of common law rights to better reflect twenty first century sensibilities.<sup>142</sup>

One must therefore give serious consideration to the possibility that their Honours did intend the first inquiry to proceed divorced from all value-oriented interpretation, whether in reliance on the Bill of Rights Act, the common law or international law. That would, however, be a dangerous methodology as it would detach the initial assessment of legislative meaning from the rich, value laden context in which it has traditionally unfolded. The human rights context would no longer be part of the "background" against which statutes are to be construed (as Lord Hoffmann put it in *Wilkinson*)<sup>143</sup> but would rather be reduced to a supplementary consideration to be addressed in cases of prima facie textual or purposive deficiency. Bearing in mind that according to *Hansen*, text and purpose are the touchstones of both inquiries, the related concern would be that such an approach would contain an inherent bias against the adoption of rights-consistent interpretations. That is because judicial determinations of what text and purpose rightfully require at the initial stage might prove difficult to dislodge later on.

More generally it might be said that the strength, if there is one, of the New Zealand approach to value-oriented interpretation is that it conceives of the Bill of Rights Act as inseparable from the rich, textured and multifaceted context provided by the common law and by international law. The two-phase approach to interpretation set out in *Hansen* undermines these synergies by juxtaposing Bill of Rights Act-mandated meaning with "ordinary" meaning.

It is only fair to note that none of the three majority judges regarded the two-phase approach set out in *Hansen* as prescriptive and that each offered their own observations as to the circumstances in which it would or would not apply.<sup>144</sup> Suffice to note, however, that none of the explicit hedges placed around the methodology by the individual justices saves it from the redundancy problem set out above. By way of example, the judge that offered the most limited view as to the circumstances

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<sup>142</sup> For a striking example of this see *Ngati Apa*, above n 85, para 82 Elias CJ, in which her Honour implied that the right of minorities to enjoy their culture (Bill of Rights Act, s 20) also enjoys the protection of the common law principle of legality.

<sup>143</sup> *Wilkinson*, above n 129, para 17 Lord Hoffmann. See Part III B The Position in the United Kingdom.

<sup>144</sup> See *Hansen*, above n 13, paras 57 and 61 Blanchard J; paras 93 and 94 Tipping J; para 192 McGrath J. It is also interesting to observe that in *Brooker v Police* [2007] 3 NZLR 91 (NZSC), a Bill of Rights Act case handed down only two-and-a-half months after *Hansen*, none of Blanchard, Tipping or McGrath JJ obviously followed the series of steps that they had agreed on in *Hansen*.

in which the approach would apply was Blanchard J. He suggested that the approach should be followed "when the natural meaning of a legislative provision and the obvious Parliamentary intention coincide".<sup>145</sup> With respect, given his Honour's apparent acceptance that section 6-mandated interpretation does not justify a departure from either text or "parliamentary intention", this formulation exposes the redundancy problem particularly vividly.<sup>146</sup>

In truth, the point of departure in *Hansen* was not the "ordinary" meaning of the provision but rather, the fact that the provision had a long established meaning that had been confirmed previously by the appellate courts. In such circumstances, it may well be entirely appropriate to take that meaning as a starting point in the inquiry and to consider whether it is consistent with protected rights and freedoms before invoking section 6. This established meaning should not, however, be honoured with the epithet "ordinary" or "natural" at the start of the inquiry. If section 6 is a statutory embodiment of the common law principle of legality then the whole point of the section 6 inquiry in such cases is surely to re-evaluate the "ordinary" meaning of the provision.

### ***B Purpose versus Principle: the Age-Old Conflict***

It will be remembered that all five of the *Hansen* judges accepted that section 6 of the Bill of Rights Act does not entitle the interpreter to adopt meanings that are inconsistent with the purpose of the statute (or, perhaps, "parliamentary intention").<sup>147</sup> For McGrath J at least, that conclusion was dictated by section 5(1) of the Interpretation Act 1999, which says that legislation is to be interpreted "from its text and in light of its purpose".<sup>148</sup> To recapitulate, he said that section 6 "does not justify the court taking up a meaning that is in conflict with s 5 [of the Interpretation Act]" because "[t]hat would be contrary to s 4 [of the Bill of Rights Act]".<sup>149</sup> In other words, because section 4 of the Bill of Rights Act denies to the courts the power to repeal, disallow or disapply other legislation, section 5(1) of the Interpretation Act 1999 must triumph over the Bill of Rights Act to the extent of any inconsistency.

