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**Dismantling Rights: Political Rights Theory and the New Zealand
Bill of Rights**

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I Introduction

On June 14, 1978 the prominent British public law scholar John Griffith stood before a lecture theatre at the London School of Economics and Political Science and preceded to argue that there is no such thing as rights. For dramatic purposes, it is tempting to imagine this declaration prompted audible gasps from his audience. To critique rights could be perceived as a form of legal blasphemy. Rights-based reasoning is present in vital civil instruments and pervasive moral documents which promote human welfare. The Magna Carta, praised by Lord Denning as “the foundation of the freedom of the individual against the arbitrary authority of the despot” employed rights reasoning.¹ The United Nations Declaration of Human Rights, which reflects the shared idealistic values of earth, holds the Guinness World Record for the most translated document. For many, rights have come to occupy a plane above ordinary political disputes. Those who dare to challenge this veneration represent a threat to human welfare.

It is likely these reverent sentiments towards rights were not shared by those in attendance at the London School of Economics and Political Science in 1978. Griffith’s objection to rights reasoning represented a growing belief within Political Constitutionalist thought which viewed rights as thinly veiled political claims. This critique of rights can be labeled ‘political rights theory.’ This paper will endeavour to show that the critical nature of political rights theory can be used to enhance the effectiveness of rights. If rights are approached naively their sacred status may be undermined and their legal strength curtailed.

This endeavour will involve a close examination of the New Zealand Bill of Rights Act 1990 (NZBORA) and a selection of the recent reform proposals mooted by the Constitutional Advisory Panel (CAP) Report published in November 2013. Broadly speaking, this paper will be split into three parts. The first part will offer an in depth analysis of political rights theory. It will begin outlining the political rights theory as described by Griffith. It will then

¹ Danny Danziger and John Gillingham *1215: The Year of Magna Carta* (Simon and Schuster, 2003) at 268.

argue that this criticism of rights can be traced back to the ambiguity created when legislating for rights. It will then argue that political rights theory can be improved by an application of the discourse theory. This will involve examining a brief history of rights.

The second part of this paper will apply political rights theory to the NZBORA and the CAP report's proposals. It will begin by examining the history of the NZBORA which will reveal the prevalence of political rights theory in New Zealand. It will then explain how this cynical attitude towards rights resulted in an attempt to curtail the role of the Judiciary in regulating rights. However, an examination of the operative sections of the NZBORA will reveal that this attempt resulted in awkward drafting. It will examine how the Judiciary exploited this poor drafting in order to give itself a larger role in regulating rights and identify the consequent negative effects. It will also examine the hazards of the Attorney-General's role under s 7.

Finally, it will examine whether any of the proposals in the CAP report can assuage these problems. It will use political rights theory and the discourse thesis to assess the advantages and disadvantages of each proposal. It will conclude by arguing that philosophical theory can show that the BORA still has a role to play despite the objections of political rights theory.

II Political Rights Theory

The basic premises of political rights theory are simple, although their implications are complex. These premises are best encapsulated by John Griffith's lecture in 1978.² Griffith's critique of rights rested on two broad objections of rights: philosophical and political opposition.³

² John Griffith, 'The Political Constitution' (1979) 42 MLR 1–21.

³ Griffith, above n 3, at 12.

The philosophical objection argued that rights amounted to window dressing which concealed the political claims of individuals and groups.⁴ For Griffith, the architects of bills of rights were simply skilled at translating political claims into abstract formulations and labeling them as rights.⁵ The political objection to rights-reasoning contends that the law is synonymous with politics. It is neither separate nor superior but rather “law is politics carried on by other means.”⁶ For example, the decisions of the Judiciary involve the settling of political disputes.

These two objections led Griffith to opine that rights should not influence the Legislature or the Judiciary as they “are the very questions which divide not unify opinion”.⁷ In the place of rights, Griffith advocated for the creation of situations in which groups and individuals may make political claims.⁸ According to Griffith this is not “because politicians are more likely to arrive at some uniquely correct answer” but because of the need for accountability.⁹

Where a bill of rights is adopted, power is handed to the unelected and thus unaccountable judges. Politicians, on the other hand, are subject to the will of the ballot box and other mechanisms of political accountability such as ministerial responsibility.¹⁰ As an aside, Griffith concedes political accountability is not perfect, but argues that strengthening it, along with the forum in which individuals may make political claims, is a more suitable route than turning to rights-based solutions.¹¹

⁴ Griffith, above n 3, at 17.

⁵ Graham Gee and Gregoire Webber “What is a Political Constitution” (2010) 30 OJLR 273 at 278.

⁶ John Griffith ‘The Common Law and the Political Constitution’ (2001) 117 LQR 42–67 at 64.

⁷ Griffith, above n 3, at 20.

⁸ Griffith, above n 3, at 18.

⁹ Gee and Webber, above n 6.

¹⁰ Griffith, above n 3, at 16.

¹¹ Gee and Webber, above n 6, at 279.

Alongside Griffith's political rights theory developed a cultural relativist critique of rights. The escalation of the Cold War and decolonization gave rise to critique based on the theory of cultural relativism: the idea that rights should be understood in terms of a state's own culture, rather than external principles.¹² Under this theory, rights are couched as a form of cultural imperialism. The individualistic focus of rights is alien to many cultures resulting in an inherent conflict.¹³

Although the focus of this paper is on rights in the context of domestic law, the cultural relativist critique is still relevant. First, it simply illustrates how rights can be viewed as being commandeered by political movements and used to advance specific agendas. For example, The United States has been accused of using rights selectively to create and maintain its hegemony.¹⁴ Second, the cultural relativist critique is particularly pertinent in a globalized world. New Zealand is increasingly becoming a multicultural country. In particular, the individualistic focus of rights conflicts with the communal element of Maori culture. For example, the eradication of communal Maori land tenure in favour of private British property rights in the nineteenth century irreversibly has damaged Maori culture.¹⁵ A cultural relativist position is essential in maintaining a healthy cynicism towards not just rights, but western hegemony, which can occur through domestic legislation.

Political rights theory focuses on the consequences of the political nature of rights. In doing so, it could be said to neglect the question as to what gives rights their political potential. An answer can be found by examining the inherent ambiguity of rights and rights-based legislation.

¹² Ilias Bantekas and Lutz Oette *International Human Rights* (1st ed, Cambridge University Press, New York, 2013) at 34.

¹³ Makau Mutua, *Human Rights: A political and cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) at 39-70.

¹⁴ Bantekas and Oette, above n 13, at 35.

¹⁵ John McAloon "Land Ownership – Maori and Land Ownership" (13 July 2013, Te Ara – the Encyclopaedia of New Zealand <www.teara.govt.nz>).

III The Ambiguity of Rights

A A Hohfeldian analysis

The Oxford English Dictionary defines a right as a “a moral or legal entitlement to have or do something”.¹⁶ The vernacular definition of rights simplifies the complex connotations the word bears in the legal sphere. It only describes rights from the perspective of the person holding the rights. Wesley Hohfeld addressed the legal ambiguities of rights.¹⁷ Hohfeld asserted that all too often the various facets and implications of rights were conflated resulting in erroneous conclusions. He developed a framework which separated rights into eight distinct concepts and grouped them into jural opposites and correlatives.

A Hohfeldian analysis reveals the vast political potential of rights. In particular, the jural correlatives are highly relevant. They form a sort of legal version of Newton’s Third Law of Motion: for every right enshrined, a correlative is brought into being. When enshrining the freedom to expression, a state is not only bringing into existence an individual’s right to expression but also it is imposing a duty upon itself to uphold that right in all future actions. In this way a Hohfeldian lens helps emphasize the far reaching corollaries of enshrining rights and their extensive capacity to guide future policy. It is this capacity which offends political rights theory.

B Bills of rights and the necessity for broadness

The rights which are the focus of the essay are those contained in bills of rights. These are general declarations of the most important rights which govern the relationship between the state and its subjects in an extremely wide variety of contexts. Furthermore, people of radically different opinions will make use of rights. In order to cover all of these

¹⁶ Concise Oxford English Dictionary (11th ed, Oxford University Press, Oxford, 2008).

¹⁷ See Wesley Hohfeld “Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays” (1919) 28 Yale LJ 721.

potential contexts and opinions, rights are expressed extremely broadly. Gre'goire Webber best describes this necessity for broadness:¹⁸

“Constitutional rights are formulated in a way that finesses reasonable disagreement about what should be within the scope and content of the right. In this way, those who disagree, for example, on the permissibility of libel and pornography, abortion and euthanasia, State-funded religious schools and conscientious objections can nevertheless agree on freedom of expression, the right to life, and the freedoms of religion and conscience.”

C Rights mediation

To counterbalance their broad nature, when legislating for rights it is very common for a limitation mechanism to be included. This involves some form of balancing or proportionality test to assess when it is appropriate to limit a right. This is what Webber terms rights mediation.¹⁹ Earlier codifications of rights, such as the United States Bill of Rights 1789, neglected this component leading to rights being limited in a discretionary manner through judicial interpretation.²⁰ At the other end of the spectrum some rights instruments, such as the International Covenant on Civil and Political Rights and the Namibian Constitution, micromanage the limits of rights by providing an individual limitation clause for every single right.²¹

A middle ground can be found in the form of providing a general, stand-alone limitation clause which give loose guidance to the Judiciary when limiting any of the enshrined rights. This approach is epitomized by s 5 of the NZBORA which stipulated rights may only be subject to limits which are demonstrably justified in a free and democratic society. However, as will be discussed later, this sections interaction with the other operative

¹⁸ Gre'goire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP, Cambridge 2009) at 1

¹⁹ Webber, above n 19.

²⁰ Andrew Butler “Limiting Rights” (2002) 33 VUWLR 537 at 539-540.

²¹ Andrew Butler above n 21, at 540.

sections is extremely unclear. These balancing mechanisms mean that the scope and extent of a right is largely uncertain and often decided by the Judiciary.

