

# LIMITING RIGHTS

*Andrew S Butler\**

Section 5 of the New Zealand Bill of Rights Act 1990 (NZBORA) concerns the placing of justified limitations on NZBORA rights and freedoms. It is a key provision of the NZBORA. It reads:

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

Yet, more than 11 years into the life of the NZBORA, practitioners, governmental officials, and Judges still operate with little native guidance as to its proper interpretation and application.

Overseas experience indicates that the assessment of the reasonableness of limits placed on rights is the stuff of most rights disputes.<sup>1</sup> In New Zealand, that has not been so much the case: a LINX search indicates that section 5 of the NZBORA has been referred to in only 95 of the 1674 NZBORA judgments on that database.<sup>2</sup> This is, probably, because of the combined effect of the so-called "4-5-6 conundrum",<sup>3</sup> and the use of the NZBORA in judicial proceedings purely for interpretative purposes, rather than evaluative.

---

\* Crown Counsel, Crown Law Office, Wellington. The author does note, that he appeared as counsel in *Drew and Moonen (No. 2)* referred to below. The views expressed in this paper are personal to the author, and do not necessarily represent the position of the Crown Law Office. My thanks to Glenn Goldsmith, summer clerk, for his research assistance on this paper.

1 Declan Costello "Limiting Rights Constitutionally" in James O'Reilly (ed) *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press, Dublin, 1992) 177; Stuart Woolman "Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause" (1994) 10 SAJHR 60, 60.

2 Search undertaken in March 2002. The LINX database contains judgment summaries of Privy Council, Court of Appeal, High Court, and some District Court decisions. "NZBORA judgments" refers to those cases where at least one NZBORA provision has been referred to in the judgment – in some reference to NZBORA will have only been in passing. [NZBORA will be used to refer to the New Zealand Bill of Rights Act 1990].

3 Briefly, the "4-5-6 conundrum" refers to the still unresolved relationship between ss 4, 5 and 6 NZBORA. See generally Andrew Butler, "The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain" (1997) 17 Ox JLS 323 ["Butler (1997)"]; Andrew Butler,

But while section 5 has not been a truly prominent feature of the *judicial* treatment of the NZBORA to date, this past judicial history gives a false picture of the importance of section 5. First, section 5 is a highly important feature of internal opinion work within government. Very many NZBORA opinions that are prepared by the Crown Law Office turn on section 5 considerations. Equally, almost all advices prepared by the Ministry of Justice and the Crown Law Office for the Attorney-General as part of the section 7 NZBORA vetting process rely to some extent on section 5. Second, the new Part 1A of the Human Rights Act 1993 (inserted by the Human Rights Amendment Act 2001), which subjects government to the publicly-funded discrimination complaints process, emphasises the role of section 5 in determining whether such complaints are justified.<sup>4</sup> In that jurisdiction, where the declaration of inconsistency is an explicitly available remedy,<sup>5</sup> the focus in many cases will be evaluative, not just interpretative. Third, the Court of Appeal in *Moonen v Film & Literature Board of Review*, signalled an important future role for section 5 in NZBORA cases, as part of the interpretive process, and, further, founded the radical concept of "declarations"/"indications" of inconsistency on the language of section 5.<sup>6</sup> Overall then, its importance in litigation can be expected to grow significantly. The purpose of this paper is to analyse the interpretation and application of section 5 NZBORA.<sup>7</sup>

## **I THE SCHEME OF NZBORA**

The NZBORA is a short document – only seven and a bit pages long in the statute book. It has three parts, *viz*, General Provisions (sections 2–7); Civil and Political Rights (sections 8–27); and Miscellaneous Provisions (sections 28–29).

Turning to Part I, first, section 2 NZBORA affirms the rights and freedoms guaranteed. Section 3 demarcates the acts (and presumably omissions) in respect of which the NZBORA applies. Broadly these are acts done by the central organs of State (s 3(a)) and by

---

"Interface Between the Human Rights Act 1998 and Other Enactments: Pointers from New Zealand" [2000] EHRL Rev 249. Aspects of this conundrum are addressed at the end of this article.

4 Human Rights Act 1993, s 20L(2).

5 Human Rights Act 1993, s 92J.

6 *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9, 17 (CA). For discussion of the concept of the declaration of inconsistency, see Andrew Butler "Declarations of Inconsistency – A New Weapon in the Bill of Rights Armoury" [2000] NZL Rev 43. No declaration of inconsistency has been made by a New Zealand court, although in *R v Poumako* [2000] 2 NZLR 695, 720 (CA) Thomas J in his separate judgment would have made one.

7 It should be noted that I do not intend to deal with issues surrounding the meaning and application of the phrase "prescribed by law".

any other person or body in the performance of a public function, power, or duty (s 3(b)). Section 3 makes it clear – through the word "only" – that if an act does not fall within this compass, then NZBORA does not apply. Section 4 provides that other enactments cannot be invalidated, impliedly repealed, or disapplied by reason only of inconsistency with NZBORA. Section 5 is the justified limitations clause. Section 6 requires a NZBORA-consistent meaning to be given to an enactment whenever such a meaning can be given to it. Section 7 provides for the Attorney-General reporting function in respect of bills introduced into Parliament.

In Part II, NZBORA the various substantive rights that are guaranteed by NZBORA are enumerated. They are grouped together under the four subheadings of life and liberty of the person, democratic and civil rights, non-discrimination and minority rights, and search, arrest, and detention. The rights and freedoms are expressed in "a broad and ample style which lays down principles of width and generality".<sup>8</sup>

In Part III, section 28 provides that existing rights and freedoms are not abrogated or restricted by reason of non-inclusion in NZBORA, while under section 29 legal persons enjoy the benefit of NZBORA "so far as practicable".

## **II SECTION 5 IN BRIEF COMPARATIVE AND INTERNATIONAL PERSPECTIVE**

Before turning to a detailed analysis of section 5, it is worth pausing to consider section 5 from a comparative and international perspective.

A stand-alone general limitation clause like section 5 NZBORA, does not represent the norm in the articulation of rights limitation; indeed, to tell the truth, there are no norms. Older bills of rights tend towards a haphazard approach to limits on rights: the United States Bill of Rights (1789 *et seq*) contains no stand-alone limitation clause (although some rights are qualified in some respects); the rights guaranteed by the Irish Constitution (1937) and the European Convention (1950) are limited in an inconsistent manner: again there is no general limitation clause; instead some rights are subject to detailed limitation clauses, others to very broadly expressed limits ("the common good"), and others to no limits at all. More recent human rights documents tend to spell out limitations that attach to particular rights. For example, the International Covenant on Civil and Political Rights 1966, affirmation of which is a principal purpose of NZBORA, contains no general limitation clause, but rather follows a model of outlining the right first and then providing a limitation clause (or clauses) particular to each right. This is equally the pattern of the Namibian and Zimbabwean Constitutions, as well of a number of Caribbean

---

<sup>8</sup> *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (PC), quoted approvingly in *Ministry of Transport v Noort* [1992] 3 NZLR 260, 268 (CA) Cooke P. See also, *Noort*, above, 277, Richardson J.

Commonwealth constitutions. That said, there are a number of other jurisdictions that have a general, stand-alone limitation clause comparable to our section 5 NZBORA – section 1 of the Canadian Charter of Rights and Freedoms (1982), section 9 of the Israeli Basic Law: Human Dignity and Liberty (1994), and section 36 of the South African Constitution (1996) are examples.

Because of the variety of limitation models in use, care must be taken in consulting comparative and international jurisprudence both as to the substantive content of individual rights and as to permissible limits. One needs to be conscious that in those jurisdictions where no explicit limits are provided for, Judges have, *through interpretation*, provided the grounds upon which limits on protected rights will be considered legitimate. In addition, in those documents where express and apparently exclusive limits are provided for in the text, judges can on occasion stretch the meaning of a particular ground for limiting rights or on other occasions feel themselves to be constrained by the particular language.

### **III PURPOSE OF SECTION 5**

What then is the purpose of section 5? In my view, the provision has several purposes, all of which need to be given effect in the proper interpretation and application of section 5. I briefly state these and proceed to examine each in turn.

First, section 5 affirms the "obvious"<sup>9</sup> proposition that rights are not absolute.<sup>10</sup>

Second, section 5 creates a two-stage process: (1) a first stage at which the scope and purpose of the civil and political rights enumerated in Part II are to be determined, and (2) a second stage at which consideration is given to the reasonableness of limits placed upon the enumerated rights so defined.<sup>11</sup>

Third, section 5 allocates burdens of proof. The phrase "demonstrably justified" in section 5 suggests that the party seeking to uphold a limit upon a right as being "reasonable" in terms of section 5 will bear the burden of proving the same.<sup>12</sup>

Fourth, the purpose of section 5 is to affirm that the NZBORA is intended to create a "culture of justification".

---

9 *Noort*, above, 286 (CA) Hardie Boys J.

10 *Noort*, above, 277 and 282-3, Richardson J; and *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 573 (CA) Richardson J. For a pre-NZBORA statement see *Melser v Police* [1967] NZLR 437, 445 (CA) McCarthy J.

11 See to similar effect *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) paras 10.27 to 10.29.

12 *Noort*, above, 283, Richardson J.

Fifth, section 5 establishes the standard for justification. Limits on rights are to be "reasonable". To be reasonable they must be capable of being "demonstrably justified in a free and democratic society".

#### **IV RIGHTS NOT ABSOLUTE**

Rights are not absolute: as Sir Ivor has consistently reminded us, "individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of the community".<sup>13</sup> This is implicit in the recognition in section 5 NZBORA that rights may be subject to reasonable limits and, importantly, that all the rights and freedoms set out in Part II are covered.<sup>14</sup> It is also consistent with comparative and international experience.

#### **V TWO-STAGE PROCESS**

In terms of technique, an important initial issue is whether limits on rights should involve so-called "definitional balancing" or so-called "*ad hoc* balancing". Briefly, definitional balancing would involve reading limitations into the definition of the right set out in Part II NZBORA (thereby largely obviating the need to proceed to section 5 NZBORA itself), while *ad hoc* balancing would require the court to define the rights broadly "without reference to competing values or other considerations", with questions as to the reasonableness of limitations on those broad rights being determined separately

---

13 *R v B* [1995] 2 NZLR 172, 182 (CA). See also *R v Jefferies* [1994] 1 NZLR 290 302-3 (CA) Richardson J; *Noort*, above, 282-3, Richardson J; 286, Hardie Boys J

14 It is sometimes suggested that a number of the rights set out in Part II of NZBORA cannot ever be limited under NZBORA, s 5. Section 26, NZBORA, which protects against retrospective criminal legislation (s 26(1)), and protects the principle against double jeopardy (s 26(2)), is frequently cited as an example. With respect this view is mistaken. Two examples assist. First, by virtue of ss 8(1)(a)(ii) and 8(4)(a)-(b) of the International Crimes and International Criminal Court Act 2000, acts of genocide and crimes against humanity committed prior to the commencement of the 2000 Act, but on or after 28 March 1979 and 1 January 1997 (respectively), are declared to be and to have been offences against New Zealand law and may be prosecuted on indictment before a New Zealand Court since the 2000 Act came into force. This is clearly a violation of s 26(1) NZBORA, but equally is a reasonable limit on that right, since the conduct targeted by the 2000 Act were by the dates mentioned in it, international crimes (see s 11(g) of the Canadian Charter, which explicitly *excludes* a prohibition against the domestic retrospective criminalisation of acts that were contrary to international law at the time of the commission). Second, the principle against double jeopardy is not absolute. In a number of jurisdictions, a person can be retried where there has been a mistrial leading to an acquittal, due to, for example, an interference with witnesses or evidence: see the tainted acquittal procedure contained in Criminal Procedure and Investigations Act 1996 (UK), ss 54-57. The proposals outlined in the New Zealand Law Commission's *Acquittal Following Perversion of the Course of Justice* (NZLC, Wellington, 2000) R 70; and Art 4(2) of the Seventh Protocol to the European Convention on Human Rights.

under section 5 NZBORA.<sup>15</sup> For example, where the meaning of freedom of expression (NZBORA, section 14) is in issue, definitional balancing would lead the court to producing a definition of that freedom which would read in "inherent" limitations so as to exclude protection for perjury, contempt, obscenity, child pornography, and so on.<sup>16</sup> Under the *ad hoc* balancing methodology, however, almost all<sup>17</sup> expressive activities (even child pornography and obscenity)<sup>18</sup> would be held to come within the meaning of "free expression" (interpreted broadly), and the court would then proceed to assess the reasonableness of particular limits on those forms of expression imposed by the law in issue. In undertaking this assessment, of course, the court will be expected to have regard to the importance of the particular type of expression in issue and undertake some type of proportionality analysis (these aspects are discussed further below).