The seeming simplicity of this argument is, however, belied by the fact that the application of the Interpretation Act 1999 is qualified by its own section 4(1). It stipulates that the Interpretation Act applies to all New Zealand enactments unless:

- (a) The enactment provides otherwise; or
- (b) The context of the enactment requires a different interpretation.

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<sup>145</sup> *Hansen*, above n 13, para 57 Blanchard J.

<sup>146</sup> *Ibid*, para 61 Blanchard J.

<sup>147</sup> See Part II The Supreme Court's Decision.

<sup>148</sup> *Hansen*, above n 13, para 252 McGrath J.

<sup>149</sup> *Ibid*. See also *ibid*, para 25 Elias CJ and para 61 Blanchard J, echoing the language of section 5(1).

There is a strong argument that the Bill of Rights Act is now part of "the context" of all New Zealand enactments in terms of section 4(1)(b). If that is so then to the extent that the interpretive directions in section 6 of the Bill of Rights Act and section 5(1) of the Interpretation Act 1999 come into conflict, it is the former that will triumph.<sup>150</sup>

There is insufficient space in this paper for an exhaustive exploration of this proposition in the light of the scheme, context and purpose of section 4(1)(b) of the Interpretation Act 1999.<sup>151</sup> In any event, there is an inescapable circularity in attempting to address the relationship between purposive interpretation and value-oriented interpretation through such an exercise of statutory interpretation. That is because until it is decided whether the reference to "context" in section 4(1)(b) of the Interpretation Act embraces the Bill of Rights Act, we cannot determine which interpretive principle to privilege in the interpretation of section 4(1)(b) itself.<sup>152</sup>

The relationship between purposive interpretation and section 6-mandated interpretation must therefore ultimately be resolved as a matter of legal and constitutional principle rather than statutory interpretation. It is in this light that I return to the principal theme of this paper: the judicial recognition of an equivalency between value-oriented interpretation under the Bill of Rights Act and at common law. To what extent does this unitary approach assist in resolving the question of whether statutory purpose acts as an ultimate constraint on value-oriented interpretation under the Bill of Rights Act?

The starting point in examining this question is to acknowledge that the tension between purpose-oriented and value-oriented interpretation is an age old one that long predates the enactment of either the Interpretation Act 1999 or the Bill of Rights Act. There is no doubt that as a matter of fact, the traditional common law presumptions have indeed been utilised at certain times and in certain cases to promote literal or even strained interpretations of legislation in disregard of statutory purpose.<sup>153</sup> The predecessor to section 5(1), section 5(j) of the Acts Interpretation Act 1924, had not

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150 The competing positions in this respect are set out but not resolved by Philip Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) para 27.4.6(4).

151 Suffice to say that such an examination yields indications in both directions. It is clear, for example, that the Law Commission intended the term "context" in section 4(1) of the Interpretation Act 1999 to include context derived from the "wider legal system": New Zealand Law Commission, above n 62, para 260. On the other hand, the government deleted a similar reference to context from the Law Commission's proposed draft of section 5(1) out of concern about the width and imprecision of the concept: Interpretation Bill 1997, no 90-1 (explanatory note) iii; Interpretation Bill 1997, no 90-2 (Select Committee report) ii-iii.

152 See Interpretation Act 1999, s 4(2), stipulating that the provisions of that Act apply to its own interpretation.

153 See Burrows "Interpretation of Statutes", above n 27, 982–983. The historic treatment of privative clauses and the strict construction of taxing statutes are the two examples most commonly cited in support of this proposition: see *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL); *Inland Revenue Commissioners v Westminster (Duke)* [1936] AC 1 (HL).

succeeded in eliminating such occurrences, and it is interesting to note that in proposing section 5(1), the Law Commission did not consider that it would either.<sup>154</sup>

It does not, however, necessarily follow that the historic practice of common law judges using interpretive presumptions to subvert legislative purpose was constitutionally legitimate. Purposive construction is grounded in the basic democratic principle that the courts should give effect to the law of Parliament.<sup>155</sup> There is much, therefore, to be said for the view that "legislation is not to be seen as a suspect interloper into the common law".<sup>156</sup> Further, it would be naïve to assume that common law presumptions have always been invoked in defence of modern, progressive values and in defiance of a socially conservative legislature. History reminds us that the common law has often been wielded in favour of a narrow vision of classical economic liberalism and against incursions from a modern, collectivist state.<sup>157</sup>