D The resulting discretion

Political rights theory abhors the large amount of discretion which is placed in the hands of an unelected and unaccountable judiciary as a result of this ambiguity. A salient example of this discretion occurred in the United States Supreme Court Decision of *Roe v Wade*.²² In this case, a woman seeking an abortion in the State of Texas sought a declaration that a Texan State law restricting abortion was unconstitutional. The Supreme Court held that it was and struck down the Texan legislation. It relied on the Fourteenth Amendment's right of due process to derive a further right, the right to privacy, which in turn formed the basis for a right to have an abortion in most circumstances.

The fact that no limiting mechanism is included in the United States Constitution meant that an enormous amount of discretion was handed to the Judiciary in defining the scope and limits of the right of due process. This imposed a Hohfeldian duty on all states within the United States to respect a women's right to abortion. For political rights theorists, this judgment took a highly moral issue from the hands of the electorate and into the hands of an unaccountable judiciary.²³

IV Rights: A conversation between the rulers and the ruled

A Limits to Griffith's political rights theory

Political rights theory, as posited by John Griffith, is an extreme position. It completely jettisons the concept of rights believing them to obfuscate the will of the common people. However, Griffith's position perhaps has limited application. He was only concerned with examining the rights in the context of the British constitution. Also, Griffith's ideas have been accused of carrying political bias.

²² *Roe v Wade* 410 US 113 (1973).

²³ Conor Gearty *Can Human Rights Survive?* (Cambridge University Press, New York, 2006) at 84.

Griffith represented “the last personal link with the radical socialist tradition that shaped the [London School of Economics] in its founding years”.²⁴ It might be expected that the function of rights would align with socialist ideals. For example, labour rights can protect the rights of working class against the oppression by capitalists. However, a constant theme throughout Griffith’s work was the way in which he “subverted self-satisfied liberal-democratic” views and replaced them with a what-actually-happens-account.²⁵ Some contend this account was produced through a lens colored by Griffith’s own values.

Griffith was routinely criticized in academic circles for his radical views of the Judiciary, believing them to be the “narrowest of social elites” that were “incapable of responding to the challenge of social justice that underpinned the disputes they were being asked to resolve”.²⁶ His view of the Judiciary was shaped by “the common law’s traditional bias towards property rights protection and the fact that access to the courts had been restricted to all but a handful of wealthy people”.²⁷ Thus, for Griffiths, labour rights would simply amount to window dressing, or perhaps even a tool for the Judiciary to creatively interpret labor rights in order to push a capitalist agenda. However, Griffith’s views could be criticized as limited due to the fact they only represent the role played by rights in a very specific context, namely in Britain in the Twentieth Century. A more nuanced approach is offered by the discourse thesis.

B The discourse thesis: a brief history of rights

The discourse thesis contends that rights are a product of discourse between competing interest groups.²⁸ Under this view, the content and function of rights is highly dependent

²⁴ Martin Loughlin, “John Griffith obituary” (25 May 2010) *The Guardian* (Online ed, United Kingdom 25 May 2010).

²⁵ Loughlin, above n 25.

²⁶ Loughlin, above n 25.

²⁷ Loughlin, above n 25.

²⁸ Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) at 217-24.

on the groups who are partaking in the discourse. Initially, rights were rooted in the power struggles between the ruling class and those they ruled. As social structures changed, and the ruling class began to decline, rights took on a new role. This new role is reflected in Griffith's political rights theory. A cursory glance at the history of rights reveals this evolution.

Early human communities, "aware of the necessity of protection in inimical surroundings", developed systems of reciprocal protection whereby in exchange for power, leaders were entrusted with the responsibility of protecting their followers.²⁹ Eventually, as these communities grew larger and took the form of modern states, this system of reciprocal protection was institutionalized in the form of rights. This dynamic was translated into the philosophical idea of the social contract by Thomas Hobbes.³⁰

The social contract theory posits that life without a centralized state power is brutal, nasty and short. In this 'state of nature' subjects are without rights, for example property rights were impossible due to the possibility of property being seized by might. To remedy this, an agreement or 'social contract' is struck between the state and its subjects. The subjects give up certain rights, for example the right to seize their neighbor's property by might, and in return the state guarantees the protection of the remaining rights, such as the right to hold private property.

In order for a contract to be valid, both parties must represent an intention to be bound. David Hume challenged the notion that the consent of the governed was actually given, or indeed possible.³¹ Under this view, the social contract is unilaterally imposed on the states subjects through sheer might. In response, it could be argued that the implicit

²⁹ Christian Tomuschat *Human Rights: Between Idealism and Realism* (2nd ed, Oxford University Press, Oxford, 2008) at 7.

³⁰ Thomas Hobbes *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (1651).

³¹ David Hume "Of Civil Liberty Part II Essay XII: Of the Original Contract" (1742).

consent of the governed could be claimed where the subjects continue to reside in the state without rebelling.³² Alternatively, it has been argued that within western representative democracies, voting constitutes a form of implicit consent.³³

Edward Herman and Noam Chomsky offer a cynical take on the consent of the governed by contending that modern news media, in particular the United States', operates as a propaganda model controlled by corporate interests and the state which 'manufactures consent'.³⁴ John Livingston and Robert Thompson highlight the danger posed by the notion of manufactured consent in this aphoristic statement: "If the opinions of the public are able to control the government, these opinions must not be controlled by the government".³⁵

The idea of manufactured consent poses a considerable challenge to the political school of rights critique. It also calls into question the validity of the social contract by eroding the legitimacy the consent of the governed. It therefore lessens the legitimacy of the alternatives to rights offered by political rights theorists such as creating further forums for public input. It calls into doubt the faith placed in politicians by political rights theorists. If politicians are susceptible or even part of the manufactured consent process, then they are unable to represent the will of the people as Griffith claims. Judges on the other hand, due to judicial immunity, could be perceived as immune to manufactured consent.

Subjects enjoy a somewhat paradoxical relationship with their governing state. The state is an organization which protects the welfare of its subjects against internal and external

³² see John Bookman "Locke's Contract: Would People Consent to it?" 43 AJES 357.

³³ see CW Cassinelli "The Consent of the Governed" 12 WPQ 391.

³⁴ see Edward Herman and Noam Chomsky *Manufacturing Consent: The Political Economy of the Mass Media* (Random House, 2010)

³⁵ John Livingston and Robert Thompson *The Consent of the Governed* (2nd ed, Collier MacMillan, 1966) at 457.

threats whilst simultaneously often posing a lethal threat to those same subjects.³⁶ For evidence of this threat one only has to cast their attention to Third Reich's systematic erosion of the rights of the Jewish, Romany, homosexual, dissenters and disabled. Rights are the discourse which navigate through this paradoxical relationship; "they are designed to reconcile the effectiveness of state power with the protection against that same state power."³⁷

One of the earliest codifications of rights, the Magna Carta 1215, exemplifies the negotiation between an oppressive state and its subjects. In an unsuccessful bid to prevent an English civil war and maintain unity, and thus power, King John met with rebellious barons who forced the King to grant them certain rights, including an early form of due process. Over the next few centuries, as the feudal system was eroded and monarchies were replaced by republican states, the parties to this discourse shifted from conversations between monarchs and nobles to those between a new ruling class and the common people. This new ruling class, formed partly by a merchant elite, lacked the cloak of divine appointment with which to hide behind which resulted in a more open and frequent conversation. It is no surprise that the formation of the first modern republican states, France and the United States of America, were accompanied by the first modern incarnations of Bills of Rights.

At this point it is arguable that rather than obfuscate the will of the people, rights accurately reflected the people's desire to be protected from arbitrary state power. However, later developments altered the role of rights. The Nineteenth Century witnessed the further erosion of class divides resulting in even more fluid conversation. By the Twentieth Century, galvanized in part by the atrocities committed during World War Two, rights had become part of ordinary political parlance.³⁸ No longer was the rights

³⁶ Tomuschat, above n 30, at 8.

³⁷ Tomuschat, above n 30, at 8.

³⁸ Banekas and Lutz Oette, above 13, at 18-22.

discourse the prerogative of the ruling class, but rather now it was accessible to ordinary interest groups. This latter development lends credence to Griffith's assertion that rights may be used as veiled political claims.

C Rights under the discourse thesis lens

Griffiths asserts that in the twentieth century Britain, rights were commandeered by the interests of the upper class to the detriment of the lower class. However, this will not always be the case. For example, just a century earlier, rights had been harnessed by labour unions in the form of labour rights. The creation of labour rights illustrates the discourse thesis in practice. In the nineteenth century unions of workers used their increasing political muscle to wrestle influence from early capitalists and enshrined this influence in the form of rights. In this case, it could be said that rights gain democratic legitimacy as they are produced as a result of genuine political struggle.

However, the legitimacy of rights is degraded in the context of a power asymmetry or in the event that those wielding power are not willing to engage in dialogue.³⁹ In this case a false consensus may be imposed resulting in a window dressing style rights.⁴⁰ At best, the consequence of this window dressing is that other remedies to social injustice are neglected, instead "endless, often individualist identity politics" are perused "rather than addressing the underlying structural problems".⁴¹

At worst, a Marxist reading may emerge whereby rights which challenge the ruling class might be "harnessed and used to serve class, economic or political interest".⁴² Griffith would argue this occurred in context of twentieth century Britain. These fears have also played out elsewhere. For example, it has been argued that property rights in South Africa

³⁹ Banekas and Lutz Oette, above 13, at 37.

⁴⁰ Banekas and Lutz Oette, above 13, at 37.

⁴¹ Banekas and Lutz Oette, above 13, at 37.

⁴² Banekas and Lutz Oette, above 13, at 37.

were used to stifle land reforms which would benefit the poor.⁴³ Moreover, it could be argued that the notion of manufactured consent suggests that there is vast potential for these fears to continue to play out in the western democratic world.