These being the options, what does NZBORA require? The law is not clear: expressions of preference for one or the other are scattered through the law reports though the issue has rarely been the subject of considered analysis. In my view, a purposive reading of the NZBORA favours the *ad hoc* balancing methodology (notwithstanding the pejorative nature of its title).<sup>19</sup>

First, the location of section 5 in Part I of NZBORA, concerning "General Provisions", suggests that issues of limiting rights should be considered separately from the prior question of the scope and meaning of the Part II rights and freedoms. In other words, the location of section 5 outside Part II suggests a two-stage process, the first stage being concerned with the proper delineation of the broad scope and purpose of the enumerated rights in Part II NZBORA in their unlimited form, and the second stage at which, if a particular right or freedom is engaged on the facts, a determination is made as to the reasonableness of any limits on the right or freedom. It should be noted that as a corollary to the proposition that section 5 is the stage at which issues of reasonableness arise, the

---

15 *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48, 60 (HC).

16 This is the approach in the United States: see for example, *Chaplinsky v New Hampshire* (1942) 315 US 568, and *New York v Ferber* (1982) 458 US 747, although more recent cases suggest a closer look will be taken at speech of this type in case unjustified interferences are occurring: see for example *Cohen v California* (1971) 403 US 15, and *Ashcroft v Free Speech Coalition* (2002) 535 US; (2002) 152 L Ed 2d 403.

17 Excluded from free expression would be, for example, acts of violence: *Re ss 193 and 195.1 of the Criminal Code* [1990] 2 SCR 1123, 1185; *Irwin Toy v Attorney-General (Quebec)* [1989] 1 SCR 927, 970; and *R v Keegstra* [1990] 3 SCR 697, 731.

18 This is the approach in Canada: see below.

19 See also Andrew Butler "Same-Sex Marriage and Discrimination" [1998] NZLJ 229, 230, 232 ["Butler (1998)"].

task at the first stage must then be merely to delineate those interferences with rights and freedoms in respect of which a reasonableness inquiry should be undertaken.

Second, the two-stage process comports well with the allocation of burdens of proof envisaged by section 5 NZBORA. It naturally results in the plaintiff having to indicate that a *prima facie* interference with a Part II right or freedom has occurred ("he or she who alleges bears the burden of proving"), while at the second stage the onus shifts to the State to "demonstrably" justify the limits it has placed on that right or freedom. This is explored further below.

Third, the *ad hoc* balancing approach ensures clearer, more transparent analysis, very important where difficult social policy issues are involved, as can be the case in NZBORA litigation.<sup>20</sup> Under this approach, each individual interference with a Part II right will be scrutinised with an eye to the detail of the particular right in issue, the scheme impugned and the context disclosed by the particular case.<sup>21</sup> In contrast, as Tipping J succinctly observed in *Quilter v Attorney-General* (the same-sex marriage case):<sup>22</sup>

[I]f restrictions which may be legitimate or justified in some circumstances are built into the right itself [ie the definitional approach is adopted – AB] the risk is that they will apply in other circumstances when they are not legitimised or justified.

Fourth, the definitional approach would render section 5 NZBORA largely otiose – if it were intended that limits on rights be considered as part of the delineation of the rights themselves, rather than at a second stage under section 5, why was section 5 enacted?

---

20 On the importance of providing extended reasoning that articulates the choice of values that a judge uses in order to decide such cases, see Rt Hon Sir Ivor Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 52 ["Richardson (1985)"].

21 See for example *Duff v Communicado Ltd* [1996] 2 NZLR 89, 99 (HC) where Blanchard J preferred the two-stage approach and saw it as facilitating both a review of the doctrine of contempt of court as a whole against free expression, *as well as* determining whether, in the particular case, that doctrine was reasonably applicable.

22 *Quilter v Attorney-General* [1998] NZLR 523, 576 (CA). See also Paul Rishworth, "How to Interpret and Apply the Bill of Rights" in Grant Huscroft, Scott Optican, and Paul Rishworth *The Bill of Rights – Getting the Basics Right* (NZLS, Wellington, 2001) 13 ["Rishworth (2001)"]. Indeed, my principal criticism of the judgments of the majority in *Quilter* was that resort to the definitional approach meant that no reasons for excluding same-sex couples from civil marriage were provided: see Butler (1998), above.

Relevant<sup>23</sup> comparative constitutional experience also favours the *ad hoc* balancing methodology. As already noted, like the NZBORA, the Canadian Charter guarantees many rights and freedoms in absolute (or only partially qualified) form, but counterbalances this with a general limitation provision, section 1 of the Charter. Its terms are in essence identical to those of our section 5, not surprisingly, since our section 5 was "based closely on section 1 of the Canadian Charter".<sup>24</sup> The two-step process implicit in the structure of the NZBORA, which I favour, has been adopted by the Canadian courts and applied consistently across the range of rights that the Canadian Charter protects.<sup>25</sup> The two-stage approach has also been adopted by South African courts, which operate under a system of broadly defined rights and a general limitation clause.<sup>26</sup>

## VI INTERNAL MODIFIERS

A number of the rights guaranteed in NZBORA contain what are known as, in the jargon, "internal modifiers". Put shortly, an internal modifier refers to an adjective (usually), which apparently qualifies the scope of a protected right or freedom. Thus, for example, section 21 NZBORA does not guarantee a right to be free of search and seizure, but rather a right to be free of "unreasonable" searches and seizures. Similarly, section 9 NZBORA guarantees the right to be free of disproportionately severe treatment or punishment, not just treatment or punishment simpliciter.

A number of commentators<sup>27</sup> and Judges<sup>28</sup> have approached such internal modifiers on the basis that they demand a full consideration of matters touching on reasonableness and

---

23 Since the ICCPR (International Covenant on Civil and Political Rights) does not follow the stand-alone general limitation clause model, jurisprudence of the Human Rights Committee is not wholly transferable to New Zealand when deciding upon the *methodology* most appropriate to s 5 NZBORA. That said, ICCPR jurisprudence will be helpful in considering the application of limitation concepts, such as reasonableness, proportionality, and the legitimate grounds for imposing limitations in respect of particular rights

24 *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) 71.

25 See generally, Peter Hogg *Constitutional Law of Canada* (4 ed, looseleaf, Carswell, Toronto, 1997) para 35.14 ["Hogg (text)"].

26 See generally, Stuart Woolman "Limitations" in Matthew Chaskalson *Constitutional Law of South Africa* (looseleaf, Juta & Co, Kenwyn, 1996) ch 12.

27 See, for example, Hon J Bruce Robertson (ed) *Adams on Criminal Law* (3 ed, looseleaf, Brookers, Wellington) Ch 10.4.03 (last updated at 31 October 2001); Grant Huscroft "Reasonable Limitations on Rights and Freedoms" in Grant Huscroft, Scott Optican, and Paul Rishworth *The Bill of Rights – Getting the Basics Right* (NZLS, Wellington, 2001) 59, 60.

28 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, 677 (CA) Cooke P (s 21 unreasonable search and seizure); *Drew v Attorney-General* [2002] 1 NZLR 58, 72-3 (CA) Blanchard J (s 27(1) natural justice). In the other direction, in *Shortland v Northland Health Ltd* [1998] 1 NZLR 433, 445 (CA), the Court appeared to regard NZBORA, s 5, as available even after a conclusion



proportionality to such an extent that separate consideration under section 5 NZBORA is unnecessary.

In my view, this "take" on the internal modifiers is but a further illustration of misconceiving the division of roles effected by the scheme of NZBORA. In particular, when the two-stage process ((1) delineating the field in respect of which justifiability is to be expected and then (2) engaging in a reasonableness assessment) is properly understood, it will be readily seen that the internal modifiers are best considered as indicators of boundaries between the scope of activity which requires to be justified, and that which does not. An example under the Canadian Charter may assist understanding.

Section 8 of the Charter is the equivalent of our section 21 NZBORA. It guarantees the right to be free from "unreasonable" search and seizure. Applying the two-stage approach to the Charter, the Supreme Court of Canada has declined to transpose a full justificatory analysis from section 1 of the Charter into its delineation of the content of the right in section 8 of the Charter to be free from unreasonable search and seizure. Rather, the Court has preferred to use the concept of "unreasonable" in section 8 as a means of establishing the parameters for those sorts of searches and seizures that it will expect the government to justify. Accordingly, the concept of unreasonableness in section 8 has been used to demarcate the searches and seizures in which the Court is interested and those in which it is not. Only the former will require governmental justification and that justification assessment takes place under section 1 of the Charter.<sup>29</sup>

Practically speaking, what this has meant is that if a search or seizure regime (or an individual search and seizure) meets certain minimum requirements, then it will not be classified as an unreasonable search and seizure and hence no justification for it will be required. Thus, a search and seizure in the criminal sphere will not be considered to be an "unreasonable" search and seizure for section 8 purposes if it is conducted pursuant to warrant, is authorised by a neutral arbiter, is only issued where there are reasonable and probable grounds to believe that an offence has been committed, that evidence of the offence will be found at the place to be searched and is required to be executed reasonably. These requirements reflect the fact that the purpose of section 8 is "to protect individuals from unjustified State intrusions upon their privacy"; where the requirements are observed, privacy is not likely to be unreasonably interfered with. Where the State wishes to put in place a search and seizure regime which does not meet these minimum requirements in the criminal sphere (such circumstances would include, for example, the

---

had been made that an action violated a person's right not to be deprived of life without the observance of the principles of fundamental justice (NZBORA, s 8).

<sup>29</sup> *Hunter v Southam* [1984] 2 SCR 145.

conferral of powers of warrantless search and seizure on police officers), then the Supreme Court requires that scheme to be justified as "reasonable" under section 1. In undertaking the section 1 assessment, the Court has regard to the importance of warrants in protecting privacy, the role of a neutral arbiter, etc and the reasons why it is claimed that the particular scheme should be permitted without these elements.

### VII THE PROBLEM OF "CONFLICTING" RIGHTS

A further illustration of the definitional versus *ad hoc* balancing issue arises when a case involves two "conflicting rights". New Zealand case law on this issue is confused. In *Re J (An Infant): B&B v DGSW*,<sup>30</sup> J's parents were Jehovah's Witnesses and had objected to a proposed course of treatment involving blood transfusion recommended by hospital authorities. On the application of the Director-General of Social Welfare, the High Court had made orders under the Guardianship Act 1968 declaring J to be a ward of the court, with a medical doctor appointed as agent of the court in respect of giving consent to medical treatment involving blood transfusion. On appeal to the Court of Appeal, the parents argued that the order was an interference with their parental right to manifest religion (NZBORA, section 15) and the concomitant right to have their wishes as to the religious practices of their children recognised and upheld by the law. The Court of Appeal, however, held that there was a countervailing NZBORA right which was required to be considered in the case, *viz*, the right of every person not to be deprived of life except on such grounds as are established by law and consistent with the principles of fundamental justice (NZBORA, section 8). The Court of Appeal held that:<sup>31</sup>

[P]otential conflicts of rights assured under the Bill of Rights Act [are to be approached] on the basis that the rights are to be defined so as to be given effect compatibly. The scope of one right is not to be taken as so broad as to impinge upon and limit others. This is to prefer the 'definitional balancing' over 'ad hoc balancing' (by resort to section 5) which is the approach favoured by Professor Peter Hogg, *Constitutional Law of Canada* (3<sup>rd</sup> ed 1992), 33.7(f), 33.7(b).