It is for these reasons that the latter half of the 20<sup>th</sup> century witnessed the gradual ascendancy of the principle of purposive construction and the gradual decline of literalism and its sometime bed mates, the common law presumptions.<sup>158</sup> The view of the *Hansen* judges that section 6-mandated interpretation must always operate within the constraints set by statutory purpose can be located within this trend. It reflects the view that the ascertainment of statutory purpose is the overriding goal of statutory interpretation and that all other interpretive principles or directions must bend to conform with it.<sup>159</sup>

Against that background, the view that section 6-mandated interpretation should never be allowed to subvert the purpose of the statute might arguably be said to flow from the proposition that value-oriented interpretation under the Bill of Rights Act is essentially cut from the same cloth as value-oriented interpretation at common law. To the extent that the common law presumptions have been used in the past to promote meanings that are inconsistent with statutory purpose, so the

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154 New Zealand Law Commission, above n 62, especially paras 51 and 56. See also *ibid*, para 65, where the Commission noted that the direction in section 5(1) would "in some cases ... have to be read with that in the new Bill of Rights".

155 See *ibid*, para 59.

156 *Ibid*, para 40, invoking Justice Harlan Stone's suggestion that a statute is not "an alien intruder in the house of the common law but a guest to be welcomed and made at home": Harlan F Stone "The Common Law in the United States" (1936) 50 Harv L Rev 4, 15.

157 See Jeffrey Goldsworthy "Parliamentary Sovereignty and Statutory Interpretation" in Bigwood (ed) *The Statute: Making and Meaning*, above n 27, 187, 208; Gordon Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38 VUWLR 417.

158 See for example Burrows "Interpretation of Statutes", above n 27, 983–988.

159 This view pervades McGrath J's extra-judicial writings: see McGrath, above n 74; Justice John McGrath "Purpose, *Hansard*, Rights, and Language" in Bigwood (ed) *The Statute: Making and Meaning*, above n 27, 227.

argument goes, that was and remains a constitutionally suspect activity. The same applies to section 6 of the Bill of Rights Act.

There is, however, an alternative line of reasoning that warrants careful examination. It relies on two further aspects of the legal, constitutional and historical matrix. The first is that neither constitutional principle nor the general trend in judicial behaviour is all in one direction. During the second half of the 20<sup>th</sup> century, the international human rights movement and its various regional and domestic offshoots have provided common law judges with an updated set of values to protect and with an enhanced constitutional expectation that they will act in a guardianship role with respect to them. This development provides the context for the judicial reassertion during the 1990s of a common law "principle of legality" that fundamental rights cannot be overridden by general or ambiguous words.<sup>160</sup>

The second and perhaps more significant point is that to the extent this latter development failed in itself to overcome the democratic objection articulated above, that objection was surely significantly ameliorated by the legislative codification of a bill of rights. It is entirely consistent with the view that section 6 of the Bill of Rights Act is cut from the same cloth as the common law presumptions to recognise that it nevertheless has a legitimising and galvanising effect. Section 6 provides democratic authorisation to the courts, in relation to the updated list of rights that it codifies, to draw on traditional common law understandings of the role of values in the interpretation process. In doing so, it might be argued, it provides democratic legitimacy to the techniques traditionally utilised by common law judges even where those techniques might otherwise have been regarded as suspect.

On that basis, there is surely a respectable argument to be made that section 6 of the Bill of Rights Act may on occasion entitle the courts to adopt constructions that are at odds with statutory purpose. As Lord Steyn put it in *Ghaidan* with reference to the Human Rights Act (UK), the question of whether the adoption of a section 6-mandated meaning would "flout the will of Parliament as expressed in the statute under examination ... cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the [Bill of Rights Act]".<sup>161</sup>

I do not necessarily suggest that on this argument, the Bill of Rights Act would entitle or require the courts to override a contrary legislative purpose in every case where they come into conflict. As Professor Janet McLean has astutely suggested, much depends on context. The practical impact of

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<sup>160</sup> For example *Simms*, above n 76; Burrows "Interpretation of Statutes", above n 27, 990. See Part III A The Bill of Rights Act and the Common Law "Principle of Legality".

