OH THAT I WERE MADE JUDGE IN THE LAND

James Allan

Oh that I were made judge in the land, that every man which hath any suit or cause might come unto me, and I would do him justice! (2 Samuel 15:4)

Imagine a Westminster common law jurisdiction without a bill of rights. As things stand at present, all important social policy decisions in this jurisdiction, including decisions about how rights are to be balanced against one another and against overall community welfare claims, rest with the elected legislature and executive. Not everyone in this jurisdiction is happy with this arrangement, however. There are some politicians who are not averse to joining the world-wide trend by adopting some sort of bill of rights. A handful of them in fact, mostly from the main left of centre political party, are positively keen on the idea. They see the post-Second World War Americanisation of constitutional law, with its emphasis on formalising the role and place of human rights in a legal instrument the judges oversee, as an unambiguously good thing. They would like an entrenched, justiciable model.

Even more enthusiastic about adopting a bill of rights is the preponderance of judges and legal academics in this jurisdiction. Many of the latter have a barely disguised disdain for elected politicians. Certainly, they tend to think these creatures of democratic elections less trustworthy, especially when it comes to giving specific content to rights, than the unelected judiciary. Truth be told, most of the judges deep down agree. When it comes to delivering justice and fairness and upholding fundamental human rights, who better than they, they think. After all, they have life tenure, independence, a proclaimed commitment to objectivity and they must give written reasons for their decisions.

Imagine further that the first goal of those who support a bill of rights is to move their jurisdiction towards some sort of Canadian or American-style model—to adopt a constitutionalised, justiciable bill of rights against which the judiciary can scrutinise primary legislation and, if necessary, strike that legislation down for infringing one of the broad, rather indeterminate protections listed therein. Alas, in this suppositious scenario there proves to be insufficient support for such an entrenched, overriding model. So the fall-back position of pressing for a statutory bill of rights is taken up. This seems less revolutionary to some opponents, and even wins a modicum of converts. But opponents still outnumber proponents. Hence the statutory bill of rights itself is watered down through a series of rather messy compromises—perhaps the

* Associate Professor, Faculty of Law, University of Otago. Thanks to Grant Huscroft for his comments on an earlier draft and to the referee of this journal for helpful suggestions and criticisms. An earlier version of this article was presented at the Human Rights and Global Challenges conference Melbourne, December 2001.
remedies section is removed and a new operative provision is added explicitly stating that this Act will lose out to all other Acts, future or past, in the event of mutual inconsistency. The mover in the House of this enervated compromise instrument even has to assure parliament that 'this will be a parliamentary bill of rights; it will create no new legal remedies for courts to grant irrespective of whether the bill of rights is an issue'.

At last, with these concessions and assurances in place, the enfeebled Bill of Rights Act limps through parliament and becomes law.

Now put away your imagination. The picture painted above is not a visionary (or even chimerical or quixotic) conjecture of how events may play out here in Australia. No, there is nothing imaginary at all about the events related above for they describe what in fact took place in New Zealand leading up to the passage of its Bill of Rights Act a dozen years ago. What I want to do next in this article is briefly to recount what happened in New Zealand subsequent to the passage of this seemingly enervated Bill of Rights Act. Then, I want to focus on a few of the leading cases to date to see what is involved when judges give specific content to broad, indeterminate rights guarantees. Finally, I will conclude with a brief summary of the main grounds I have for objecting to bills of rights and for hoping that Australia sets its face against the worldwide trend towards their adoption.

In effect, this article amounts to a cautionary tale. It invokes the New Zealand experience with a statutory Bill of Rights to warn Australians against the current temptation to join with their common law cousins in adopting such an instrument. What this article does not do however, is to focus directly on the issue of why a statutory model fails to answer the criticisms of critics of constitutional rights. That issue is put to one side, not because it is unimportant, but rather because I have attempted to deal with it elsewhere. Here, I deal with the related, ancillary issue of how the rights disputes arising out of that statutory Bill of Rights are best characterised. In particular, my claim will be that the New Zealand experience of over a dozen years shows that no cases—not a single one—have been decided there that vindicate the common rationales given by proponents of bills of rights, namely that

---


2 See James Allan, Sympathy and Antipathy: Essays Legal and Philosophical (2002), especially Section B, and 'Rights, Paternalism, Constitutions and Judges' in Grant Huscroft and Paul Rishworth (eds), Litigating Rights: Perspectives from Domestic and International Law (2002) 29. See too 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 Otago Law Review 613; 'The Effect of a Statutory Bill of Rights Act: Where Parliament is Sovereign: The Lesson from New Zealand' in Adam Tomkins, KD Ewing and Tom Campbell (eds), Sceptical Essays on Human Rights (2001); 'Take Heed Australia—A Statutory Bill of Rights and its Inflationary Effect' (2001) 6 Deakin Law Review 322. These last three articles also give my full views on how the New Zealand judiciary 'upgraded' what had clearly been intended to be an enervated Bill of Rights Act. See too Tom Campbell's 'Incorporation through Interpretation' in Sceptical Essays above for a powerful argument (and lament) to the effect that interpretive provisions (such as section 6 below n 3) can go most of the way towards accomplishing US-style strong judicial review.
judges can and will protect us from widespread moral weakness, or that they can and
will protect vulnerable minorities from the tyranny of the majority.