As a result of its approach, the Court of Appeal held that it should define "the scope of the parental right under section 15 of the Bill of Rights Act to manifest their religion in practice so as to exclude doing or omitting anything likely to place at risk the life, health or welfare of their children".<sup>32</sup> And the Court of Appeal was clear that in the circumstances

---

30 *Re J (An Infant): B&B v DGSW* [1996] 2 NZLR 134, 146 (CA).

31 *B&B v DGSW*, above, 146.

32 *B&B v DGSW*, above, 146.

the Court's decision to invoke its wardship jurisdiction "[was] not a denial of rights by the State but the securing of a right of a child".<sup>33</sup>

With respect, nothing in the acts done by the Director-General or the High Court would have interfered with J's section 8 right; if anything, the right to life of J was being imperilled, not by the State, but by the choices which his parents sought to exercise on his behalf in the name of religion. But those choices are not ones which could fairly be said to amount to acts done by the executive or judicial branches of the government of New Zealand in terms of section 3(a) NZBORA. Hence, it is hard to see how section 8 NZBORA was directly engaged by the case.<sup>34</sup>

The analysis should have proceeded as follows: the Court order depriving J's parents of the right to make decisions in respect of blood transfusions, notwithstanding the acknowledged parental right to manifest religious beliefs on their children's behalf was "an act done" by the judicial branch of the Government of New Zealand in terms of section 3(a) NZBORA. Moreover, it was an act that implicated the rights protected by section 15 NZBORA. Clearly such an interference is one which calls for justification both generally and in individual cases, and which, therefore, the State should be called upon to justify at the general level and at the particular level, even though the result of such an analysis will be, in most cases, one that will involve the trumping of the parental right by reference to the State's overwhelming interest in the preservation of a child's life. It is important to affirm at this stage, that the purpose of going through this two-stage process is to ensure that the State *does* adequately *justify* its motivation for limiting the particular right (at the general level) and to ensure that in the particular case due consideration has been given to limiting the relevant parental right in a manner that is reasonable and consistent with effectively achieving the legitimate State interest that motivates the particular limitation.<sup>35</sup>

---

33 *B&B v DGSW*, above, 146.

34 Of course, if the Director-General had failed to intervene on J's behalf, or if the common law would have left J's parents with untrammelled power to determine matters of life and death over J, then J (or persons on his behalf) might have been able to sue claiming that the Director-General's omission or the default of the common law respectively was contrary to NZBORA. *But in such a case, the impugned act would not have been the parents' religious practices.*

35 The decision of the Full Court of the High Court in *Newspapers Publishers Association of New Zealand v Family Court* (1999) 5 HRNZ 41 (HC) provides an excellent illustration of the methodology at work. In that case, a Family Court Judge had made an order making a child (L) a ward of court so that he would be able to receive intensive chemotherapy treatment, a treatment to which L's parents were opposed. The parents went into hiding. The case attracted significant publicity and was a matter of substantial public controversy. The Judge had originally approved the issuance of a press release in an endeavour to locate L. Soon thereafter, however, counsel appointed by the court for L applied for an order suppressing details of the case, and prohibiting contact with health personnel and others involved in the case. The Judge held that the

Contrast *Re J* with the more recent decision of the Court of Appeal in *Living Word Distributors v Human Rights Action Group*.<sup>36</sup> In that case the Film and Literature Board of Review had decided that two videos discussing aspects of homosexuality in the United States context and discussing political and social ramifications of claims made by homosexuals, bisexuals, and transgender people for equal rights and the right not to be discriminated against were "objectionable" within the meaning of section 3(1) of the Films Videos and Publications Classification Act 1993 because the videos vilified and denigrated homosexuals. (The classification of a publication as "objectionable" affects the availability of a publication, rendering it largely illegal to possess and distribute.) Before the Board, *Living Word Distributors* had submitted that such classification would amount to an unreasonable interference with free expression. The Board accepted that free expression was implicated, but rejoined that, equally, the right to be free from discrimination on grounds of sexual orientation (protected by section 19(1) NZBORA) was also implicated and, on the proper interpretation of the legislation, this freedom trumped freedom of expression to the extent that the latter was to be read down so as to exclude discriminatory expression.

Without reference to its earlier decision in *Re J*, the Court of Appeal rejected the Board of Review's approach. The Court of Appeal took as its "starting point" that the Board was performing public functions in its censorship role which attracted the application of the Bill of Rights through section 3 NZBORA. It specifically observed that, "it is their conduct in exercising their censorship role, and so in abridging free speech, which engages the Bill of Rights".<sup>37</sup> From this proposition, the Court concluded that, "s 19 does not apply directly [to censorship decisions]".<sup>38</sup> This was because, "the Bill of Rights is a limitation on governmental, not private action. The ultimate enquiry under section 3 [of the 1993 Act] involves balancing the rights of a speaker and of the members of the public to receive

---

Guardianship Act 1968, s 23 (welfare of child paramount) overrode NZBORA, s 14 (free expression). A Full Court of the High Court questioned the order, holding, that while s 23 of the 1968 Act had to be respected, so too did NZBORA, s 14, as limited by NZBORA, s 5. The High Court held that any suppression order should be tailored to intrude only to the extent reasonably necessary to ensure L's welfare was protected. The Court provided guidelines on the interaction of these provisions, emphasising the need for an order to be tailored to the individual facts, with an eye to legitimate media interests. See also *Duff v Communicado Ltd* [1996] 2 NZLR 89, 99-104 (HC).

<sup>36</sup> *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA).

<sup>37</sup> *Living Word Distributors*, above, 583.

<sup>38</sup> *Living Word Distributors*, above, 584.

information under section 14 of the Bill of Rights as against the State interest under the 1993 Act to protect individuals from harm caused by the speech".<sup>39</sup>

The purport of this structuring of the NZBORA methodology was to make it clear that even where the motivation for a governmental limitation on a guaranteed right or freedom is to protect the rights and freedoms of other members of society, that limitation should not be couched in terms of a direct conflict of rights, with the neutral State mediating between the two. Rather it should be seen as the State placing limits on one person's protected rights because, for example, by imposing that limit it hopes to secure the rights and interests of other members of society. It will be apparent that this conception of the NZBORA methodology reflects a preference for the *ad hoc* balancing approach that had been rejected only five years before in *Re J*.<sup>40</sup>

My own view is that the approach adopted in *Living Word* represents the correct methodology.<sup>41</sup> At the end of the day, it is the plaintiff's claim of an interference with guaranteed rights of freedoms that is to be assessed. The scheme of the NZBORA is quite clear that the plaintiff must first of all identify a relevant "act done" (s 3), and then demonstrate how it is that that act infringes one of the rights guaranteed in Part II NZBORA. At that point, one moves to the second stage under section 5 NZBORA to consider whether any limits have been placed on the right. The onus at this point shifts to the defendant to defend any limitation on the guaranteed right or freedom in terms of section 5 NZBORA.

Structuring the methodology in this way achieves the primary goal of NZBORA, which is to create the "culture of justification" referred to in my opening paragraphs and discussed further below. What needs to be said immediately, however, is that in structuring the analysis of a NZBORA claim in this way, it is not my intention to denigrate the importance of any countervailing interests or rights which the State may be seeking to vindicate through the limit which it places on the plaintiff's rights. In other words, the particular rights of a class of individuals or a particular individual other than the plaintiff that are guaranteed by NZBORA can, and should be, raised, explored and, in an

---

39 *Living Word Distributors*, above.

40 As noted above, *Re J (An Infant): B&B v DGSW* [1996] 2 NZLR 134, 146 (CA) was not even referred to by the Court in *Living Word Distributors*, above. I note that, notwithstanding *Living Word Distributors*, the authors of the NZBORA section in Bruce Robertson J (eds) *Adams on Criminal Law* (looseleaf, Brookers, Wellington) ch 10.4.03(2) (last updated 31 October 2001) curiously continue to regard *B&B v DGSW*, above, as having resolved the definitional, *ad hoc*, balancing controversy.

41 Rishworth also prefers that methodology: see Paul Rishworth, "How to Interpret and Apply the Bill of Rights" in Grant Huscroft, Scott Optican, and Paul Rishworth *The Bill of Rights – Getting the Basics Right* (NZLS, Wellington, 2001) 14-15 ["Rishworth (2001)"].

appropriate case, be capable of overriding (reasonably) the plaintiff's rights in a given case. But the correct method of evaluating the competing claims (as well as any additional interest that the State can point to) is through the justificatory prism of section 5. Definitional balancing does not achieve this, because it tends to trade off the two conflicting rights at the general level before attention becomes focussed on the particular circumstances of the individual case. Hence, it prematurely curtails the justification assessment. Indeed, the Court of Appeal apparently conceded this in *Re J*: it justified its preference for the definitional balancing approach on the basis that, "[i]t also avoids any approach casting an onus to be discharged in respect of the inclusion of the parents' rights before the right of the child can be secured. That is not appropriate for reconciling these competing rights".<sup>42</sup>

### VIII ONUS OF PROOF AND METHOD OF PROOF

#### A Onus of Proof

This topic has been focused on earlier in considering textual support for the two-stage process. The basic rule of the common law legal system is that he or she who alleges, carries the burden of proving that allegation. In some jurisdictions, that rule translates into a burden on a person challenging legislation or an executive action on rights grounds to prove that the limit on a right is an unreasonable one. Doubt is resolved in government's favour.<sup>43</sup> This is the position in jurisdictions such as the United States,<sup>44</sup> Ireland,<sup>45</sup> India, and, more recently, Zimbabwe,<sup>46</sup> and Namibia.<sup>47</sup> That approach, however, does not appear consistent with section 5 NZBORA. First, the phrase "demonstrably justified" in section 5 NZBORA is a powerful indicator that the task of justifying a limit as reasonable falls on the party seeking to uphold it. Second, placing a burden on the State to justify the limits it places on rights significantly contributes to creating the "culture of justification" discussed below. Third, such a burden of proof is consistent with practice in a number of

---

<sup>42</sup> *B&B v DGSW*, above, 146.

<sup>43</sup> *Norris v Attorney-General* [1984] IR 36 (ISC); *Attorney-General v Paperlink Limited* [1984] ILRM 373 (IHC); *VM Syed Mohammad & Co v Andhra* [1954] SCR 1117 (Indian SC).

<sup>44</sup> Note that in respect of some rights guaranteed in the United States Constitution, the Supreme Court has placed an onus on the Government to demonstrate the reasonableness of a limit, once the challenger has raised a prima facie case of breach.

<sup>45</sup> John Kelly, Gerard Hogan, and Gerry Whyte *The Irish Constitution* (3 ed, Dublin, Butterworths, 1994) 448-458.

<sup>46</sup> *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983(2) ZLR 376 (S) (ZimHC); *In Re Chinamasa* (2000) 9 BHRC 519 (ZimSC).

<sup>47</sup> *Kavesa v Minister of Home Affairs* 1995(1) SA 51 (NamHC).

comparable overseas jurisdictions, which operate under a general limitations clause like our section 5,<sup>48</sup> as well as international human rights practice.<sup>49</sup> Accordingly, the better view is that the party alleging a NZBORA violation bears the onus of proving a *prima facie* interference with a Part II right or freedom (including any internal modification as required), and the onus then shifts to the State to demonstrate reasonableness of the impugned limit. This approach was approved by Richardson J in *Noort*,<sup>50</sup> and was what was envisaged in the White Paper.<sup>51</sup>

***B "Proving" reasonableness: The role of evidence***

As noted in the introduction, section 5 NZBORA has not played a prominent role in New Zealand thus far. Where it has been invoked there has been a marked unevenness in respect of issues of evidence. On the one hand, evidence appears to have been important in dismissing Crown claims that the exercise of the right to counsel could undermine the scheme of the drink-driving legislation,<sup>52</sup> and in another case, a similar claim was dismissed for the lack of any evidence that the right would have a detrimental effect.<sup>53</sup> But in many other cases a perfunctory section 5 analysis, that reflects the assertion of general abstractions, has sufficed.<sup>54</sup> This unevenness is, doubtless, a reflection of the primary

---

48 For example, in Canada and South Africa, which have limitation clauses very similar to ours, the State bears the onus of demonstrating the reasonableness of a limitation: *R v Oakes* [1986] 1 SCR 103 and *State v Zuma* (1995) (2) SA 642 (CC).