<sup>161</sup> *Ghaidan*, above n 10, para 40 Lord Steyn. See also *ibid*, para 30 Lord Nicholls; *Sheldrake*, above n 23, para 53 Lord Bingham. The approach of the courts and others to the role of parliamentary intention under section 3(1) of the Human Rights Act (UK) is usefully discussed by Aileen Kavanagh, above n 137.

section 6 of the Bill of Rights Act in any particular case is likely to depend on such factors as "the type of rule in question and the right at stake".<sup>162</sup> To that list I would add the nature of the breach, the forcefulness with which the countervailing purpose has been expressed, and the legislative history (including, for example, the extent to which Parliament addressed the human rights concerns during the legislative process).<sup>163</sup> That same flexibility characterises the deployment of presumptions at common law. The circumstances in which they have been wielded and the willingness of judges to consider them rebutted has always depended on a range of factors, including the perceived importance of the value being protected and the seriousness of the particular intrusion on it. The more serious the intrusion is perceived to be, the less likely it is that judges will allow the right to be displaced by "necessary implication" as opposed to explicit legislation direction.<sup>164</sup>

The argument that I am floating here is that this same dynamic approach to statutory interpretation must surely guide the application of section 6 of the Bill of Rights Act and that at the extremes, this may enable courts to adopt meanings that are contrary to statutory purpose. This argument deserves more careful and considered examination than there is space for here. I am, however, comforted in raising it by the fact that it is consistent with the extrajudicial observations and, indeed, the judicial behaviour of Sir Kenneth Keith himself. Writing in 2001, Sir Kenneth noted that conflicts between value-oriented and purpose-oriented interpretation can arise but did not suggest that section 5(1) of the Interpretation Act 1999 was capable of providing the answer to them. Instead, he posed the following (perhaps rhetorical) question:<sup>165</sup>

In these hard cases of choice is it possible to say much more than this: the Courts remain controlled by the text they are interpreting (that is the democratic imperative), that other matters, notably the wider values of the society, may nevertheless be relevant, and that the process of finding meaning is as much an art as a science?

This echoed the views expressed by the Law Commission when Sir Kenneth was a Commissioner: that conflicts between purpose and principle will continue to arise in the interpretation process, that legislative directions such as section 5(1) do not ultimately determine

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<sup>162</sup> McLean, above n 11.

<sup>163</sup> This latter feature was an explicit part of the reasoning in *Poumako*, above n 47.

<sup>164</sup> For example *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 714 (CA) Staughton LJ; *R v Lord Chancellor, ex parte Witham* [1998] QB 575, 586 (HC) Laws J. See also TRS Allan "Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority" (2004) 63 CLJ 685, 703–704.

<sup>165</sup> Sir Kenneth Keith "Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 77, 96.

their resolution and that generally, courts are left to make the choice between conflicting approaches.<sup>166</sup>

His Honour's judgment in *Zaoui v Attorney-General (No 2)* is, I would suggest, a case that reflects the intuition that in an appropriate case, even quite strong legislative indications of "purpose" must yield to the statutorily mandated imperatives set out in the Bill of Rights Act.<sup>167</sup>

### ***C The Interrelationship Between Sections 5 and 6***

I turn finally to the question that most divided the Supreme Court in *Hansen*: the interrelationship between sections 5 and 6 of the Bill of Rights Act. To recapitulate, a majority of three judges concluded that section 6 only requires the courts to seek a Bill of Rights Act-consistent meaning if the ordinary meaning limits a *prima facie* right or freedom in a manner that cannot be justified by reference to section 5.<sup>168</sup> The Chief Justice, on the other hand, argued that section 5 has no place in a section 6 analysis and that such an approach risks the erosion of fundamental rights.<sup>169</sup>

This is a complex and in some respects technical question and I do no more here than to offer some passing observations from the perspective already developed in this paper: that of the perceived relationship between section 6 of the Bill of Rights Act and the common law. Looked at from that perspective, one possible conclusion is that the majority's refusal to engage with section 6 until the intrusion on the right has been subjected to a prior proportionality analysis amounts to a dilution of common law method and thus, as the Chief Justice suggests, risks the erosion of fundamental rights. Clearly the deployment of common law presumptions in favour of human rights has not traditionally been subjected to such a gloss.