In summary, the discourse thesis offers a more nuanced and realistic account of rights. Griffith's analysis of rights is limited to the context of the United Kingdom in the twentieth century. The discourse thesis is enduring and applicable throughout time. The notion of manufactured consent suggests that Griffith's conclusion that rights can obfuscate the will of people is still correct, but the path to this conclusion is different.

V The history of the New Zealand Bill of Rights Act 1990: A long and tortuous journey

The history of the NZBORA reveals that political rights theory has dominated both the public and academic sphere. The circumstances of its eventual enactment illustrates and exemplifies the discourse thesis in operation. Almost thirty years prior to the enactment of the NZBORA, a bill of rights was almost enacted. In 1951, the transition of the New Zealand Government from a bicameral to unicameral House prompted concerns regarding the concentration of power and the subsequent potential for the tyranny of the majority.⁴⁴ In response to these concerns the National Party proposed an unentrenched, non-supreme bill of rights in 1963.⁴⁵ However, a year later the Parliamentary Constitutional Reform Committee recommended against the enactment of a bill of rights due to a lack of support among New Zealand society as a whole.⁴⁶

⁴³ M Mutua, *Human Rights: A political and cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) at 142-144.

⁴⁴ David Erdos *Delegating Rights Protection* (Oxford University Press, Oxford, 2010) at 3.

⁴⁵ Ronagh McQuigg *Bills of Rights: A comparative Perspective* (Intersentia, Cambridge, 2014) at 32.

⁴⁶ McQuigg, above n 46, at 32.

The most vehement opposition came from academic circles. It was spearheaded by an unlikely figure, Geoffrey Palmer who, rather ironically, later became the chief architect of BORA. In 1968, Palmer presented four main objections to the notion of a supreme bill of rights which could strike down legislation.⁴⁷

First, he reproached the way judges would be launched into a political role for which they lacked the ability and the desire.⁴⁸ The first part of this objection, the lack of Judiciary's ability to deal with political issues, is a fundamental tenet of political critical rights theory. Judges represent a narrow demographic and therefore are without the political mandate, and indeed understanding, to deal with political issues. However, Palmer's assertion that the Judiciary was not "adventuresome enough" to fulfill this function is curious.⁴⁹ It could be argued that this derogates from the political rights theory's persuasiveness in a New Zealand context. If our Judiciary lacks an adventurous disposition then could be said that their application of rights would be cautious; careful not to stray into political territory. Regardless, Palmer did not want to provide a platform for an adventurous judicial culture to develop.

Second, Palmer believed a bill of rights would risk the public's respect of the judicial system by inviting partisan criticism.⁵⁰ This objection plays on the political rights theory premise that law is synonymous with politics. In the event of a supreme bill of rights, and subsequent political decisions, it would become apparent to the public that the law was becoming just another means of carrying out politics. The overt political appointment of United States Supreme Court Justices is an example of this getting out of hand.

⁴⁷ Geoffrey Palmer "A Bill of Rights for New Zealand?" in Kenneth Keith (ed.) *Essays on Human Rights* (Sweet & Maxwell, Wellington 1968).

⁴⁸ Geoffrey Palmer "A Bill of Rights for New Zealand?", above n 48, at 107.

⁴⁹ Geoffrey Palmer "A Bill of Rights for New Zealand?", above n 48, at 126.

⁵⁰ Geoffrey Palmer "A Bill of Rights for New Zealand?", above n 48, at 127.

Third, Palmer believed there was simply no need for a bill of rights due to the small and sensitive political system of New Zealand.⁵¹ This argument is double sided. It is true that a small and sensitive system has the capacity to respond civil rights violations as they arise. However, it is also true that small political system could be hijacked by an extremist group. However, Palmer likely dismissed this threat for reasons enumerated in his final objection.

Palmer highlighted a culture within New Zealand politics which was more concerned with pragmatism than principle. Palmer explained that, as New Zealand was free of the “conflict which is often a pre-requisite for unreasonable curtailment of civil rights by government”, its citizens were more concerned about the “guaranteed price for butterfat” rather than theoretical deficiencies in civil liberties.⁵² He also noted that New Zealand was relatively tolerant of deficiencies in civil liberties issues such as freedom of expression and gender based discrimination.⁵³ It could be argued that this tolerance and apathy is generational. The CAP reported, in a rare finding of a consensus, that the public viewed the NZBORA as “a fundamental and enduring part of [New Zealand’s] constitutional arrangements”.⁵⁴ In 1999, Philip Joseph commented that the NZBORA had been successful in “engendering broad acceptance of constitutional rights among the citizenry”.⁵⁵ It is clear that politics played a key role in dispelling this public suspicion towards rights.

After the failed attempt to enact a bill of rights in 1963, Palmer’s assertion of public apathy was proven true over the next 15 years. Negligible attention was given to the matter.⁵⁶

⁵¹ Geoffrey Palmer “A Bill of Rights for New Zealand?”, above n 48, at 107.

⁵² Geoffrey Palmer “A Bill of Rights for New Zealand?”, above n 48, at 130-131.

⁵³ Geoffrey Palmer “A Bill of Rights for New Zealand?”, above n 48, at 130-131.

⁵⁴ Constitutional Advisory Panel, *New Zealand’s Constitution: A Report on the Conversation* (Ministry of Justice, November 2013) at 53.

⁵⁵ Phillip Joseph, “New Zealand’s Bill of Rights Experience” in Philip Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, Oxford 1999) at 317.

⁵⁶ McQuigg, above n 46, at 34.

Enter Prime Minister Robert Muldoon who, during the tail-end of his 1975-1984 administration, stretched executive powers to the extent that many considered him to be in breach of the separation of powers doctrine.⁵⁷ The policies in question were of a partisan nature; Muldoon refused to carry out the wishes of the Prime Minister elect leading to a rare New Zealand constitutional crisis.⁵⁸ These events inspired the Labour Party, including the reformed Geoffrey Palmer, to advocate for a bill of rights in order to restrain executive powers.⁵⁹

The Labour Party came to power in 1984 with a bill of rights forming part of their election manifesto.⁶⁰ This begun what Palmer dubbed, “a long and tortuous” journey towards the enactment of the NZBORA.⁶¹ The reason for this difficulty was the wide acceptance of political rights theory in New Zealand. Indeed, even within the Labour party ranks there was some opposition to a supreme bill of rights which Michael Taggart described as “vestiges of the political left’s distrust of the judicial branch.”⁶² John Griffith’s view of the Judiciary as the narrowest class of social elites reflects this distrust. However, it is arguable that there is something distinctly British about this distrust given the United Kingdom’s longstanding and rigid class system. Although, it is possible the Labour politicians in question were simply influenced by the fact that the Judiciary is not demographically proportionate.

⁵⁷ McQuigg, above n 46, at 34-35.

⁵⁸ See *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

⁵⁹ McQuigg, above n 46, at 35.

⁶⁰ McQuigg, above n 46, at 35.

⁶¹ Geoffrey Palmer *New Zealand’s Constitution in Crisis* (John McIndoe, Dunedin, 1992) at 51.

⁶² Michael Taggart, “Tugging on Superman’s Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990” in *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing, Oxford, 1988) at 39.

A White Paper on the subject of a New Zealand bill of rights, was produced in 1986 which proposed a supreme and entrenched bill of rights.⁶³ The Justice and Law Reform Select Committee heard 431 public submissions on the White Paper and found “a clear majority were opposed to the bill of rights proposal”.⁶⁴ The opposing submissions echoed the political rights theory objections of Palmer almost 30 years earlier: it would provide too much power to an unelected and unaccountable judiciary.⁶⁵ Accordingly, the Select Committee recommended that the proposals not be carried out. It should be noted that similar objections are noted in the CAP report.⁶⁶ This indicates that many still subscribe to the political rights theory within New Zealand. Although, given the aforementioned overall support for the NZBORA noted in the CAP report, it seems they no longer form the majority.

Faced with mounting opposition, Palmer suggested a diluted bill of rights which was unentrenched and non-supreme.⁶⁷ After the addition of s 4 during its passage through parliament the NZBORA was enacted in 1990. The strange origins of the NZBORA are best summarized by Paul Risworth:⁶⁸

“[The NZBORA] was enacted as a party political measure rather than unanimously. There was no ground-swell of public support for it; indeed, it is possible that public opinion was against it.”

This prompts the question as to what exactly the unconventional passage of the NZBORA represented: whether the NZBORA represented a discourse between the state and its subjects, whether it represented rights being commandeered by political interests, or

⁶³ Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* (1985)

⁶⁴ Justice and Law Reform Committee, *Inquiry into the White Paper: A Bill of Rights for New Zealand* (1986)

⁶⁵ McQuigg above n 46, at 37.

⁶⁶ Constitutional Advisory Panel, above n 55, at 55.

⁶⁷ McQuigg above n 46, at 39

⁶⁸ Paul Risworth “The New Zealand Bill of Rights Act 1990: The first fifteen months” in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland 1992) at 7-8.

even amounted to an example of manufactured consent. To an extent, an argument could be made for each of these interpretations.

The history and passage of the NZBORA illustrates the discourse thesis in operation. Disregarding the symbolic role of the Governor-General, the closest embodiment to the state is the executive. The actions of the Muldoon government revealed that the executive had the capacity to, and indeed the inclination, to act illegally.⁶⁹ It was possible that a future government could act in a similar way to the detriment of its citizens. Thus the NZBORA act was enacted to provide a safeguard for New Zealanders.

The fact that the NZBORA was passed in the face of public opposition but now enjoys considerable acceptance is a curious phenomenon. It could be argued that NZBORA simply achieved one of its purposes; to promote civil and political liberties and general constitutional principles.⁷⁰ This role was necessary as the Law Reform Select committee concluded that there “was a lack of knowledge generally of the issues under consideration”.⁷¹

A more cynical interpretation might view this as an example of manufactured consent. In an odd case of persuaded rights protection, the government manipulated the New Zealand public from of a position of tolerance of civil infringements to one which supports the principles of rights protection. This argument is supported by the partisan backdrop to the enactment NZBORA. Conor Gearty has hinted at the possibility of progressives who have lost confidence in the ability to pitch their policies to the public using rights as a short-cut to implement them.⁷² Of course this line of argument does pose a danger of straying into conspiracy terrain. The public’s new acceptance of rights could simply

⁶⁹ The illegality of Muldoon’s actions were established in *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

⁷⁰ The New Zealand Bill of Rights Act 1990, long title.