49 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle I.A.12. ("The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State".)

50 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *Curran v Police* [1992] 3 NZLR 260, 283 (CA) Hardie Boys J.

51 *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) 73, para 10.29.

52 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *Curran v Police* [1992] 3 NZLR 260, 286 (CA) Hardie Boys J, *passim* (evidence indicating that delay of an hour or so to facilitate lawyer contact would have only a marginal impact on effectiveness of scheme); *Police v Smith & Herewini* [1994] 2 NZLR 306, 313, 317-8, 323, 324-5 (CA) (evidence indicating that presence of counsel in hospital accident and emergency areas would be disruptive).

53 *Rae v Police* [2000] 3 NZLR 452, 465 (CA) (no evidence that lawyer right being used to undermine testing procedures). In *Bennett v Attorney-General* (9 August 2001) High Court, Rotorua CP61/00, Salmon J, extensive affidavit evidence was presented about the operation of the prison visiting system in defending a claim for breach of NZBORA arising out of a shortening of visitor hours.

54 For example, in *Quilter v Attorney-General* [1998] NZLR 523 (CA), no sociological or other evidence was produced about the impact (negative or otherwise) on homosexuals of their exclusion from marriage. Of course, it must be recalled that a number of judges did not regard NZBORA, s 5 as relevant to the case, as the matter was to be determined at the prior definitional stages as to the

forensic use of NZBORA as a *tool of interpretation* (ie, as a way of influencing the meaning of words), rather than a *measure of reasonableness*.<sup>55</sup>

The lack of evidence in NZBORA cases contrasts with experience in a number of comparable overseas systems.<sup>56</sup> In *R v Oakes*, the Supreme Court of Canada was clear that evidence would generally be required to be put before it in order for the State to prove the constituent elements of a section 1 inquiry,<sup>57</sup> though later cases have accepted that this may be "supplemented by common sense and inferential reasoning".<sup>58</sup> Similarly, the South African Constitutional Court has stated that "to the extent that justification [under section 36(1) of the South African Constitution 1996] rests on factual and/or policy considerations, the party contending for justification must put such material before the court".<sup>59</sup>

Typically, Canadian Charter and South African Bill of Rights litigation involves the preparation of an extensive evidentiary record, including affidavits of relevant experts, officials and Ministers, the reproduction of relevant Parliamentary Debates, the filing of departmental reports and memoranda, extracts from the scientific literature, and so on.<sup>60</sup>

---

meaning of "discrimination". The important point is that relevant evidence of the type described does not appear to have been put before the Court.

55 The shame of it is the failure to see the connection between the two: arguments about the proper meaning of words often revolve around which meaning is most reasonable having regard to parliamentary intent, workability of the statutory scheme, and so on – evidence can usefully assist/augment the text-based arguments.

In *Noort*, above, for example, the proper interpretation of the Transport Act 1962 was significantly affected by evidence. First, an affidavit filed by the appellant indicated that the delay involved in contacting a lawyer by telephone would have a minimal impact on breath/blood alcohol levels. Second, an English study revealed that "contrary to common sense" the provision of legal advice more often improved suspect-police interaction than not. Both of these features pointed the way to an interpretation of the Transport Act 1962 which facilitated the right to counsel, based on the impact which such an interpretation would have on the workability of the drink-driving provisions. See Rt Hon Sir Ivor Richardson "Assumptions Underlying Legal Rules" [1999] NZL Rev 149, 156-7 ["Richardson (1999)"]. For a discussion of the potential for evidence to assist interpretation generally, see John F Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1999) 159-163.

56 See Juliane Kokott *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International, The Hague, 1999).

57 *Oakes*, above, 138.

58 *R v Sharpe* [2001] 1 SCR 43, 78.

59 *Moise v Transitional Local Council of Greater Germiston* (2001) 11 BHRC 474, 481 (SACC), in particular, para 19.

60 Note Hogg's criticisms of the cost of Charter litigation created by the need to gather such an extensive record. He would prefer that the Court more readily resort to a conclusion based on the



These materials will be directed towards providing a helpful indication of the economic, social, cultural, administrative, moral, and other factors, which were brought to bear upon the creation of a particular scheme or, if not available at the time of the scheme's creation,<sup>61</sup> to justify its retention.<sup>62</sup>

The lack of evidence in NZBORA cases, particularly where section 5 has been raised, has not gone unremarked upon. In a 1995 paper, Sir Ivor observed:<sup>63</sup>

... generalities need to be matched by specifics. In some cases there ought to be extensive empirical analysis ... to allow propositions to be tested, policy alternatives to be considered in an informed manner, and decisions made more rationally and less intuitively.

... the problem is that decisions of courts in the human rights area may impose massive economic costs on society. Nor is it a sufficient answer to say that human rights cannot be reduced to a cost-benefit analysis. In my view the Courts are entitled to be given a very clear analysis of the likely economic and social consequences of the decisions they are asked to make. The Courts have the same information needs in that regard as those involved in law reform and legislative processes and in executive decision-making.

Of course there are limits (no pun intended!) to the role that evidence can, or should, play. As Sir Ivor has noted:<sup>64</sup>

---

obvious or self-evident: Peter Hogg *Constitutional Law of Canada* (4 ed, looseleaf, Carswell, Toronto, 1997) para 35.4. For a more critical review of the Supreme Court's watering down of the importance of evidence in Charter cases see Danielle Pinard "Charter and Context: The Facts for Which We Need Evidence, and the Mysterious Other Ones" (Paper presented at Osgoode Hall Law School Constitutional Conference, 6 April 2001).

61 Canadian courts have accepted that post-enactment material can be legitimately relied upon to prove s 1 elements: see for example *Irwin Toy v Attorney-General (Quebec)* [1989] 1 SCR 927, 983-4.

62 It should be noted that the heavily evidence-based approach of Charter litigation contrasts with the practice of a number of other human rights tribunals. In particular, the approach of the European Court of Human Rights in Strasbourg can be fairly characterised as one based on formal, dogmatic reasoning (in the true sense of the word, rather than with any pejorative overtones). Evidence is rarely filed by the parties as to possible alternative measures available to the State; as to the impact of a particular scheme on an individual or the general public; and so on. Rather the Court tends to make its own evaluations based on experience, its sense of the possible, and transcendent interests and beliefs.

63 Rt Hon Sir Ivor Richardson "Rights Jurisprudence – Justice for All" in P Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 74-5 ["Richardson (1995)"]. For similar observations pre-NZBORA, see Rt Hon Sir Ivor Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 49-50 ["Richardson (1985)"].

64 Richardson (1995), above, 74.

The adversary process is not particularly suited to the conduct of an extensive public interest inquiry. Parties other than the Crown may lack resources or even any interest in exploring wider issues. The techniques of seeking briefs, including statistical material from government and the potentially affected industry and citizen groups, need to be developed ...

Of course there are other considerations that tell against an indiscriminating use of evidential material. For example, care needs to be taken in letting the proper interpretation of a law be dictated by non-textual material to which many areas of the legislation will have had no access in guiding their conduct. And as an American court has stated:<sup>65</sup>

The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

### **IX CULTURE OF JUSTIFICATION**

In my mind, one of the positive benefits of consistently applying the two-stage process under the NZBORA, is that it will produce a "culture of justification" to use a phrase of respected South African constitutional law professor, the late Etienne Mureinik. By culture of justification, I mean a society in which citizens are entitled to call upon the provision of reasons for measures that affect their rights, are entitled to challenge those reasons, and, in a sense more importantly, are entitled to expect that in advance of impairment thought will have been given to the reasonableness of a particular limit. The culture of justification contributes to principles of good government, such as transparency, accountability, rational public policy development, attention to differing interests and so on.

The two-stage process does this because it assumes that, where a *prima facie* interference with Part II rights and freedoms has been demonstrated, it will be the State's task to justify such interference. In this way, section 5 will lead to a position that when rights are implicated, interferences are deliberate, measured, and (one would hope) closely scrutinised before the interference occurs. In addition, the two-stage process ensures that consideration of the reasonableness of interferences will occur not just at a general level (ie, is contempt of court a reasonable limit on free expression?) but rather the contemplation of a number of scenarios and an assessment of reasonableness in respect of each. I emphasise that this is not to say that justification will always be difficult; but rather more simply that it is right and proper for the State<sup>66</sup> to be called upon to justify any such interference.

---

<sup>65</sup> *Dunagin v City of Oxford, Mississippi* (1983) 718 F 2d 738, 747 (5th Cir) per Reavley J. This case was appealed to the Supreme Court, reported at *Dunagin v City of Oxford, Mississippi* (1984) 467 US 1259.

<sup>66</sup> It should be noted that strictly speaking it will not always be "the State" that will have the task of justifying limits on rights. Since, by virtue of s 3(b), acts done by private persons and entities are subject to NZBORA if they involve the performance of a public function, duty or power, the

## X "REASONABLE LIMITS": SOME GENERAL CONSIDERATIONS

### A *The Relationship Between Rights and Limits*

The relationship between rights and limits is, of course, a key question underlying this paper. In order to be able to answer it, though, one must have some understanding as to what it means to guarantee a "right", since it is only when one knows what one is trying to limit that one can determine the basis upon which limits can be properly imposed.

Perhaps the most obvious, but important, point is that rights are not *Dinge an Sich* (things in and of themselves). Thus, even if one accepts (with Kant) that people should be treated as ends in themselves, and not as a means to the ends of others, that does *not* lead to a conclusion that *rights* should be treated as ends in themselves. Rather, rights serve to ensure that people are not treated as others' means. Rights are a construct through which the needs, interests, and values of human beings in society are expressed in moral, political, and legal terms depending on context. And, once one posits reasons for the recognition of rights, then those reasons, rather than the rights themselves, should animate discussion, interpretation, and application. In short, rights are instrumental, even though human beings are not.

This realisation has two immediate implications. First, we are forced to make clear the values underlying the rights we recognise. Second, it highlights the fact that, in pursuit of those values (whatever they may be), the limits we place on rights are just as important as the rights themselves. For not only can our chosen values be compromised if the scope of rights is too narrow, but equally they can be compromised if rights are allowed too much scope.

Recognising that rights are instrumental does not tell us which rights should be recognised as a matter of morality (never mind of law), nor the proper scope of rights so recognised. Other theories have to be considered to deal with these matters. In turn, these theories will affect one's approach to limits on rights. As Rawls notes, one may limit rights in either an equal or an unequal fashion. If one is to limit them equally, either because of conflict with other rights, or with interests, recourse must be had to an overriding standard of some sort, such as self-ownership (Nozick); utility in one of its many guises (Bentham and Mill); or what rational actors would agree to (Rawls' general conception of justice).

Where the proposed limitation would be unequal in effect, a distributional principle must be brought into play. Possibilities are:

---

occasion will arise where non-State actors will bear the justification task under NZBORA, s 5. In addition, where a common law rule is challenged for NZBORA-inconsistency in private litigation the party relying on the improved rule will, practically speaking, have to provide the justification for the rule.

- (1) No unequal rights be allowed whatsoever (eg, Rawls' special conception in respect of liberty, Nozick);
- (2) Unequal rights be allowed subject to the condition that it maximise the position of the least advantaged (Rawls' difference principle);
- (3) Unequal rights be allowed where this would, overall or on average, further the chosen goals (eg, utilitarianism);
- (4) Unequal rights be allowed where this would, overall or on average, sufficiently promote chosen goals to justify the inequality (a middle ground position between 2 and 3).