It would, however, be wrong to think that when judges invoke common law presumptions they do not have mechanisms available to them for mediating between competing rights and interests. The lack of precision surrounding the definition of the protected interests at common law, the discretionary invocation of common law presumptions, and the potential for variability in their

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<sup>166</sup> New Zealand Law Commission, above n 62, paras 49–56.

<sup>167</sup> *Zaoui (No 2)*, above n 31. In it, Justice Keith, writing on behalf of a unanimous Supreme Court, used section 6 of the Bill of Rights Act (in conjunction with the common law presumption of consistency with international law) to impose substantive and procedural constraints on the government's statutory power to deport Mr Zaoui once the security risk certificate being made in respect of him is confirmed. In doing so, the Court glossed over a number of strong indications within the scheme of the Immigration Act 1987 that removal of the affected individual is to be expedited in such cases. For a full discussion see Geiringer "International Law through the Lens of *Zaoui*", above n 2.

<sup>168</sup> *Hansen*, above n 13, paras 57–59 Blanchard J; paras 89–91 Tipping J; paras 186–189 McGrath J. See Part II The Supreme Court's Decision.

<sup>169</sup> *Ibid*, paras 6 and 15–24 Elias CJ.

application combine to provide judges with the flexibility to take competing interests into account, whether implicitly or explicitly.<sup>170</sup>

An alternative conclusion, therefore, is that section 5 of the Bill of Rights Act reduces at least some elements in this rather nebulous and subjective concoction down to an explicit framework. Just as codification enables the *prima facie* rights to be better defined, it also enables provision to be made for an explicit mechanism for determining what sort of intrusions judges should be concerned about and in what circumstances.<sup>171</sup>

There are two lessons to be taken from this. The first is that there is more than one way to skin a cat.

That is not to say, however, that some feline scalping techniques might not be better than others. The question of which is preferable in this instance is not one that I propose to answer here, except to say that the second and related lesson is that the question whether section 5 is to be incorporated into the interpretive exercise has consequential methodological implications. By discounting section 5, the Chief Justice's approach leaves more work to be done by other methodological techniques. One of these, as her Honour acknowledges, is the definition of the scope of the *prima facie* rights.<sup>172</sup> The other is the application of section 6 itself. If section 5 has been discounted, one might expect the invocation of section 6 to reproduce much of the flexibility and variability that has traditionally attended the common law presumptions.

The converse of this proposition is that if, as the majority suggests, a section 6 inquiry is dependent on a prior conclusion that the intrusion on the right cannot be saved by section 5, one might surely expect the application of section 6 to be more robust. On this account section 6 is not even engaged unless the particular right or freedom has been intruded on in a manner that is not reasonably justified in a free and democratic society. That is a strong condemnation, particularly if an appropriate degree of deference to legislative judgment has already been factored into the section 5 analysis.<sup>173</sup> One might, therefore, expect the courts in such circumstances to be particularly zealous in their search for an interpretive solution.

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<sup>170</sup> See Rishworth, above n 78, 123–124.

<sup>171</sup> It is worth bearing in mind in this respect that the proportionality framework provided by section 5 of the Bill of Rights Act is, in other human rights instruments (including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights), provided in the definition of individual rights.

<sup>172</sup> This technique is explicitly embraced by Elias CJ in *Hansen* and reflected in her approach to freedom of expression in the subsequent cases of *Brooker v Police*, above n 144, para 4 Elias CJ and *Rogers v Television New Zealand Ltd* [2008] 2 NZLR 277, paras 36–37 Elias CJ.

<sup>173</sup> See *Hansen*, above n 13, paras 113–119 Tipping J for a discussion of the role of deference in the section 5 inquiry.

In short, therefore, resolution of the controversy over the interrelationship between sections 5 and 6 may have a range of downstream methodological consequences which need to be carefully assessed and factored into any proposed approach.

## **V CONCLUSION**

*Hansen* reflects a serious commitment from our new Supreme Court to addressing the constitutional and practical implications of the Bill of Rights Act. In doing so, however, it is necessary to come up with a conceptually coherent vision of what the Bill of Rights Act means and how it functions. The vision of section 6 that predominates in the New Zealand jurisprudence is that it is a statutory legitimisation of the common law principle of legality. If that is so then it has downstream implications for the details of the methodology that is to be adopted. This article has attempted to address the *Hansen* decision from that perspective and to suggest that some aspects of the approach set out there may need further work.