⁷¹ Justice and Law Reform Committee, *Inquiry into the White Paper: A Bill of Rights for New Zealand* (1986) at 4.

⁷² Gearty, above n 24, at 80.

indicate a generational shift. Nonetheless, this analysis offers an interesting account of how can rights potentially function.

Immediately after the NZBORA was passed, it received a distinct lack of attention due to the perception that it was a ‘toothless document’.⁷³ It was the Judiciary’s interpretation of the NZBORA which ensured it was to have substantial legal impact and become “one of the most cited statutes” in New Zealand.⁷⁴ It could be argued that this common law development represents the greatest fear of the political rights theorist. This will be discussed in further detail in the context of the NZBORA’s operative sections.

VI The Backdrop to the Constitutional Advisory Panel’s Report on the NZBORA

Much like the initial impetus for the enactment of the NZBORA, the origins of the Constitutional Advisory Panel can be subject to different interpretations. The result is radically different depending on whether political rights theory or the discourse theory is applied. The Constitutional Advisory Panel (the CAP) was established per a supply and confidence agreement between the National Party and the Maori Party in 2008.⁷⁵ The National Party did not obtain an outright majority in the 2008 elections. It therefore required the support of the minor parties. In exchange for the Maori Party’s support, the National Party agreed to undertake a consideration of constitutional issues.

The CAP was assigned to carry out this role. It was tasked with stimulating debate on the matter, garnering public opinion. It was to “report to Ministers with advice on the topics, including any broad consensus where further work is recommended”.⁷⁶ This gives the CAP the real potential to influence policy.

⁷³ Taggart, above n 63, at 268. (Ronagh page 104)

⁷⁴ Erdos, above n 45, at 100.

⁷⁵ Constitutional Advisory Panel, above n 55, at 9.

⁷⁶ Constitutional Advisory Panel, above n 55, at 9.

A political rights theorist may view this as a case of the Maori Party, due to its limited political muscle, attempting to use constitutional matters, including rights, as a convenient short-cut in order to advance its personal agenda. Alternatively, it could be perceived as the National Party implementing window dressing which neglects to address the underlying issues with which the Maori agenda is concerned with.

Conversely, a subscriber to the discourse thesis would view the CAP report favorably. This engagement with the public should be commended. In particular, with regards to the CAP's role in examining the NZBORA, it could be perceived as an overt and formalized method of discourse between the state and its subjects as to how best balance the power of the state. Historically, people have had to struggle for this conversation, but here the public was being proactively consulted. However, it remains to be seen whether the public's opinion will actually be implemented. A public consensus on matters concerning constitutional matters was not forthcoming.

None of the proposals regarding the NZBORA reflected public consensus. As a result the recommendations of the CAP did not go beyond calls for further discussion. The paper separates the proposals into two distinct classes. First, it examines proposals which would improve compliance with the standards set by the NZBORA. Second, it examines a range of proposed rights which could be added to the NZBORA. Before examining these proposals, it is first necessary to outline the operative sections of the NZBORA and their subsequent judicial application. This will ensure the full ramifications of the proposals are understood.

VII The Operative Sections of NZBORA

A Sections 4, 5 and 6

1 Drafting Ambiguities

The operative sections which define the judicial application of the NZBORA are found in ss 4, 5 and 6. The interrelationship between these sections is awkward and has been subject to much academic criticism. Importantly, for the political rights theorists, this awkwardness has given a large amount of discretion to the Judiciary in developing the powers of the NZBORA.

Section 4 makes explicit that the Judiciary cannot rely on rights within NZBORA in order to strike down other legislation.⁷⁷ This is a direct result of the concerns grounded in political rights raised during the passage of the NZBORA. This section has come under criticism for preserving the concentration of power which NZBORA was supposed to dilute. Geoffrey Leane comments that “the fox, then, is still guarding the hen house” since “[r]ights are still vulnerable to something very close to legally unlimited majoritarianism”.⁷⁸ However, the adoption of the Mixed Member Proportional voting system in 1996 system has helped to assuage these fears by ensuring that majority governments are extremely rare. To date, no single party has gained an outright majority in an election.

Section 5 represents a limiting mechanism designed to address the ambiguity of rights. Section 5 provides that the rights within the NZBORA “may be only subject to such reasonable limits *prescribed by law* as can be demonstrably justified in a free and democratic society” [emphasis added]. When juxtaposed with s 4, s 5 is arguably rendered

⁷⁷ New Zealand Bill of Rights Act 1990, s 4(a).

⁷⁸ Geoffrey Leane, “Enacting Bills of Rights: Canada and the Curious Case of New Zealand’s ‘Thin’ Democracy” (2004) 26 HRQ 152 at 172.

meaningless.⁷⁹ Section 5 requires limits to rights are required to be prescribed by law, but if a limit *has* been prescribed by law then s 4 is engaged and the legal limit in question trumps the NZBORA. This could not have been the intention of parliament; however such cumbersome drafting invites creative judicial interpretation.

Section 6 provides the most potential for judicial creativity. It provides that “where an enactment can be given a meaning that is consistent with [the rights in NZBORA], that meaning shall be preferred”. This gives the Judiciary explicit powers to use rights to colour their interpretation of statutes. Without it the NZBORA would be toothless and weighed down by s 4. It is likely s 6 was a compromise included as a result of stripping the NZBORA of its intended supreme status.

The tension between s 6 and s 4 is palpable. Andrew Butler describes this interaction between these two sections as creating “a difficult Janus-like role for the Courts”.⁸⁰ Section 6 appears to imply that the Court is required to serve as the protector of rights whilst s 4 demands they yield when parliament decides to breach those rights. This fosters a public expectation of rights protection which the courts may be powerless to fulfill.

To resolve this tension, Butler contends that statutory interpretation of ss 4 and 6 may appear arbitrary: judges who value rights-protection will stretch interpretation towards s 6, whereas those who believe in a more pragmatic and less principled approach will lean on s 4.⁸¹ In other words decisions pertaining to rights protection may be decided by personal values.

⁷⁹ Paul Risworth, “Affirming the Fundamental Values of the Nation: How the Bills of Rights and the Human Rights Act affect New Zealand Law” in G. Huscroft and P Risworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooke’s, Wellington 1995) at 105.

⁸⁰ Andrew Butler, “The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain” (1997) 17 OJLS 323 at 337.

⁸¹ Butler, above n 81, at 327.

The problems presented by the relationship between ss 4, 5 and 6 undoubtedly stem from the fact that s 4 was inserted late into the Bill as a response to the prevalence of political rights theory during the process of enacting the NZBORA. It is ironic that s 4, which was designed to limit the influence of judges in the field of rights, essentially provided the Judiciary with a platform to shape the way right-based legislation operates in New Zealand. As Anna Adams remarked, the NZBORA has “constitutional potential” due to the fact that “minimal changes in the drafting of the Bill’s operational sections had been made to reflect its transition from entrenched supreme law to ordinary statute” resulting in an Act which was “ambiguous and open to creative interpretation”.⁸²

Perhaps most surprisingly, this awkward drafting was not addressed by the CAP report. It could be argued that this is an indication that the public and the members of the Panel are content with the active role the Judiciary has been given in shaping the role of the NZBORA. The CAP report simply concluded that “where reasonably possible, the Judiciary must apply laws in a way that is consistent with the [NZBORA]”.⁸³ This describes the effect of s 6 and “where reasonably possible” describes the limit imposed by s 4. However, the CAP report disregards the effect the s 5, its ambiguous relationship with ss 4 and 6, and the subsequent judicial application.

2 The Courts Interpretation

Many have criticized the NZBORA for its perceived impotency. Leane described it at the time of its enactment as a bill of rights “of the weakest kind”.⁸⁴ More recently, Gearty labeled it as “grudging and minimalist in its use of rights language”.⁸⁵ However, contrary to these opinions, the Act itself, whether intended or not, is drafted in an ambiguous fashion which provides the Court with the discretion to give it some real bite.

⁸² Anna Adams “Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal” (1996) NZLR 368.

⁸³ At 49.

⁸⁴ Geoffrey Leane, above n 79, at 39.

⁸⁵ Geoffrey Leane, above n 79, at 39.

The leading judgment on the operative sections of the NZBORA is the Supreme Court decision of *Hansen v The Queen*.⁸⁶ The majority prescribed a method for applying the operative sections, referred herein as the ‘Hansen test’.⁸⁷ Where a prima facie conflict with a right is present s 5 is applied to determine whether the right is demonstrably justified. If it is not, then s 6 will be engaged; that is an interpretation which preserves the right, or limits it to a justifiable extent, will be adopted. If this is not possible then s 4 applies and the inconsistent provision prevails.

A notable feature of the Hansen test is that s 6 is not engaged until after s 5 is applied. This raises the potential of s 6 being neglected altogether. Consider an enactment which prima facie limits a right under the ordinary rules of statutory interpretation, but it could be possible to stretch its interpretation via s 6 so as to prevent this limitation. If the prima facie limit is deemed demonstrably justified under s 5 there is no need to apply s 6 and the limit applies.

This problem is compounded by the fact that s 5 offers a large amount of discretion. Applying s 5 involves considering how important the government’s objective is behind the limiting measures, whether the limiting measure is rationally connected to this objective and whether the limiting measure is proportionate.⁸⁸ This test has been described as a “value judgment”.⁸⁹ Handing over this kind of personal discretion to judges is the grand fear of political rights theorists.

The majority in *Hansen* was split as to whether the limit in question was demonstrably justified. The provision in question placed a persuasive burden upon the accused to

⁸⁶ *Hansen v R* [2007] NZSC 7 at [92] and [104].