It is not apparent which rights theory the NZBORA has incorporated, and hence, which limitation theory it supports. This itself poses a quandary for Judges when fulfilling their role of policing compliance with NZBORA: Is the generality of expression of both the Part II rights themselves and the basis for their limitation in section 5 NZBORA a signal that several different rights theories (and limitation theories) are legitimately "in play" and that those with the power of initiative (usually Parliament and the executive) are free, in the first instance, to operate within one or more of those? Or is it intended that the courts articulate one vision of rights and limitations and adopt that as the template? In addressing these issues especial attention must be paid to the role of utilitarianism. As many commentators have noted, utilitarianism, in various forms, is the dominant modern form of political discourse.<sup>67</sup> How should rights discourse interact with it?<sup>68</sup> Should rights talk be subsumed within a utilitarian analysis as some have suggested? If not, can a utilitarian analysis ever be deployed to justify limits on rights? If not, or only rarely, what does this mean for the task of those entrusted to adjudicate on the point where rights end, and politics starts (and *vice versa*)?

These are difficult issues, which I do not even attempt to answer here. I merely raise them to indicate their existence and relevant to the practical task of interpreting and applying section 5 NZBORA.

---

<sup>67</sup> See for example, Richard Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, (Mass), 1977) 184-191; John Hansas "From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights" (1995) 89 NWUL Rev 900; Mirko Bagaric "A Utilitarian Argument: Laying the Foundation for a Coherent System of Law" (2002) 10 Otago L R 163.

<sup>68</sup> Extra-judicially, Sir Ivor has commented that, "Section 5 of the New Zealand Bill of Rights Act requires a utilitarian assessment of the public welfare in determining whether setting reasonable limits on a protected right is justified". Rt Hon Sir Ivor Richardson "Rights Jurisprudence – Justice for All" in P Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 82 ["Richardson (1995)"].

### ***B Limits are Fundamental Too***

On one view (not the one I would support), the language of section 5 considered on its own, suggests that a niggardly approach should be adopted to submissions, that limits placed on rights are reasonable. After all, the word "only" could be taken to imply narrowness in and of itself, while the words "demonstrably justified" place an onus on the party seeking to establish the justifiability of a limit. For some, this approach is reflected in the mantra: "interpret the rights broadly, and apply the limitations narrowly". Indeed, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights<sup>69</sup> reflect this sentiment, declaring as a general principle of interpretation that, "All limitation clauses *shall be interpreted strictly and in favour of the rights at issue*".<sup>70</sup> This is a significant statement, since one of the purposes of the NZBORA is to affirm New Zealand's commitment to the ICCPR, and the Siracusa Principles (which were drawn up by a panel of international experts) are said to represent the state of international human rights law, as at Spring 1984. The rationale for this approach is succinctly captured in the comment of Bose J in *Ram Singh v Delhi*, that "it is the *rights* which are fundamental, not the limitations".<sup>71</sup>

With respect, I disagree. It is not simply that rights are not absolutes. Rather, more positively, very many limitations placed on rights are fundamental too. Indeed, when it is recalled that section 5 NZBORA – properly interpreted – is the vehicle through which "competing rights" come to be considered, such a position should not be all that surprising. Limits on free expression are often required to ensure a fair trial, to secure consumer protection, to protect vulnerable groups from harm that would otherwise be caused through certain types of pornography, and hate speech. Interferences with the right to be free from arbitrary detention may be required to protect the public from drunk drivers. Moreover, the fact is that government is essential to the realisation and protection of many rights and to the creation of an ordered society in which alone rights can have true meaning and individuals flourish. Accordingly, antagonism to the role of government as such, and in particular when it seeks to limit rights, would be an unhelpful posture to adopt. Seen in the light of all this, section 5 can be more readily seen as implicitly endorsing the notion that the State is *entitled* and *expected* to limit rights and freedoms.

Thus, I see the culture of justification which section 5 NZBORA creates as being one in which the value and importance of limitations on rights and freedoms can be celebrated as

---

69 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984) 4 HRNZ 753.

70 See, Siracusa Principles, above, clause I.A.3, 754 (emphasis added).

71 *Ram Singh v Delhi* (1951) AIR SC 270, 276 Bose J, para 22 (italics in the original) (dissenting).

much as the rights and freedoms themselves. For these reasons, I agree with the respected Indian constitutional lawyer H M Seervai that Bose J's observation in *Ram Singh* (quoted above) is "misleading" because, "to say that the rights are fundamental and the limitations are not is to destroy the balance which [the fundamental rights guarantee] was designed to achieve. To say this is not to belittle fundamental rights but only to say that the rights are not absolute and can be enjoyed only in an orderly society".<sup>72</sup>

### ***C Courts as Guardians of Rights and Public Discourse and Action***

Next, there is the issue of the intersection between the courts' role as guardians of human rights and their role as guardians of the space of public discourse *and action*, essential to our representative democracy. I deliberately say that the courts are the guardians of both, because it is their responsibility when exercising their supervisory jurisdiction to get the balance right when undertaking a section 5 analysis. The courts must accept that to the extent that they demand the least possible limitations or insist on the adoption of the "perfect" scheme in the name of human rights, they inevitably cut down on legislators' freedom of action because they in effect say that there is only one "correct" solution.

At this point freedom of expression assumes some importance. Let me explain. Unless one adopts a very impoverished view of the purpose of speech – seeing it as confined to entertainment or "letting off steam" – it will be readily accepted that much speech is directed at persuading others of a particular position *and persuading them to act upon it*.<sup>73</sup> In short, one speaks to produce action. But if, in a wide range of areas, little or no action can be taken, because it has been foreclosed by the courts, the point of much speech is diminished. That is not necessarily always a "bad thing". After all a key purpose of a bill of rights *is* to put certain issues beyond the reach of (shifting) majorities in the legislature and from the arbitrary exercise of discretion by Judges and executive officers. But the key questions are "Which issues"? and "To what extent"? It is at this level that the analysis of reasonableness must be sensitive to public space.

### ***D Limits and Uncertainty***

Many new pieces of legislation or new government policies are adopted in an environment of scientific (or other) uncertainty and complexity. This reality creates a variety of problems. First, the nature of the harms that a new technology or social phenomenon poses to the community (or parts of it) are unknown and the subject of

---

72 Hormnasji M Seervai *Constitutional Law of India: A Critical Commentary, Vol 1* (4 ed, Tripathi, Bombay, 1991) 702-703.

73 Stanley Fish *There's No Such Thing as Free Speech and It's a Good Thing Too* (Oxford University Press, New York, 1994) ch 8.

speculation. Second, the measures that need to be taken to tackle the putative harms are equally speculative – therefore does one assume the worst case scenario and respond accordingly (the precautionary principle) or does one work with the current state of known harm and only deal with other potential harms when they actually manifest themselves? Will it be too late by then? What impact should the human rights dimension have on the approach to uncertainty particularly where the impact on rights and freedoms is clear, but the benefits from the limits imposed are speculative?<sup>74</sup>

### *E Limits and Exactitude*

A further general consideration that needs to be accommodated within a reasonableness test concerns the need (or otherwise) for individualised response. The language of rights, and indeed one of the purposes of rights, is to ensure that attention is paid to the claims of each individual within our society – each person is worthy of respect and concern and should have a certain freedom of action, which permits them not to "follow the crowd".

At the same time, however, the nature of public policy and, indeed, of law as an instrument of public policy is to focus on the general. In other words, a "problem" which is the focus of public policy considerations is usually discussed in terms of a "typical" scenario, thought to be representative of that problem. Responses are devised to respond to that paradigmatic scenario (and often some variations on it). Moreover, individualised response to the needs of particular individuals is often eschewed, because reposing discretion in those who have to apply the new scheme is not considered desirable: unconstrained administrative discretion which could be responsive to individual circumstances also holds the danger of rendering decision-making "haphazard, uncoordinated and easily influenced by extraneous considerations".<sup>75</sup> Because of this, legislatures are wont to set criteria to trammel that discretion and hence avoid arbitrariness. (Equally, if Parliament has conferred a very broad discretion on the administration, the administration is wont to erect guidelines, policies and standards to control the activities of officials.) Thus, as Professor Galligan has noted:<sup>76</sup>

---

74 For a discussion of these sorts of issues in the specific context of the random breath-screening procedures under the (then) Transport Act, see Sir Kenneth Keith "Road Crashes and the Bill of Rights" [1994] NZRec LR 115.

75 Denis Galligan *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1990) 29.

76 Galligan, above, 30.

The assumption, which is most appropriate in the context of judicial discretion, that each situation calling for a decision is unique in some way does not fit easily with the widespread diffusion of powers amongst administrative authorities.

Accordingly, care needs to be taken in constructing standards of reasonableness: an insistence on exactitude, requiring the legislature/executive to avoid any under-inclusiveness or over-inclusiveness may be premised on unreal expectations of what the regulatory system can be expected to deliver.

#### ***F Limits and Expertise***

It is often said that the standard of reasonableness must accommodate the differing expertise of judges and legislators/administrators. However, I have some reservations as to the appropriateness of making this an explicit element of the section 5 NZBORA reasonableness standard itself. In my mind, where a *court* is exercising its supervisory jurisdiction to determine whether the legislature or an executive official has only imposed a reasonable limit on guaranteed rights, then it is only proper that *it* recognise the limits of *its* expertise in certain spheres. But the fact that a court is not well equipped to make expert judgments in certain spheres does not justify the courts "watering down" the criteria which section 5 NZBORA demands – in other words, even though the courts may not be able to effectively supervise the application of section 5 NZBORA, it should not assume that the law of section 5 NZBORA is not capable of being understood and applied by those who *do* have expertise in the field and that they should attempt to comply with those standards to the best of their ability.

An example may assist. It has been established that NZBORA is to be given effect to in the classification of publications for censorship and broadcasting standards purposes – accordingly, any classification must only limit free expression to the extent that is reasonable in the circumstances.<sup>77</sup> But the courts are not experts in censorship, and indeed that task has been assigned by Parliament to the expert judgement of nor in broadcasting standards.<sup>78</sup> In my view, this means that the courts cannot use the "reasonableness" requirement of section 5 NZBORA to supplant the experts' assessments. But equally, the court should not water down what the law requires of those experts in terms of their obligations under NZBORA, just because it will only be in the clearest of cases that the *courts* will overturn such assessments. In short, the limits of the courts' supervisory capacities should not dictate the substantive law applicable to specialist or expert bodies. Indeed, it can be expected that such bodies, bound as they are by the terms of section 5

---

<sup>77</sup> *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA); and *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA).

<sup>78</sup> Films, Videos and Publications Classification Act 1993, s 4 and Broadcasting Act 1989.



NZBORA, will try in good faith to meet those obligations even where judicial intervention is unlikely.

### **G Intensity of Review**

A further issue related to all those before, is the intensity of review which should be adopted when undertaking a section 5 assessment. Here great care needs to be taken. There is a view abroad that once the label "human right" applies to a particular situation, then strict scrutiny of the reasonableness of any interference with that right or freedom is called for. One sees this type of thinking emerging not only in NZBORA proceedings, but also in respect of the judicial review of administrative action. The English Courts, for example, have adopted a schema of intensity of judicial review, which assigns the closest scrutiny to administrative action affecting human rights, the so-called "anxious scrutiny" review.<sup>79</sup> That notion has been accepted in New Zealand.<sup>80</sup> The flaw is the assumption that some make; that all human rights issues are the same and that whenever a human right is implicated it is appropriate to apply the same intensity of review, regardless of the context. With respect, this cannot be right.

First, the adoption of a generous approach to the meaning of individual human rights creates a situation in which many legislative and administrative acts can be legitimately characterised as ones implicating human rights concerns. Examples in the field of freedom of expression include commercial broadcasting licences,<sup>81</sup> telecommunications infrastructure,<sup>82</sup> criminalisation of soliciting prostitutes,<sup>83</sup> the regulation of child pornography,<sup>84</sup> broadcasting standards, professional advertising,<sup>85</sup> refusal to answer questions put by regulatory authorities, as well as the more traditional regulation of protesters, court reporting, defamatory statements, contempt of Court, political comment, and so on. As will be apparent even from this short list, there is a wide range of matters

---

79 *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 415, 531 (HL) Lord Bridge; 537 Lord Templeman; *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696, 757 (HL) Lord Ackner; *R v Secretary of State for the Home Department; ex parte Launder* [1997] 1 WLR 839, 855, and 867 (HL); *R v Ministry of Defence; ex parte Smith* [1996] QB 517, 554, 563 and 564-5 (CA); *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115 (HL); *R v Secretary of State for the Home Department; ex parte Daly* [2001] 2 WLR 1389 (HL).