⁸⁷ *Hansen* at [92] and [104].

⁸⁸ *Hansen* at [203–204].

⁸⁹ Dean Knight “Nine to Noon: the Electoral Finance Act, the Bill of Rights and the Attorney-General” (9 July 2008) LAWS179 Elephants and the Law <www.laws179.co.nz>.

show he did not possess cannabis for the purpose of supply.⁹⁰ The accused argued that it would be consistent with the right to be presumed innocent, per s 25(c) of the NZBORA, to interpret the provision as merely imposing an evidentiary burden.

Justice Blanchard applied the first limb of the Hansen test and found that the limit placed on the right to be presumed innocent by a persuasive burden was demonstrably justified.⁹¹ In finding this, Justice Blanchard relied on the policy considerations which underpinned the Misuse of Drugs Act provision, namely that a net benefit of social good was provided by expediting drug prosecutions.⁹² For an old school political rights theorist like Griffith, Justice Blanchard would earn plaudits as he simply regurgitated the policy which informed the limiting provision. Such policy would be perceived as representing the will of the people as expressed through the Legislature.

Conversely, Justices Tipping and McGrath deemed that the objective of the limiting provisions was worthy, but the means to achieve that limit was not proportionate. Justice Anderson went even further by finding that the objective of the limiting provision was not sufficient.⁹³ Nonetheless, all three justices found that the provision was clearly worded so as to impose a persuasive burden, thus s 4 applied. Nonetheless, the Justices use of s 5 in order to undermine the policy of the government based on their own personal views would concern political rights thought. If the wording of limiting provision were less clear it is conceivable that they might have completely derogated the will of the Legislature in a similar fashion to the United States Supreme Court in *Roe v Wade*.

⁹⁰ Misuse of Drugs Act 1975, s 6(6).

⁹¹ *Hansen* at [66–69].

⁹² *Hansen* at [66–69].

⁹³ *Hansen* at [273]–[281]

The majority's reasoning for readily engaging s 5 was offered by Justice Tipping. He contended that, through s 5, Parliament had provided the courts with the mandate to ascertain whether any limitations which Parliament placed on rights were justified.⁹⁴ Justice Tipping relied on the wording '*demonstrably* justified' within s 5, asserting that this denoted that the limits prescribed by parliament had be shown to be justified outside of Parliament that is, by the courts.⁹⁵

This is a prime example of the potential for creative interpretation which the ambiguity of the operative sections provides. Justice Tipping appeared concerned to protect rights and, with all due respect, his reasoning appears to have worked backwards from there. The history of the NZBORA and the way it was tempered by political rights theory, suggest that this was not what parliament intended. It is likely that '*demonstrably*' was simply included to ensure that a high threshold for the limitation of rights was set. These are the sentiments present in Chief Justice Elias' minority judgment. She simply held that s 5 was directed at Parliament when making laws rather than as an aid for statutory interpretation.⁹⁶ Under Elias' version of the Hansen test, an interpretation of the provision in question which does not limit right, or limits it to a justifiable extent, should be preferred per s 6. If this is not tenable, then s 4 applies and the right is limited in accordance with Parliament's clear intent. The application of s 5 is exclusively a consideration for parliament when making laws and the Attorney-General in his or her application of s 7.

B Section 7

Section 7 requires the Attorney-General to flag any provision of a new bill introduced into Parliament "that appears to be inconsistent with any of the rights" contained in the NZBORA. Geoffrey Palmer asserts that s 7 is "not a matter of political judgment, but of

⁹⁴ *Hansen* at [108].

⁹⁵ *Hansen* at [108].

⁹⁶ *Hansen* at [23].

formal legal opinion”.⁹⁷ This is debatable. The use of the word ‘appears’ conveys a large amount of discretion. It could be argued that it conveys a subjective standard. In other words it must appear inconsistent in the eyes of the Attorney-General. Furthermore, a s 7 analysis may involve the use of s 5. If bill does indeed infringe a right, it could be argued it is demonstrably justifiable and therefore does not appear to infringe the rights.

The s 7 report is undertaken by the Attorney-General on the advice of the Ministry of Justice. Both form part of the Executive and, as such, have a vested interest in supporting the passage of government legislation. It could be argued that the discretion granted by s 7 leaves open the possibility of political bias. Roughly the same amount of government and non-government bills have been vetted under s 7, suggesting that this role has been carried out impartially.⁹⁸ However, this does not discount the fact that there have been bills which were not vetoed under s 7 despite clearly appearing to be inconsistent.

The Electoral Finance Act 2007 *prima facie* limited the freedom of expression, but a s 7 report was not issued in respect of its Bill. The Attorney General found the limit demonstrably justified per s 5, although the issue was “finely balanced”.⁹⁹ Where such an event occurs, Carolyn Archer and Gaze Burt offer a provoking analysis:¹⁰⁰

“The Attorney-General’s failure to bring to the attention of the House a breach of the Bill of Rights Act, perhaps inadvertently, abdicates the responsibility of weighing up legislative facts and deciding questions of policy, to the Judiciary.”

⁹⁷ Geoffrey Palmer and Mathew Palmer *Bridled Power: New Zealand’s Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 325.

⁹⁸ “Section 7 Reports” Ministry of Justice <www.justice.govt.nz>.

⁹⁹ Val Sim “Electoral Finance Bill: Consistency with the New Zealand Bill of Rights Act 1990” (26 June 2007) Ministry of Justice <www.justice.govt.nz> at [3].

¹⁰⁰ Carolyn Archer “Section 7 of the Bill of Rights Act” (2004) NZLJ 320 at 323.

However, this theory is brought into doubt by the Court of Appeal's decision in *Boscawen v Attorney-General*.¹⁰¹ The decision concerned the Attorney-General's failure to issue a s 7 report in relation to the Electoral Finance Bill. The appellants sought a declaration that the Attorney-General breached s 7 by failing to flag provisions of the Bill that appeared to be inconsistent with the NZBORA.

Justice O'Regan held that, since the Attorney-General's duty under s 7 was by nature parliamentary and was exercised in good faith, it would be contrary to the principle of comity for the Court to review it.¹⁰² Furthermore, Justice O'Regan observed that the Judiciary is poorly placed to undertake a broad review of a whole piece of legislation and in any event such a review could delay the legislative process and involve the courts in active parliamentary debate.¹⁰³

This decision confirms that the courts are not willing to take on Archer's alleged abdication of responsibility by the Attorney-General. Section 7 was deemed the Attorney-General's exclusive territory. This raises an obvious problem. The Attorney-General, motivated by political leanings, could simply lean on s 5 and declare the limit to be demonstrably justified. Indeed, Justice O'Regan confirmed that s 5 confers a large amount of discretion to the Attorney-General by holding that opinions as to whether a particular restriction was demonstrably justified might legitimately vary.¹⁰⁴

Arguably, *Hansen* offers a partial solution. The first limb of Hansen test provides the Judiciary with opportunity to apply s 5. This gives the Judiciary the option to state that a limit is not demonstrably justified in an official forum. This could be perceived as an implied declaration of inconsistency. However, if the limiting provision wording is clear then the Judiciary is bound to apply it per s 4. Regardless, the consequences of a limitation

¹⁰¹ *Boscawen v Attorney-General* [2009] 2 NZLR 299 (CA).

¹⁰² *Boscawen* at [32].

¹⁰³ *Boscawen* at [33] – [38].

¹⁰⁴ *Boscawen* at [18].

of rights being highlighted by the Judiciary are clear. Even though Justice O'Regan declined to employ an s 5 analysis in *Boscawen*, the effect of giving judicial attention to a potentially unjustifiable limit to freedom of expression was significant. Although, the Electoral Finance Act 2007 was poorly drafted and riddled with implementation issues, it could be argued that, the judicial attention given to its potential limit on freedom of expression contributed to its eventual repeal in 2009. The decision in *Hansen* provides the Judiciary to go step further, from identifying a potential limit to commenting on whether it is demonstrably justifiable.

However this role played by the Judiciary is problematic according to political rights theory. As already noted, it involves the Judiciary making political arguments grounded in personal opinion. It also raises an issue of equal access to justice. This concern was raised during the enactment of the NZBORA.¹⁰⁵ The rights in NZBORA apply to legal personalities where possible.¹⁰⁶ The limit to freedom of expression in the Electoral Finance Act only received judicial attention because litigation was brought against the Attorney-General by the leaders of lobby organizations and a political party.¹⁰⁷ As noted, the capacity exists for the Attorney-General to approach s 7 in a partisan manner. In this event, the prime method of rights enforcement is litigation. Unlike corporations and organizations like those in *Boscawen*, ordinary people do not have the financial backing to instigate litigation. This could mean that the developed of rights could be skewed in favour of those with deeper pockets.

Boscawen represents what Gearty labels a depressing irony of rights.¹⁰⁸ The policy rationale behind the Electoral Finance Act was to prevent the influx on money flooding into politics and drowning out the voice of the poor. The NZBORA could be said to have had similar objectives. The NZBORA is designed to protect minorities. The poor could be

¹⁰⁵ McQuigg above n 46, at 37.

¹⁰⁶ New Zealand Bill of Rights Act 1990, s 29.

¹⁰⁷ GreyPower NZ, The Sensible Sentencing Trust and the ACT Party.

¹⁰⁸ Gearty, above n 24, at 82.

couched as a political minority due to their lack of influence in policy. This makes the result of *Boscawen* curious. The right to freedom of expression contributed to the repeal of an Act which was, ultimately, aimed at protecting the common peoples' political expression.

C Summary: the problem with the operative sections

The drafting history of the NZBORA, namely its abrupt demotion from supreme law status, resulted in confusingly drafted operative sections. The insertion of s 4 was intended to remove power from the hands of the Judiciary. However, to ensure the NZBORA was not completely irrelevant, s 6 was included. Furthermore, s 5 was included to account for the inherent ambiguity of rights and mediate limitations. The resulting ambiguity, somewhat ironically considering the prevalence of political right concerns, gave the Judiciary a large amount of discretion to shape the development of rights law.

Despite Palmer's assertion that the Judiciary lacked the disposition and desire to be thrust into a political role by rights, when presented with the opportunity they seem to not have been able to help themselves. The Hansen test, as prescribed by the majority allows, the Judiciary to wade into political debates. This development leaves the Judiciary vulnerable to political critique which detracts from its public veneration as an impartial disputes resolver.

Furthermore, as Justice Blanchard's approach demonstrates, the Hansen test can be used to render the rights in the NZBORA completely irrelevant. It presents the opportunity for judges to simply regurgitate policy via s 5 and totally neglect s 6, the provision which provides NZBORA its only power. Similarly, *Boscawen* confirms that the Attorney-General may use his subjective, often political, personal view to refuse to flag a bill under s 7. Subsequently, the only certain means of right enforcement is a weak and expensive one. It must occur through litigation in the form of a tangential finding by the Judiciary that a limit to a right is not demonstrably justified.

VIII *The CAP's Proposals*

A *A role for rights today*

Before considering the proposals mooted in the CAP report, it should be ascertained whether rights should have a role to play in New Zealand today. According Griffith's political rights theory they should not. Even the Judiciary's capacity to find that a provision was unjustifiably limited a right is a concern due to the political role it gives judges and the fact it can only be exploited by those able to afford litigation. Orthodox political rights theory would advocate for the NZBORA's repeal.

However, Griffith's lecture took place over thirty years ago.¹⁰⁹ At this time rights-based reasoning was at a crossroads. There was a debate raging within countries like the United Kingdom as to whether a bill of rights should be adopted. Griffith's lecture in 1978 was a response to the emerging British support for rights.¹¹⁰ Today, rights-based reasoning appears to have won out. Every single western democracy, with the exception of Australia, has adopted a bill of rights in one form or another. The CAP report confirmed a broad acceptance of rights exists in New Zealand.¹¹¹ This has resulted in an evolution of political rights reasoning, one which is resigned to the pervasiveness of rights based reasoning but is geared at minimizing rights' infringement into politics. The most lucid explanation of this new wave of political critical rights theory is offered by Connor Gearty.¹¹²

Gearty, a professor from the London School of Economics and Political Science, has continued the tradition of political rights theory established by Griffith. Like Geoffrey

¹⁰⁹ John Griffith, 'The Political Constitution' (1979) 42 MLR 1.

¹¹⁰ In particular the following three works: Lord Scarman *English Law: The New Dimensions* (Stevens, London, 1974); Lord Hailsham *Dilemma of Democracy: Diagnosis and Prescription* (Collins, London, 1978); Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1977).

¹¹¹ Constitutional Advisory Panel, above n 55, at 50.

¹¹² see Conor Gearty *Can Human Rights Survive?* (Cambridge University Press, New York, 2006).

Palmer's views on the New Zealand bill of rights proposal in 1963, Gearty was initially opposed to the enactment of the United Kingdom Human Rights Act 1998 and advocated for its repeal.¹¹³ This illustrates his careful approach towards rights. He described the enactment of a supreme bill of rights as a "Faustian bargain".¹¹⁴

Gearty believes that in our post-religious and post-socialist culture, rights have the capacity to "provide a language for the voiceless, the vulnerable and the marginalized" who "have no other means of getting the public's attention".¹¹⁵ This is relevant even in Western countries with a rich tradition of welfare and democracy as rights can guide these "cultures further along the paths of civility and humanity".¹¹⁶ To evidence this Gearty points to landmark desegregation and civil rights decisions in the United States Supreme Court which were guided by the United States Bill of Rights.¹¹⁷ Similar, but less monumental, developments have arisen in the New Zealand context.¹¹⁸ Some may view these advancements as judicial activism. Griffith would certainly blanch at the idea of unelected judges holding sway in such politically charged matters.

These benefits come at a cost. Gearty highlights the over-legalization of politics and the resultant uncertainty produced by bills of rights as "the public must wait to learn the fate of legislative initiatives".¹¹⁹ He notes the potential to use rights as a short-cut for implementing policy.¹²⁰ He uses *Roe v Wade* as an example of a judicial ruling which took a decision of moral importance away from the people at large and handed to the

¹¹³ Conor Gearty "The Human Rights Act – an academic skeptic changes his mind but not his heart" (2010) EHRLR 6 (2010) 6 at 582-588.

¹¹⁴ Gearty, above n 113, at 67.

¹¹⁵ Gearty, above n 113, at 67.

¹¹⁶ Gearty, above n 113, at 66.

¹¹⁷ Gearty, above n 113, at 66.

¹¹⁸ see Petra Butler "15 Years of the NZ Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder" (2005) 4 HRRJ 1 at 6-21.

¹¹⁹ Gearty, above n 113, at 81.

¹²⁰ Gearty, above n 113, at 80.

unelected judiciary.¹²¹ Finally, and perhaps most significantly, he highlights the compromise to equal access to justice produced by rights due to the necessity of litigation.¹²²

Despite these negatives, Gearty states that to eliminate rights would make a “strong negative statement” which “our liberal culture cannot afford to do.”¹²³ His solution is the United Kingdom Human Rights Act 1998 (‘the UKHRA’).¹²⁴

B The British Approach

Section 3 of the UKHRA is equivalent to s 6 of the NZBORA; it requires a rights-friendly interpretation of legislation to be favored. The UKHRA incorporates most of rights in the European Convention on Human Rights (‘the ECHR’) and its rights limiting mechanism.¹²⁵ The ECHR micromanages limitations to every single right.¹²⁶ This means that British judges do not enjoy the same freedom as New Zealand judges when assessing the limitation of rights through s 5 of the NZBORA. Where a consistent interpretation is impossible, s 4 of the UKHRA prescribes the higher courts with the power to issue a declaration of incompatibility. The effect of this does not invalidate the legislation, but s 10 does give the relevant minister an avenue to fast-track an amendment which would remove the incompatibility.

There are several things to note when comparing the NZBORA and the UKHRA. S 4 of the UKHRA means that the Judiciary is clearly assigned the power to review and comment on legislation which limits rights. The UK Parliament were more likely to assign this power than New Zealand’s because of the ECHR’s micromanagement of permissible limits to

¹²¹ Gearty, above n 113, at 84.

¹²² Gearty, above n 113, at 82.

¹²³ Gearty, above n 113, at 92.

¹²⁴ Gearty, above n 113, at 88-93.

¹²⁵ United Kingdom Human Rights Act 1998, s 2.

¹²⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms, United Kingdom, (signed 4 November 1950, entered into force 3 September 1953), art 18.

rights as compared to the large discretion provided by s 5 of the NZBORA. It is arguable that with the first limb of the Hansen test, the New Zealand Judiciary has seized upon the ambiguity of NZBORA and claimed this power itself. Furthermore this power is wider in scope due to the general nature of s 5.

As this is a common law development, as opposed to an explicit declaration by Parliament, a declaration of an unjustifiable limit by New Zealand judges carries less political weight than the British declaration of inconsistency. However there is nothing to compel the government to use s 10, or indeed acknowledge a declaration of incompatibility bar political compulsion. However, similar political compulsion exists where the New Zealand courts find a limit to a right unjustified per the first limb of the Hansen test. Justice McGrath held that it results in a “constitutional expectation” that there will be a reappraisal of the objectives of the offending measures and the means by which it was implemented in the legislation.¹²⁷ It should be noted that the UKHRA does provide British courts with various remedies where public authorities are deemed to have infringed rights.¹²⁸ However, there is nothing in the NZBORA which prohibits the courts from imposing such remedies. In fact, the New Zealand court has created a remedy in the event of rights being breached.¹²⁹

Therefore, there is very little difference between how the NZBORA and the UKHRA function. The only difference is that UKHRA is explicit that the Judiciary has the ability to review the degree to which an enactment complies with rights and issue remedies where rights have been breached whilst the New Zealand has read in these powers. If anything, s 5 confers more discretion to New Zealand judges in protecting rights. Accordingly, it is surprising to note Gearty supports the UKHRA but criticizes the NZBORA as weak since it restricts judicial power in relation to rights to one of “mere interpretation”.¹³⁰

¹²⁷ *Hansen* at [254].

¹²⁸ United Kingdom Human Rights Act 1998, ss 7-9.

¹²⁹ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA).

¹³⁰ Gearty, above n 113, at 93.

C The CAP's Proposals: Increasing Compliance with the NZBORA

The CAP report discusses two avenues which could resolve the ambiguity surrounding the operative sections: increasing the powers of the Judiciary or increasing the powers of the Legislature. To be clear, the report did not acknowledge the ambiguity surrounding the operative sections. However, these avenues could be used to resolve this ambiguity.

The first avenue is to increase the role of the Judiciary. It proposed three ways of achieving this. First was to grant the ability for the Judiciary to strike down inconsistent legislation to the effect it becomes unenforceable.¹³¹ Many nations have adopted a supreme bill of rights whereby the Judiciary can strike down legislation if rights-inconsistency is found.¹³² The Report presented arguments for and against this measure. It accurately reflected the Faustian bargain being struck.

Those supporting supreme rights argued that judges, as independent, impartial and fair decision makers with human rights expertise, were better equipped to protect minority rights than majoritarian parliaments.¹³³ The demographic make-up of the Judiciary casts doubt on this argument. They also argued that the Judiciary could provide an independent check on Parliament.¹³⁴

Those against supreme rights argued parliamentary sovereignty must be preserved on the basis that it has a democratic mandate and can best gauge public opinion.¹³⁵ They also highlighted the risk of politicizing judicial appointments.¹³⁶ A political rights theory argument omitted was the fact that the law would become uncertain if it were capable of

¹³¹ Constitutional Advisory Panel, above n 55, at 55.

¹³² Germany, Japan, The United States, Ireland and South Africa.

¹³³ Constitutional Advisory Panel, above n 55, at 55.

¹³⁴ Constitutional Advisory Panel, above n 55, at 55.