80 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA).

81 *Observer Publications Ltd v Matthew* (2001) 10 BHRC 252 (PC).

82 *Retrofit (Pvt) Ltd v Posts Telecommunications Corp* [1996] 4 LRC 489 (ZimSC); *Cable & Wireless (Dominica) Ltd v Marpin Telecom & Broadcasting Co Ltd* [2001] 1 LRC 632 (PC).

83 *Re ss 193 and 195.1 of Criminal Code* [1990] 2 SCR 1123.

84 *R v Sharpe* [2001] 1 SCR 43.

85 *Rocket v Royal College of Dental Surgeons* [1990] 2 SCR 232.

implicated by free expression, not all of which would appropriately call for the same measure of review.

At this stage, I pause to note the view of some commentators that a generous approach to the definition of rights should not be taken, precisely because it could lead to a dilution of the intensity of reasonableness review.<sup>86</sup> But if a central purpose of NZBORA is to create a culture of justification, there is much to be said for a policy of generosity at the *prima facie* stage, so long as there is proper recognition that variable intensity of review is a necessary concomitant.

Second, it must be recalled that not only are particular human rights capable of application to a vast array of situations, but also there is a vast array of human rights which vary in nature to such a degree that invariable intensity of review is an inevitability. While the NZBORA largely concerns itself with the traditional civil and political rights (with the notable exception of private property rights), the International Bill of Rights protects not just civil and political rights, but also economic, social, and cultural rights. These include the right to housing, education, and social security. Is it to be suggested that the intensity of review which the Courts traditionally subject administrative action impinging upon certain of the civil and political rights (though by no means all) is suitable for application to the range of economic, social and cultural rights? Of course not.<sup>87</sup> But the reason for this is not that such rights are not human rights (it is hard to see how anyone could suggest that the right to minimal adequate housing, clean water, family life, and so on are not human rights) but rather because the nature of the rights themselves and the contexts within which they tend to arise are such that an intensive level of judicial scrutiny is inappropriate, for reasons such as lack of judicial expertise, the polycentric nature of the issues and interests involved, the need to recognise space for the democratic process, and so on.

A variable intensity of review is a phenomenon of much overseas human rights law. For example, in Ireland, the Courts have shown deference to the legislature's limitation of constitutional rights in matters concerning compulsory water fluoridation,<sup>88</sup> revenue

---

86 Peter Hogg "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28 Osgood Hall LJ 817 ("Hogg (1990)").

87 *Soobramoney v Minister of Health (KZN)* (1998 (1)) SA 765 (SACC) para 11; *Government of the Republic of South Africa v Grootboom* (2000) 10 BHRC 84, 100 (SACC) (allegation that right of access to adequate housing violated rejected, court holding: "A court considering reasonableness will not inquire whether other more desirable or favourable reasons could have been adopted, or whether public money could have been better spent. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations.").

88 *Ryan v Attorney General* [1965] IR 294 (IrSC).

statutes,<sup>89</sup> social welfare legislation,<sup>90</sup> and the conduct of foreign affairs.<sup>91</sup> In Canada, the Supreme Court has held that child pornography,<sup>92</sup> hate propaganda,<sup>93</sup> and defamatory libels<sup>94</sup> do not lie at the core of free expression, and hence, are more readily subject to limits than other forms of expression. The European Court of Human Rights has recognised that in a host of fields, States must be allowed a "margin of appreciation" to reflect the fact that they "commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely".<sup>95</sup> Examples are censorship,<sup>96</sup> adoption by homosexuals,<sup>97</sup> immigration,<sup>98</sup> property legislation,<sup>99</sup> education,<sup>100</sup> and so on. In other contexts, of course, proportionality analysis will be more rigorous, and particularly, where consensus over the non-justifiability of particular types of limits emerge throughout Europe.<sup>101</sup> On the other hand, certain areas are much more likely to be the subject of intense review: for example, the European Court of Human Rights has consistently held that interferences with political association will be looked at very closely and national governments will enjoy only a very limited margin of appreciation.

In the United Kingdom, the courts have recognised the need for care in applying human rights standards. In *R v DPP, ex parte Kebilene*, Lord Hope observed:<sup>102</sup>

---

89 *Madigan v Attorney General* [1986] ILRM 123 (IrSC).

90 *Hyland v Ministry for Social Welfare* [1989] IR 624 (IrSC).

91 *McGimpsey v Ireland* [1988] IR 567 (IrHC).

92 *R v Sharpe* [2001] 1 SCR 43.

93 *R v Keegstra* [1990] 3 SCR 697, 731.

94 *R v Lucas* [1998] 1 SCR 439, para 94.

95 *James v United Kingdom* (1986) 8 EHRR 123, para 46 (ECHR) (expropriation legislation).

96 *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECHR); *Otto-Premirger Institut v Austria* (1995) 19 EHRR 34 (ECHR).

97 *Fretté v France* (26 February 2002) European Court of Human Rights, Strasbourg, App No 36515/97.

98 *Abdulaziz v United Kingdom* (1985) 7 EHRR 2471 (ECHR).

99 *James v United Kingdom* (1986) 8 EHRR 123, para 46 (ECHR) (expropriation legislation).

100 *SP v UP* (1997) 23 EHRR 139 (ECHR).

101 Contrast with *Rees v United Kingdom* (1987) 8 EHRR 56 (ECHR) with *Goodwin v United Kingdom* (11 July 2002) European Court of Human Rights, Strasbourg, App No 28957/95.

102 *R v DPP, ex parte Kebilene* [2000] 2 AC 326, 381 (HC) Lord Hope.

In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention ... [T]he area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of judgment'. It will be easier for such an area of judgment to be recognised where the [European] Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.

More generally, the House of Lords in *R v Secretary of State for the Home Department, ex parte Daly* approved the statement by the English Court of Appeal in *R (Mahmood) v Secretary of State for the Home Department* that: "[T]he intensity of review in a public law case will depend on the subject matter in hand".<sup>103</sup> All of this is but a reflection of the succinct observation of Lord Steyn in *Daly*: "In law, context is everything".<sup>104</sup>

#### **XI "REASONABLE LIMITS": THE GENERAL NEW ZEALAND APPROACH**

Putting to one side for the moment the qualification that applies in respect of enactments,<sup>105</sup> the only limits that section 5 NZBORA permit to be placed on Part II rights and freedoms are those that are "reasonable" and "demonstrably justified in a free and democratic society". What do these terms mean?

Surprisingly little has been said about them in New Zealand. In *Noort*, Richardson J observed that they "involve public policy analysis and value judgments on the part of the Court".<sup>106</sup> In *Solicitor-General v Radio New Zealand*, the Full Court of the High Court was of the view that the compendious phrasing of section 5 did *not* require the State to go so far as to show that a limit is "necessary" or correspond to "a pressing social need".<sup>107</sup> In *TVNZ v*

---

<sup>103</sup> *R v Secretary of State for the Home Department; ex parte Daly* [2001] 2 WLR 1389 (HL) para 28, quoting from *R v Secretary of State for the Home Department; ex parte Mahmood* [2001] 1 WLR 849 (HL) para 18.

<sup>104</sup> *R v Secretary of State for the Home Department; ex parte Daly* [2001] 2 WLR 1389, 1436 (HL) Lord Steyn.

<sup>105</sup> See the opening words of NZBORA, s 5: "Subject to section 4 of this Bill of Rights".

<sup>106</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *Curran v Police* [1992] 3 NZLR 260, 283 (CA) Hardie Boys J.

<sup>107</sup> *Solicitor-General v Radio New Zealand* [1994] 1 NZLR 48, 62 (HC). For this reason, Canadian and European case law on the limits that can be placed on free expression in the name of a fair trial were not necessarily helpful: see, *Radio New Zealand*, above, 62-3.

*Quinn*, McGechan J was of the view that "necessary" was narrower than "demonstrably justified", and hence, section 5 NZBORA could be regarded as allowing a broader scope of restrictions than those available under the European Convention or the International Covenant.<sup>108</sup> Beyond these observations, little attention has been focussed on the actual words of section 5 NZBORA. Rather, Judges have tended to move immediately to outlining a series of steps or tests that, they say, flow from section 5 NZBORA.

The Court of Appeal's judgment in *Moonen v Film & Literature Board of Review* is illustrative.<sup>109</sup> There, in considering a question of law as to the interaction between section 14 NZBORA and the Films, Videos and Publications Classification Act 1993, the Court of Appeal made a range of observations about the application of section 5 NZBORA, laying out various substantive tests that would further explicate the concept of reasonableness. But it did so with no principled exposition of the purpose of section 5 NZBORA, no explicit consideration of the comparative law in the field, nor of previous Court of Appeal (or High Court) case law. The Court stated:<sup>110</sup>

In determining whether an abrogation or limitation of a right or freedom can be justified in terms of section 5, it is desirable first to *identify the objective* which the legislature was endeavouring to achieve by the provision in question. *The importance and significance of that objective must then be assessed.* The way in which the objective is statutorily achieved must be in *reasonable proportion* to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a *rational relationship with the objective*, and in achieving the objective there must be *as little interference as possible* with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgements will be involved ... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgement which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

Although these observations are helpful to the extent that they provide a guide as to how section 5 NZBORA may be applied, they also, place the cart before the horse. The principal flaw is that nowhere in *Moonen* do the Court ask basic questions as to the

---

108 *Television New Zealand v Quinn* [1996] 3 NZLR 23, 58 (CA).

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

110 *Moonen*, above, 16-17, para 18 (emphasis added).

purpose of section 5 NZBORA, or the meaning to be ascribed to the particular words employed.<sup>111</sup>

For example, why was the word "reasonable" used in section 5, as opposed to "necessary"? There is no mere semantic argument here. For the European Court of Human Rights recognised in an early case that the word "necessary" does not contain the "flexibility of such expressions as ... 'reasonable' ...".<sup>112</sup> Hence "necessary" and "reasonable" need not necessarily be equated, and this can have substantive effect on one's approach to limitations.<sup>113</sup>

What function does the reference to "free and democratic society" perform? "Society" presumably affirms the basic notion that rights only have meaning within a community where we interact with others; but does it perhaps also recognise that the existence of society is a precursor to the enjoyment of rights? What impact would this have on assessing the reasonableness of limits? Do the adjectives "free" and "democratic" establish the principal purposes of the rights protected in Part II (the securing of a free and democratic society), thereby helping us to evaluate what the "core" values of those rights are? Do they perhaps (and subject to section 28 NZBORA)<sup>114</sup> reduce the range of values and interests that can be taken account of in a section 5 inquiry to those found in Part II, and hence, validate only those limits founded upon competing rights?<sup>115</sup> To what extent does the word "democratic" reflect a desire to recognise public space for discussion and disagreement, and reasonable freedom for the majority to act in limiting rights reasonably? Is "democratic" intended to be a qualifier on "free" (emphasised by the use of the conjunctive "and")? Is the reference to a free and democratic society intended to draw from constitutional organs ideal conceptions of such a society, or is it merely intended to

---

111 See also Grant Huscroft "Reasonable Limitations on Rights and Freedoms" in Grant Huscroft, Scott Optican, and Paul Rishworth *The Bill of Rights – Getting the Basics Right* (NZLS, Wellington, 2001) 65 ("The touchstone for the section 5 inquiry – freedom and democracy – is nowhere mentioned.").

112 *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 275 (ECHR) para 59.

113 See *Solicitor-General v Radio New Zealand* [1994] 1 NZLR 48 (HC), where the High Court accepted this proposition. See also, McGechan J in *TVNZ v Quinn* [1996] 3 NZLR 58 (CA). I note that Cooke P, at 37, to the contrary, commented in *Quinn* that the differences between the two were "[v]ery largely ... a matter of word games". To the extent that there is truth in what Lord Cooke said, it lies in the fact that "necessary" has taken on a strong "reasonableness" tone in Strasbourg jurisprudence.