¹³⁵ Constitutional Advisory Panel, above n 55, at 55.

¹³⁶ Constitutional Advisory Panel, above n 55, at 55.

being struck down. However, on the whole, the Report does a good job of reflecting many of the concerns of political rights theorists.

The second method of increasing judicial powers discussed was the ability for the Judiciary to declare legislation inconsistent with BORA and a subsequent requirement for the Government to respond.¹³⁷ This is analogous to the UKHRA, except it would go a step further by *requiring* Parliament to respond. This would increase the Judiciary's powers as established in *Hansen*. However, the power is potentially toothless; the government could simply invoke s 5 by asserting the relevant limit was 'demonstrably justified'. Additionally, this amendment would not address many of the concerns of political right theory discussed throughout this paper. For example, it will still launch the Judiciary into an uncomfortable political position, personal opinions could be exercised through the first limb of the Hansen test, legislation would be rendered uncertain, and, perhaps most significantly, equal access to justice would be compromised.

Finally, the Canadian model was discussed.¹³⁸ This involves granting rights a supreme status, but with a caveat. Canada has adopted a unique model whereby legislation may be struck down unless the legislation includes a "notwithstanding" clause.¹³⁹ This grants the inconsistent legislation immunity from judicial critique for 5 years, at which point a notwithstanding clause may be enacted again. This clause preserves parliamentary sovereignty whilst maintaining public accountability when or if the Legislature decides to limit rights. It has seldom been used by the Canadian Legislature, indicating public accountability may provide an appropriate check.

¹³⁷ Constitutional Advisory Panel, above n 55, at 55.

¹³⁸ Constitutional Advisory Panel, above n 55, at 55.

¹³⁹ Canadian Charter of Rights and Freedoms 1982, s 33.

However, Gearty interprets this lack of use as the Judiciary lording over the Legislature. He argues that it appears “the pressure not to defy judicial versions of rights has proved next to impossible to resist” and thus the notwithstanding clause fails to operate as a “political counterweight to the court’s version of right and wrong”.¹⁴⁰ Consequently, this option succumbs to all the shortcomings of supreme rights legislation.

The second avenue discussed was to increase the role of the Legislature. It is arguably the preferable one. The Report noted that Parliament has the democratic mandate to decide what limits on rights are appropriate.¹⁴¹ It suggested enhancing this role by establishing a Select Committee with specific responsibility for human rights issues.¹⁴² However, this suggestion could be taken a step further and require a Human Rights Select Committee to report on every bill which was introduced into Parliament which appears *or has the potential to appear* inconsistent with the rights contained in the NZBORA. This lower potential standard would ensure that personal values of the Judiciary would not influence an s 5 analysis.

Additionally, it could be made explicit that s 5 is an exclusive consideration for Parliament. This section would align with Chief Justice Elias’ minority judgment in *Hansen* and remove the potential to politicize the Judiciary. It would also ensure that s 6 is always applied by the courts.

This Select Committee would usurp the Attorney-General’s s 7 role, but provide a much better alternative. As discussed, the Attorney-General as part of the executive is not the appropriate party to be screening bills for compliance with rights. The composition of this panel would be important. It could not be dominated by the executive, or else it would be analogous to the Attorney-General. New Zealand’s mixed member

¹⁴⁰ Gearty, above 113, at 92

¹⁴¹ At 54.

¹⁴² At 54.

proportional system resulting in a diverse Legislature would ensure that the select committee make up would be well balanced politically.

The Report also recommended caulking a s 7 loophole.¹⁴³ Currently, s 7 applies only at the introduction of a Bill and is not applicable to Supplementary Order Papers.¹⁴⁴ The Human Rights Select Committee could be required to review rights infringement during a bills entire passage through the House.

The Report discussed the possibility of ‘double entrenchment’.¹⁴⁵ Those in favour pointed to BORA’s precarious status and the fundamental importance of human rights.¹⁴⁶ Those against entrenchment stressed the need for flexibility and that the barriers posed by an entrenched supreme law might become unworkable.¹⁴⁷ Political rights theory stresses the possibility of change and would disapprove of entrenchment. It would inhibit the fluidity of the rights-discourse between the state and its subjects

IX The CAP’s Proposed Additional Rights

A NZBORA Current Catalogue of Rights

It is helpful to examine the NZBORA’s current catalogue of rights in order to inform an analysis of those proposed by the CAP report. The drafters of the NZBORA drew upon: the International Covenant on Civil and Political Rights of 1966, to which New Zealand is a party.¹⁴⁸ Article 2 of this treaty requires parties to take legislative action which recognizes the rights within ICCPR. The long title of NZBORA confirms it was intended to affirm the ICCPR.¹⁴⁹ However, Ronagh suggests that this reference to the ICCPR was included in

¹⁴³ At 54.

¹⁴⁴ *Boscawen and others v Attorney-General* [2009] 2 NZLR 229 (NZCA).

¹⁴⁵ At 55.

¹⁴⁶ At 55.

¹⁴⁷ At 56.

¹⁴⁸ McQuigg above n 46, at 53.

¹⁴⁹ New Zealand Bill of Rights Act 1990, long title.

order to convince a public skeptical towards rights that the NZBORA was necessary to meet international obligations.¹⁵⁰

This could be perceived as an example of the government manufacturing the consent of the governed. In fact, the rights in the ICCPR and those in the NZBORA do not necessarily align.¹⁵¹ Most rights in NZBORA have corresponding articles to some extent in the ICCPR.¹⁵² But many rights enshrined in the ICCPR are omitted, such as a right to privacy, the right to be free from slavery and rights specific to children.¹⁵³ For these omissions New Zealand has been criticized by the ICCPR's Human Rights Committee for failing to implement the Convention.¹⁵⁴ The Committee also censured New Zealand for failing to give the NZBORA supreme status.

The catalogue of rights is found in Part 2 of the NZBORA which is entitled, 'Civil and Political Rights'. The rights are separated into four categories: Life and Security of the Person; Democratic and Civil Rights; Non-Discrimination and Minority Rights; and Search, Arrest and Detention. A distinct emphasis is placed on procedural rights rather than substantive rights.¹⁵⁵ The parliamentary intention which can be gleaned from this procedural focus is clear: the rights were "designed to preserve the opportunity for political participation and decision making, rather than dictate substantive outcomes".¹⁵⁶

Furthermore, none of these rights are novel to New Zealand law. The Judiciary has observed that rather than adding to procedural rights, the NZBORA is simply a formal

¹⁵⁰ McQuigg above n 46, at 54.

¹⁵¹ McQuigg above n 46, at 54.

¹⁵² McQuigg above n 46, at 54-58.

¹⁵³ McQuigg above n 46, at 59-60.

¹⁵⁴ Concluding Observations of the Human Rights Committee 07.04.2010, CCPR/CN/ZL/CO/5. at para 7.

¹⁵⁵ Erdos, above n 45, at 59.

¹⁵⁶ Paul Risworth "Human Rights and the Reconstruction of the Moral High Ground" in R Bigwood (ed), *Public interest in Litigation: New Zealand Experience in International Perspective*, (Lexis Nexis, Wellington, 2006) at 126.

codification of pre-existing rights.¹⁵⁷ The CAP Report notes this.¹⁵⁸ This suggests further that the NZBORA was not intended to substantively alter the legal landscape. Any intentions of this nature were phased out during the passage through parliament.

Karel Vasak's categorization of rights into three distinct generations is a useful tool when comparing the rights current enshrined in NZBORA to those proposed in the CAP report.¹⁵⁹ According to this categorization, the first generation of rights are those basic civil and political rights forged by political struggles between the rulers and the ruled. The United States Bill of Rights and the French Declaration of the Rights of Man and of the Citizen are prime examples. The second generations of rights are those geared at equality through social, economic and cultural rights. They are exemplified by the implementation of socialist policies such as labour rights. The third generation of rights is still emerging. They are idealistic and target global issues such as intergenerational rights and environmental preservation. As such, they are seldom reflected in domestic law.

The rights within the NZBORA are limited to the first generation; it is simply a mechanism to regulate the relationship between the state and its subjects. The rights proposed within the CAP belong to the second and third generation of rights.

B The CAP's Proposed Additional Rights

As noted earlier, the degree which these proposed rights are supported does not go beyond a call for further discussion. Additionally, the CAP report does not examine the interaction between the proposals which would improve compliance with the standards set by the Act and the proposed additional rights. For example, if the NZBORA was to be granted supreme status *and* enact the proposed additional rights this would essentially

¹⁵⁷ *R v Jefferies* [1994] 1 NZLRD 290 and *Simpson v Attorney-General (Bagient's Case)*

¹⁵⁸ At 49

¹⁵⁹ See Karel Vasak, "Human Rights: a thirty year struggle: the sustained efforts to give force of law to the universal declaration of rights" *UNESCO Courier* (November 1977).

hand the keys of policy making over to the Judiciary. The effect of proposed additional rights will be examined in relation to their effect under the current NZBORA law.

The role of s 5 and its ability to limit rights where it is deemed justifiable is of particular concern. The proposed additional rights all have countervailing political justification meaning that s 5 could be readily engaged. The Report proposed economic, social and cultural rights aimed at reducing the wealth gap, ensuring essential needs are met, fostering a peaceful society, building communities and supporting economic development.¹⁶⁰ Depending on political belief, these goals could be achieved in innumerable ways. Liberal policy might cite financial regulation as a means of reducing the wealth gap, whilst conservative policy will contest deregulation is the best avenue to overall economic progress. Similarly, cultural rights and peaceful communities might arguably be achieved either by assimilation or preservation of distinct diaspora. Additionally, these proposed rights would have to be protected through costly litigation. Due to resource asymmetry between the poor, rich and corporate entities; equal access to justice could be compromised.

The Report considered enshrining some form of property right.¹⁶¹ This right appears relatively apolitical, but legislation which clearly defeats property rights might be justified by policy objectives. Consider government expropriation of petroleum.¹⁶² The original government expropriation of petroleum in 1937 was motivated by the prevailing belief that complete government control over petroleum was a necessary prerequisite to large-scale oil production.¹⁶³ Today, as privatization is deemed more efficient, other political

¹⁶⁰ Constitutional Advisory Panel, *New Zealand's Constitution: A Report on the Conversation* (Ministry of Justice, November 2013) at 50.

¹⁶¹ At 51.

¹⁶² see Crown Minerals Act 1991, s 10.

¹⁶³ DP Grinlinton "A Brief History of Petroleum Law in New Zealand" 1 (1996) NZ Petroleum Conference Proceedings 304 at 307.

rationale justifies expropriation; such as ensuring collective gain instead of private windfalls.

The Report considered the addition of environmental rights in a variety of forms: establishing obligations to protect the biosphere, affirming a human right to a healthy environment or intergenerational equity and a constitutional requirement to pursue sustainable development.¹⁶⁴ In the vast majority of cases economic interests are contrary to environmental ones and could provide demonstrable justification when limiting any form of environmental right.

The other proposed rights have similar countervailing policy interests. A right to privacy is opposed by law enforcement interests.¹⁶⁵ The proposed indigenous right would be opposed by the rhetoric of 'one law for all'.¹⁶⁶ Equality itself was another mooted right.¹⁶⁷ In summary, numerous policy rationales could be invoked in order to argue that any limits to the right were justified per s 5. This would completely invalidate the rights. This could prove devastating to the public's perception of the NZBORA. It would inspire a false expectation of rights which could be routinely limited.

Another problem exists in relation to enshrining cultural and indigenous rights. In the midst of the debate in 1986 about whether or not New Zealand needed a supreme bill of rights, the few submissions to the Law Reform Select Committee which supported a bill of rights highlighted the need to protect minorities' rights.¹⁶⁸ Indeed, other factors which contributed to Palmer's volt-face on a New Zealand bill of rights included the

¹⁶⁴ At 51.

¹⁶⁵ Constitutional Advisory Panel, above n 55, at 52.

¹⁶⁶ Constitutional Advisory Panel, above n 55, at 53.

¹⁶⁷ Constitutional Advisory Panel, above n 55, at 52.

¹⁶⁸ McQuigg above n 46, at 38.

“globalization of human rights” and “accelerating cultural diversity”.¹⁶⁹ It was believed rights could help protect the new minorities which were emerging in New Zealand.

However, a cultural relativist strain of the political rights identifies reveals a significant problem. Rights, as enshrined in legislation, reflect western values. Parallels can be drawn to Maori concerns over the proposals in 1986 to include the Treaty of Waitangi in the bill of rights. Enshrining treaty rights in a general statute concerned mainly with other issues would demean the Treaty’s importance and there was suspicion that the reasonable limitations provision would be applied by the Judiciary in way contrary to Maori interests.¹⁷⁰ Similarly, cultural and indigenous rights could be applied in a manner which was contrary to the agenda of respective cultures and Maori people. The Judiciary lacks the demographic make up to apply these rights sensitively and in accordance with the interests they are purported to represent.

X What makes a right legal?

If the role of the Judiciary is eliminated by adopting a Human Rights Select Committee, then this will avoid the political objection of the political rights theorist: that law is politics carried on by other means. The establishment of a Human Rights Select Committee with a role comparable to s 7 and preventing judicial consideration of s 5 would ensure that politics do not enter the legal world.

But where does this leave the philosophical objection of political rights theory; that rights amount to window dressing which conceals the political claims of individuals and groups? Even though the Judiciary is phased out, Parliament could still use rights for political purposes. This problem is mitigating by rejecting the CAP report’s proposed additional

¹⁶⁹ Taggart, above n 63, at 267

¹⁷⁰ David Erdos “Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act 1990” (2007) 5 ICL 343 at 356-357.

rights and restricting the NZBORA's catalogue of rights to the first generation of rights. This means that political parties will be prevented from using rights as a shortcut for policy which they are unable to convince the public to support. However, a question arises as to whether the first generation of rights, those of a procedural nature which protect fundamental civil and political freedoms, are vulnerable to the philosophical objection of political rights theory? An answer can be provided by briefly examining the differing philosophical justifications for enshrining rights.

There are many different underlying values which justify the legal recognition of rights: moral, cultural, religious, political, utilitarian and so on. It can be argued that, like most modern western legislation enshrining rights, the NZBORA is underpinned by moral and liberal values. The NZBORA was intended to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights ('ICCPR').¹⁷¹ The origin of the ICCPR is intricately linked to the Universal Declaration ('UDHR').¹⁷² The UDHR is "silent and ostensibly agnostic" on what its philosophical groundings are, presumably in a bid to avoid any disagreement which could jeopardize consensus about the validity and contents of the declaration.¹⁷³ However, the drafting history and language of the UDHR suggests it was heavily influenced by moral and liberal theories.¹⁷⁴ The moral justification simply asserts that for the sake of morality people should enjoy the protection of rights. For example, the right to life is inspired by the ethical principle that killing is wrong. Liberalism entrusts the state to protect individual autonomy to the extent it does not infringe the autonomy of others.¹⁷⁵ This includes protecting the individual from state infraction. The

¹⁷¹ New Zealand Bill of Rights Act 1990, long title.

¹⁷² "The International Bill of Human Rights" (United Nations Office of the High Commissioner for Human Rights, Fact Sheet No 2, June 1996).

¹⁷³ Ilias Bantekas and Lutz Oette *International Human Rights* (1st ed, Cambridge University Press, New York, 2013) at 32-33.

¹⁷⁴ Above n 174, at 33.

¹⁷⁵ Above n 174, at 34.

procedural focus of the NZBORA reflects the social contract between the Government and the New Zealand people.

Natural Law and Positivism are the two dominant jurisprudential theories which explain what creates law. These two theories have differing views on the role which the moral and liberal values have in creating the rights contained in NZBORA. The positivist position argues that “the existence and content of law depends on depends on social facts and not on its merits.”¹⁷⁶ Accordingly, the rights in the NZBORA constitute law because simply because they gained passage through New Zealand parliament. A natural law theorist, on the other hand, would claim that the NZBORA was created because it reflects the meritorious principles of morality and liberalism. However, there are problems with both theories. The dangers of positivism were made abundantly clear by the way in which the Third Reich justified atrocities by referring to national law.¹⁷⁷ On the other hand, natural law runs into the problem of moral relativity; for example natural law has been used to justify practices now universally recognized as evil such as slavery and denying woman the vote.¹⁷⁸

Ronald Dworkin offers a convenient middle ground between the two in the form of Legal Interpretivism.¹⁷⁹ Interpretivism is focused on the way institutions, such as Parliament and the Judiciary, create law by reference to internal principles. It differs from positivism in that these principles are “screened and rejected or modified” to the extent that they conflict with certain basic moral principles of fairness or justice.¹⁸⁰

¹⁷⁶ Leslie Green “Legal Positivism” (August 2009) The Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>.

¹⁷⁷ Bantekas and Oette, above n 174 at 14.

¹⁷⁸ Kenneth Cauthen “Natural Law and Moral Relativism” Big Issue Ground <www.bigissueground.com>

¹⁷⁹ See Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1977) at Chapters 2-4.

¹⁸⁰ Nicos Stravropoulos “Legal Interpretivism” (April 2014) The Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>.

An interpretivist lens can be applied to the NZBORA. It could be argued that the NZBORA reflects an example of overt and institutionalized legal interpretivism. The enshrined procedural rights can be couched as a codification of the internal moral and liberal principles which would otherwise guide legislation and common law. The operative sections, namely ss 6 and 7 require the relevant legal institutions, the Judiciary and parliament respectively, to take into account these principles. The fact the statute is unentrenched means that the internal principles (in the form of rights) are subject to change as values change.

This view offers a response to the philosophical objection of political rights theory. The procedural rights within the NZBORA might well be perceived as political claims. However, they have become an inalienable part of western culture produced by the discourse between the rulers and the ruled. Even if the rights were not enshrined, the Legislature and Judiciary would draw upon the moral and liberal principles they represent when creating law. By codifying these principles in the form of rights, a more lucid and certain system is created. The public, politicians and judges are overtly informed of the principles and predication as to their future application becomes easier.

XI Conclusion

Griffith's political rights theory argues that rights amount to thinly veiled political claims and that the law, particularly the Judiciary, is just another avenue for pushing these political claims. The ambiguity of rights legislation helps to achieve this purpose. However, Griffith's theory does not acknowledge the pivotal role which rights can play in negotiating power arrangements between the state and its subjects. This role is revealed by an application of the discourse thesis. The product of these negotiations is the first generation of rights; the procedural rights which protect fundamental civil and political rights.

The history of the NZBORA reveals that the public and academics alike shared Griffith's cynicism towards rights. In response to the concern that law is synonymous with politics, the Legislature attempted to reduce the role of the Judiciary in applying rights. However, this attempt was clumsily drafted resulting in the ss 4, 5 and 6 conundrum. This left a large amount of discretion available to the Judiciary. In *Hansen* the majority of the Supreme Court exploited this discretion and established an active judicial role in assessing the limits to rights. However, this role can only be performed in the event of litigation which compromised equal access to justice. The alternative check on limits of rights, s 7, was performed by a member of the executive, who had the discretion to exercise this role on the basis of his or her own political opinion.

The CAP report contains several proposals which have the ability to remedy this problem. The most preferable is the establishment of a Human Rights Select Committee. This would provide an impartial check on limitations to rights and ensure that the judiciary is not politicized in the process. It would also guarantee equal access to justice is not compromised. The CAP report's proposed additional rights should be rejected on the grounds that they could be perceived as thinly veiled political claims. Conversely, the current catalogue of rights contained in NZBORA can be defended on the basis that they effectively negotiate the relationship between the state and its subjects by protecting civil and political freedoms. Furthermore, they make explicit the values underlying the decisions of the Legislature and the Judiciary, thereby reducing the uncertainty of the law.

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