114 NZBORA, s 28 provides that existing rights and freedoms are not to be held to be abrogated or restricted by reason only of their non-inclusion in NZBORA.

115 See for example, Lorraine Weinrib "The Supreme Court of Canada and Section One of the Charter" (1998) 19 Sup Ct L Rev 483.

direct them to look at other societies that are adjudged to be free and democratic and compare the limits they place on the rights in equivalent circumstances? None of these issues are explored in *Moonen*, yet surely they are key to a proper interpretation and application of section 5?

Interestingly, it would appear that the drafters intended section 5 NZBORA to provide quite a level of flexibility, with broad approbation expected to be given by the courts to democratically enacted limits on rights, precisely because the explicit reference to democracy in it would lead to judicial distance. The White Paper states:<sup>116</sup>

In a great many cases where controversial issues arise for determination, there is no 'right' answer. The action taken by the Government of the day will depend upon its own political persuasions, and its assessment as to where the balance of the public interest lies. It is the very essence of democracy that it allows for people to hold differing views on controversial issues, and for the democratically elected Government of the day to adopt a standpoint thereon but for which of course it must take responsibility in the normal way at the next election. *The basic test stated in Article 3 [now section 5 NZBORA-AB] means that in most cases the courts will leave it to Parliament to define the public interest, and to enact legislation encapsulating its decision.*

The failure to engage in a purposive interpretation of the text of section 5 NZBORA has secondary consequences, as should already be plain. In particular, a number of the components of a section 5 enquiry enumerated in *Moonen* can be criticised as going beyond what is required by section 5 NZBORA. For example, Grant Huscroft has criticised the emphasis on requiring the legislature to achieve its objectives with "as little interference as possible" on a Part II right or freedom. He argues that this requirement "proves too much; all that should be required is that rights be limited as little as reasonably possible in the circumstances".<sup>117</sup> In addition, the *Moonen* test says nothing about evaluating the importance of the particular Part II right in the context within which it is triggered, which is surely an oversight as few rights carry the same weight regardless of context. Finally, the reference to the Court being obliged to make the value judgements as to whether a limitation is or is not demonstrably justified appears to assume a primary evaluative role for the Court, as opposed to the legislature/executive, without any deep consideration of the purpose of judicial *review* and the degree of circumspection that that function carries with it.

---

116 Weinrib, above, 45, para 6.17 (emphasis added).

117 Grant Huscroft "Reasonable Limitations on Rights and Freedoms" in Grant Huscroft, Scott Optican, and Paul Rishworth *The Bill of Rights – Getting the Basics Right* (NZLS, Wellington, 2001) 66.

In the sequel to *Moonen*, *Moonen v Film & Literature Board of Review (No 2)*,<sup>118</sup> the Court of Appeal, although resisting the Solicitor-General's invitation to review aspects of the first *Moonen* judgment on the application of section 5 NZBORA (and the minimal impairment limb in particular), did note that the issue was "complex", stating that "arguably" its application is "context dependent and would require extensive consideration of the application of section 5 in relation to various provisions of the NZBORA".<sup>119</sup>

## **XII REASONABLE LIMITS: LEARNING FROM OVERSEAS**

Since little about section 5 NZBORA is written in stone, New Zealand courts have the opportunity to profit from overseas experience in the application of the reasonableness standard, so as to produce a nuanced set of questions that need to be considered.

Reference to Canadian jurisprudence has been a prominent feature of NZBORA litigation to date. In my view, the Canadian experience with their section 1 is instructive.

The seminal Canadian judgement on section 1 of the Charter is that of Dickson CJ in *R v Oakes*.<sup>120</sup> Dickson CJ started his analysis of section 1 by emphasising the significance of the Charter as a commitment to uphold basic rights and freedoms. Next, he held that the interpretation of section 1 was to be enforced by the values and principles of a free and democratic society, which embodied:<sup>121</sup>

[t]o name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

Finally, section 1 indicated that it "may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance".<sup>122</sup> To give effect to these purposes, Dickson CJ held that two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society.<sup>123</sup> First, the objective to be served by the measure limiting a Charter right must be sufficiently important to warrant overriding the constitutionally protected right of freedom. At a minimum, an objective

---

118 *Moonen v Film & Literature Board of Review (No 2)* (2002) 6 HRNZ 623 (CA).

119 *Moonen*, above, para 13.

120 *R v Oakes* [1986] 1 SCR 103.

121 *Oakes*, above, 136.

122 *Oakes*, above, 136.

123 *Oakes*, above, 138-9.



must relate to societal concerns which are "pressing and substantial in a free and democratic society" before it can be characterised as sufficiently important.<sup>124</sup> Second, the party invoking section 1 must show the means adopted to be reasonable and demonstrably justified. This involves a form of proportionality test involving three components. First, the measure must be fair and non-arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.<sup>125</sup> Second, the means should impair the right in question "as little as possible".<sup>126</sup> Third, there must be proportionality between the effects of the limiting measure and the objective – for the more severe the deleterious effects of a measure, the more important the objective must be.<sup>127</sup>

The first part of the *Oakes* test – that the objective of the measure be "pressing and substantial" – requires an assessment of the purpose of the limitation itself, not of the objective of the law as a whole.<sup>128</sup> This test has rarely led to the finding of a Charter breach.<sup>129</sup> In one sense this is odd, because the phrase "pressing and substantial" postulates quite a high threshold to be met. But the lack of difficulty in governments satisfying this requirement, suggests that as a "test" it serves little use, because it is no hurdle. That is not to say that consideration of the importance of a limitation should be abandoned altogether, but rather that the purpose and importance of the objective underlying the limit should be reduced to a factor to be considered in undertaking a proportionality assessment. In this way, the true importance of the objective of the limit can be understood and weighed in its full context.

Moving on, from an early stage the court's stipulation that in order to be proportional, a limiting measure must impose the least limitation possible came to be regarded as too stringent and too demanding a standard. The Supreme Court accepted this criticism and has modified the "least possible limitation" component. Soon after *Oakes*, in the *Edwards Books* case, Dickson CJ stated that the test under section 1 was whether the law or the act in

---

124 *Oakes*, above, 138-9.

125 *Oakes*, above, 140.

126 *Oakes*, above, 140.

127 *Oakes*, above, 140.

128 Thus, while the purpose of the Misuse of Drugs Act 1975 is the control and criminalisation of the possession and supply of certain drugs, the purpose of the Misuse of Drugs Act 1975, s 18 is to authorise the conduct of warrantless searches and seizures. It is the objectives which support such a warrantless power that, on the *Oakes* approach, above, must be "pressing and substantial" in the case of a challenge to the reasonableness of s 18.

129 Peter Hogg *Constitutional Law of Canada* (4 ed, looseleaf, Carswell, Toronto, 1997) para 35.9(b); *R v Zundel* [1992] 2 SCR 731 is the only case I am aware of in which this has occurred.

question infringed a "protected right as little as is *reasonably* possible".<sup>130</sup> As Professor Hogg noted, the introduction of the qualifying word "reasonably" captures the notion that legislatures and the executive should have a zone of discretion within which different choices affecting a Charter right could be tolerated.<sup>131</sup> This shift in emphasis has been affirmed in many subsequent cases. For example, in *R v Chaulk*, Lamer CJ stated that, "Recent judgments of this court ... indicate that Parliament is not required to search for and to adopt the absolutely least intrusive means of obtaining its objective".<sup>132</sup> Thus, so long as the legislature or executive has chosen from "within a range of reasonable alternatives",<sup>133</sup> section 1 will not be violated. More recently, the court has begun referring to the concept of "excessive impairment" as the danger against which section 1 guards, rather than securing "minimal impairment" which was the focus of *Oakes*.<sup>134</sup>

This shift in approach has been justified by several rationales, including:<sup>135</sup>

- (1) There is a distinction between those laws and actions which involve the State "mediating" between competing interest groups within society and attempting to achieve a balance between their conflicting demands, and those where the State is the "singular protagonist" against the citizen. In the former, a wider range of discretion should be allowed to the legislature, so as to accommodate the democratic process, than should be allowed in respect of the latter. This is because democratic institutions are meant to let all persons share in the responsibility for making the difficult choices where a balance needs to be struck between the claims of competing groups;
- (2) Often the interests of vulnerable groups are at stake and legislative advance in their protection should not be too easily rolled back by the Charter (ie, limits are fundamental too);
- (3) Frequently conflicting scientific evidence and differing justified demands for scarce resources are involved;

---

130 *R v Edwards Books & Art Limited* [1986] 2 SCR 713, 772.

131 Hogg (text), above, para 35.11(b).

132 *R v Chaulk* [1990] 3 SCR 1303, 1341.

133 *RJR - MacDonald Inc* [1995] 3 SCR 199, para 160, McLachlin J. See, for an endorsement of this type of approach to NZBORA, s 5, Sir Kenneth Keith "Road Crashes and the Bill of Rights" [1994] NZRec LR 115, 118-9.

134 *R v Sharpe* [2001] 1 SCR 43, para 78.

135 See generally *Irwin Toy v Attorney-General (Quebec)* [1989] 1 SCR 927, 993-994, 999.

- (4) Lack of certainty as to what impact on rights will result from the impugned measure and lack of certainty as to what measures need to be taken in order to achieve the legitimate governmental objective;
- (5) The practical limitations of legislation must be recognised. The State must often develop rules and policies that apply to many cases.<sup>136</sup> Tailoring an impairment of rights so that those rights are impaired no more than necessary in individual cases can be difficult (sometimes "impossible").<sup>137</sup> It "seldom admits of perfection and the courts must accord some leeway to the legislator".<sup>138</sup>
- (6) Some pragmatism must be recognised on occasions so as to allow for the balancing of fairness with efficiency in the administration of legitimate statutory objectives.<sup>139</sup>
- (7) The courts' role under section 1 is to *review* assessments initially made by other constitutional organs (except, obviously, where the common law or exercise of a judicial discretion are involved). Review implies a measure of restraint on judicial activity: "The courts are not called upon to substitute judicial opinions for legislative ones as to the precise place at which to draw a precise line".<sup>140</sup>
- (8) Lack of judicial expertise as compared with that of the legislature/executive.

Importantly then, while the court had signalled in *Oakes* that in determining whether a limit was reasonable in terms of section 1, the courts would need to know what alternative measures for implementing the objective were available to the legislators when making their decisions, subsequent decisions have counterbalanced this by emphasising that "when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the same objective or would achieve the same objective as effectively".<sup>141</sup> It is only where "the government fails to

---

<sup>136</sup> *Committee for the Commonwealth of Canada v Attorney General (Quebec)* [1991] 1 SCR 139, 248 McLachlin J.

<sup>137</sup> *Committee for the Commonwealth*, above, 248.

<sup>138</sup> *RJR - MacDonald Inc* [1995] 3 SCR 199, para 160, McLachlin J. As several US Supreme Court justices have observed, it would be a dull and unimaginative lawyer indeed who could not come up with some alternative that limited a right a little less drastically or a little less restrictively in almost any situation. See *Illinois Elections Board v Socialist Workers Party* (1979) 440 US 173, 188-9, Blackmun J; *US v Playboy Entertainment Group Inc* (2000) 529 US 803 Breyer J.

<sup>139</sup> *R v Jones* [1986] 2 SCR 284, 304, La Forest J.

<sup>140</sup> *R v Edwards Books & Art Limited* [1986] 2 SCR 782.

<sup>141</sup> *R v Chaulk* [1990] 3 SCR 1303, 1341.

explain why a significantly less intrusive and equally effective measure was not chosen [that] the law may fail".<sup>142</sup> Further, in *Irwin Toy*, the Court observed: "This court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups".<sup>143</sup>

Thus, questions of effectiveness and the breadth of the means necessary to achieve a legitimate goal are considerations that must be factored into any proportionality analysis.

Next, reflecting some of the concerns about uncertainty noted previously, the Supreme Court has held that in some fields (eg, obscenity,<sup>144</sup> and child pornography<sup>145</sup>), a reasoned apprehension of a harm-based standard, as opposed to scientific proof based on concrete evidence, suffices in making policy choices and evaluating their reasonableness. In that regard, the Court has been quick to accept that the Crown cannot be required to adduce a higher level of proof than the subject matter admits of.<sup>146</sup> This insight has been applied both in assessing the rational connection element of *Oakes* and in evaluating the level of impairment that the measure imposes on the protected right.

Finally, it is important to note that in *Oakes*, Dickson CJ, having outlined the elements of the "Oakes test", was quick to emphasise the relevance of context. In particular, when discussing the third component of the proportionality test (the effects component) His Honour observed:<sup>147</sup>

A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society.

While largely ignored in the immediate aftermath of *Oakes*, the emphasis in that passage on context, its acknowledgment of a sliding scale of protection that should be accorded rights dependent on the core values that the right or freedom is designed to

---

<sup>142</sup> *MacDonald Inc.*, above.

<sup>143</sup> *Irwin Toy v Attorney-General (Quebec)* [1989] 1 SCR 999.

<sup>144</sup> *R v Butler* [1992] 1 SCR 452, 504.

<sup>145</sup> *R v Sharpe* [2001] 1 SCR 43, paras 88 and 198.

<sup>146</sup> *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120, para 67; *Sharpe*, above, 89.

<sup>147</sup> *R v Oakes* [1986] 1 SCR 103, 139-140.

protect, and the reference to the integrity of a free and democratic society, have been more prominent features of later section 1 discussions in the 1990s. Thus, just last year McLachlin CJ stated: "At its heart, section 1 is a matter of balancing".<sup>148</sup>

### ***XIII SOUTH AFRICA***

Section 36(1) of the South African Constitution 1996 provides for a general limitation clause. It reads:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

To the list of mandatory factors, the Constitutional Court has added "the importance of the right",<sup>149</sup> with it being used to emphasise sliding scale possibilities.

The Court has held that the application of section 36(1) involves a process of weighing up competing values and ultimately making an assessment based on proportionality.<sup>150</sup> The Court has consistently eschewed a mechanistic application of tests and has resisted a stepped, *Oakes* style test: "The Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check".<sup>151</sup> The Court has emphasised that "different rights have different implications for ... an open and democratic society based upon freedom and dignity" and, accordingly, "there is no absolute standard which can be laid down for determining reasonableness ...".<sup>152</sup> Rather, the Court is to engage in "a nuanced and context-sensitive form of balancing".<sup>153</sup> Thus, in *State v Mamamela* the Court said:<sup>154</sup>

As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be.

---

<sup>148</sup> *Sharpe*, above, para 97.

<sup>149</sup> *National Council for Gay and Lesbian Equality v Minister of Justice* (1998) 6 BHRC 127, 143 (SACC).

<sup>150</sup> *National Council*, above, 143.

<sup>151</sup> *Christian Education South Africa v Minister of Education* (2000) 9 BHRC 53, 68 (SACC). See also *State v Zuma* 1995 (2) SA 642, 660 (SACC), and *State v Makwanyane* 1995 (6) BCLR 665, 711 (SACC).

<sup>152</sup> *Makwanyane*, above, 708, Chaskalson P.

<sup>153</sup> *Christian Education*, above, 67.

<sup>154</sup> *State v Mamamela* (2000) 5 BCLR 491 (SACC) para 32.

Particularly of interest, in light of our extended discussion of the Canadian jurisprudence on minimal impairment, is the Constitutional Court's observations in *State v Mamabolo* on the "less restrictive means" factor:<sup>155</sup>

Where section 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant.

#### ***XIV ICCPR AND ECHR JURISPRUDENCE***

Because they do not contain a stand-alone general limitation clause, the ICCPR and ECHR might be thought to be irrelevant to the proper interpretation and application of section 5 NZBORA. That is not so. As noted earlier, one of the twin purposes of the NZBORA is to affirm New Zealand's commitment to the ICCPR; hence the ICCPR is highly relevant, at least, in so far as it concerns the outcomes that our limitation jurisprudence under section 5 NZBORA should be aimed at achieving. Accordingly, it would be better to say that the different modelling of limitation issues under section 5 NZBORA means that care be taken in aligning our section 5 NZBORA methodology with the international jurisprudence, so long as the results of the application of the methodology of our section 5 NZBORA do not permit significantly greater limitation than that allowed by the ICCPR. As a general proposition, it would be fair to say that international jurisprudence displays the same context-specific approach to reasonable limits as that evident in Canada and South Africa. A broad framework, based on proportionality analysis, is used, and the assessment varies from subject matter to subject matter.<sup>156</sup>

Four important points about international limitations jurisprudence need to be noted. First, the international limitation clauses attached to particular rights tend to specify the exclusive purposes that limits on rights may pursue; that is not the case under section 5 NZBORA. But there is no reason that regard cannot be had to those exclusive purposes in deciding what purposes will pass muster under section 5 NZBORA. Second, international instruments explicitly provide that rights cannot be relied upon in order to engage in activities aimed at the destruction of rights.<sup>157</sup> Our section 5 NZBORA contains no such

---

<sup>155</sup> *State v Mamabolo* (2001) 10 BHRC 493, 514 (SACC).

<sup>156</sup> See for example, Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (Oxford University Press, Oxford, 2000) para 6.45, and Elizabeth Evatt "The Impact of International Human Rights on Domestic Law" in Grant Huscroft and Paul Rishworth *Litigating Rights* (Hart Publishing, Oxford, 2002) 281, 298-300

<sup>157</sup> ICCPR, art 5(1); ECHR, art 17; Universal Declaration of Human Rights (UDHR), art 30.

general statement, but it could be readily inferred to be part of section 5 NZBORA. Third, it is a basic principle that limits must respect the right of non-discrimination.<sup>158</sup> Again there is no reason in principle why such a gloss on the availability of section 5 NZBORA should not apply in New Zealand (if it is not clearly prohibited by section 19 NZBORA, itself). Fourth, international human rights tribunals perform different functions than national human rights tribunals and do so from a position of distance. The role of the former is to monitor compliance with treaty obligations, which raises difficult issues as to the extent to which issues of sovereignty and diversity of cultures affect analysis. In addition, distance makes international tribunals wary, on some occasions, of making judgment calls where proportionality has to be assessed, while on other occasions, distance means that matters that would weigh heavily in the domestic court as significantly justifying a limit would be under-appreciated at the international level. And, in any event, the ability to sensibly assess arguments about the justifiability of measures must be affected by the paucity of empirical or expert evidence tested before international tribunals.

#### ***XV REASONABLE LIMITS: SOME CONCLUSIONS***

Setting the standards by reference to which the reasonableness of limits will be judged under section 5 NZBORA is a complex process. Thought needs to be given to the relationship between theories of rights and limits. Rights must be given their weight, but the particular weight which a right carries in individual cases will be affected by the purpose of the right, the good which the limit gives effect to, and a range of more general considerations such as preserving room for legislative choice; uncertainty; the limits of law; the judicial role and so on. While New Zealand case law has barely scratched the surface of the complexity that section 5 NZBORA involves, there is valuable comparative experience available to be drawn on. That experience suggests that a limitation evaluation is a weighing up exercise that calls for attention to the particular circumstances of the particular case. A mechanistic approach is not to be adopted; judgment will have to be exercised. Context will play a significant role in determining:

- (1) The significance of the right;
- (2) The weight that the objective of the limit can legitimately carry;
- (3) The assessment of proportionality; and
- (4) The Court's perception of the extent to which it can second guess Parliament and the executive.

---

158 ICCPR, arts 2, and 26; ECHR, art 14; UDHR, art 2

In short, the factorial evaluation exercise envisaged by section 36(1) of the South African Constitution best encapsulates the task. And there is New Zealand authority supporting it. In *Noort v MOT; Curran v Police*, Sir Ivor wrote:<sup>159</sup>

In the end an abridging inquiry under section 5 is a matter of weighing:

- (1) The significance in the particular case of the values underlying the Bill of Rights Act;
- (2) The importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
- (3) The limits sought to be placed on the application of the [Bill of Rights] Act provision in the particular case; and
- (4) The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

In my view, this passage strikes the right note by capturing the nuanced and flexible standards that section 5 ultimately will require.

#### ***XVI RELATIONSHIP OF SECTION 5 TO THE INTERPRETATION OF ENACTMENTS***

As its wording makes clear, the role of section 5 is to establish the tests by reference to which statute that places limits upon rights and freedoms guaranteed in Part II of the Act can be justified. To this extent, I agree with the analysis of section 5 NZBORA by Cooke P in *Noort* that:<sup>160</sup>

Section 5 does not on its face appear to lay down a rule for interpreting other enactments. Rather, it reads as a provision of substance stating rights and freedoms contained in the [NZBORA] may be accepted to be made subject to limits.

However, section 5 cannot be ignored in the task of properly interpreting an enactment. That is because, as Paul Rishworth observed in an early article on the operational provisions of NZBORA:<sup>161</sup>

---

<sup>159</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *Curran v Police* [1992] 3 NZLR 260, 283 (CA) Hardie Boys J. Note that in the NZLR version the words in parentheses do not appear in point (3). However, in the NZBORR version of the judgment (*Curran v Police* [1990-92] 1 NZBORR 97, 160 (CA)), the word "Bill" appears instead of "Act". Clearly, the reference intended is to "Bill of Rights Act".

<sup>160</sup> *Noort*, above, 273.

<sup>161</sup> Paul Rishworth "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZ Rec LR 337, 340.



[W]hen an ambiguous statutory provision is invoked against a litigant and is said to have a meaning which, if it were adopted, would limit a right, one must first enquire whether it would be a reasonable limit. If it would be, then the meaning advanced is not an infringing meaning and the Bill of Rights ought to have no further application to the case.

Some Judges have erroneously seen section 5 as a means of cutting a Gordian knot created by sections 4 and 6 NZBORA. In *Noort*, for example, Hardie Boys J feared that relying on section 6 NZBORA to argue for an interpretation of a statute that favours the incorporation of Part II rights and freedoms *in their absolute form*, could result in Judges moving too quickly to section 4 NZBORA to defeat that absolutist interpretation. In His Honour's view, section 5 NZBORA was designed to enable courts to read a statutory provision consistently with NZBORA rights and freedoms by allowing for the imposition of some limit or qualification upon them in order that the NZBORA not be entirely excluded.<sup>162</sup> But conceiving of section 5 NZBORA in this way detracts from the notion that the true purpose of section 5 is to recognise the State's entitlement to impose reasonable limits on rights and freedoms. Thus, section 5 NZBORA is a step in the process which needs must *precede* the determination of a binding interpretation of the other enactment, section 6 can only demand the courts to interpret statutes subject to reasonable limits, not subject to the least possible limit that is linguistically available.

Coupled together with my basic proposition that section 5 is predicated upon the assumption that the State is entitled to place reasonable limits on rights and freedoms, in my view, what section 5 requires in any particular case, is for the court to undertake an assessment of what would be a reasonable limit on a particular right or freedom in the particular context of the case (this will usually emerge from the limit which Crown counsel urges upon the court as being the appropriate limit on the right as provided for by the legislation). At that stage, the court's task is to determine whether or not the particular provision does indeed provide for such a limit. This latter step is embraced by the requirement that any limit be "prescribed by law".<sup>163</sup> Practically speaking, the "4-5-6 conundrum" will involve the court, as well as counsel, in shuttling between the various provisions in an effort to ensure (a) that an unnecessarily broad interpretation of the provision is not adopted (thereby avoiding the need to resort to section 4 NZBORA); (b) an overly narrow interpretation of the provision if not adopted (thereby avoiding the trap of giving section 6 precedence over section 5 and, hence, denying the legitimacy of the State in placing reasonable limits on the absolute rights and freedoms contained in Part II of NZBORA).

---

<sup>162</sup> *Noort*, above and *Curran*, above.

<sup>163</sup> See to similar effect, *Rishworth*, above, 343-4.