If that claim be correct, if I be right about this ancillary issue, defenders of any sort
of bills of rights—statutory models included—are in a much more difficult position. To
put them there is the limited goal of this article.

I. JUDICIAL INFLATION OF THE STATUTORY BILL OF RIGHTS IN
NEW ZEALAND

Almost immediately after passage it became clear that the s 6 operative provision
(which roughly seems to amount to an instruction to ‘do what you can—with a straight
face—to interpret this other statute as consistent with the rights in this Bill of Rights’)
would be emphasised over the operative provision that had been inserted especially to
get the Act passed and which became s 4 (in essence commanding that ‘all other
inconsistent statutes override the rights in this Bill of Rights’). In the first ever Bill of
Rights Act case to reach the Court of Appeal, the then President, speaking for the
Court, suggested in obiter that s 6 may require a court to depart from a long established
judicial interpretation of the meaning and intent of a particular statutory provision.
There followed a steady stream of dicta to the effect that the enervated Act actually
enacted should, contrary to the clear legislative history, be treated as some sort of
extra-special, quasi-constitutional Bill of Rights.

Meanwhile, despite the specially added qualification at its start to help ensure the
Bill’s passage (‘Subject to section 4 of this Bill of Rights’), even the third main operative
provision—the s 5 abridging inquiry—was given pre-eminence over s 4. In fact, in a
1992 case the then President of the Court of Appeal announced that ‘[i]t is worth
emphasising too that in principle an abridging inquiry under s 5 will properly involve
consideration of all economic, administrative and social implications.’ And this, remember,
in a Bill of Rights Act where any abridging inquiry is ultimately otiose because if any
statutory limit does happen to be found unreasonable or unjustified it nonetheless

3 Section 6 reads: 'Interpretation consistent with Bill of Rights to be preferred—Wherever
an enactment can be given a meaning that is consistent with the rights and freedoms
contained in this Bill of Rights, that meaning shall be preferred to any other meaning.'

4 Section 4 reads: 'Other enactments not affected—No court shall, in relation to any
enactment (whether passed or made before or after the commencement of this Bill of
Rights)—

(a) Hold any provision of the enactment to be implicitly repealed or revoked, or to be
in any way invalid or ineffectual; or

(b) Decline to apply any provision of the enactment—by reason only that the
provision is inconsistent with any provision of this Bill of Rights.'


6 '[The court saw] force in the argument that, to give full effect to the rights ... [a particular
statutory provision with a long-standing interpretation] ... should now receive a wider
interpretation than has prevailed hitherto', ibid 441.

7 See the last three articles cited above n 2 for more details.

8 Section 5 reads: '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.'

prevails over the Bill of Rights Act because of s 4! Still, the judges would keep open the option of an abridging inquiry regardless, as they made clear eight years later in the case of Moonen.10

In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s. 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 ... Of necessity value judgments will be involved. In this case it is the value to society of freedom of expression, against the value society places on protecting children and young persons from exploitation for sexual purposes ... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.11

Wow, seems the only appropriate response. Here is the s 5 operative provision— an amended, so as to be subject to s 4, carry-over from the earlier thoroughly rejected, constitutionalised Bill of Rights model—being made the basis for judges to make all these sweeping value judgments 'on behalf of the society which they serve'. And for what ultimate purpose? In that same Moonen case the judges tell us:

That purpose necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee ... New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.12

In other words, out of nowhere, a full decade after the Bill of Rights Act came into force, and with only the flimsiest, most implausible statutory basis for doing so at all (namely, s 5), the New Zealand Court of Appeal in Moonen announced that, henceforth, when some statute is found to be inconsistent with the Bill of Rights Act, although the courts will be bound by s 4, they may also make a declaration of inconsistency.

At least as remarkable as the Moonen Case, however, was the 1994 Baigent’s Case.13 There, in a 4-1 decision of the Court of Appeal, the judges simply read back into the Bill of Rights Act the remedies provision that parliament had specifically removed (and had removed as the price of getting the Bill enacted). In doing so, the judges ignored everything in their way, in particular the Crown Proceedings Act 1950 which precluded all known Crown liability at the time, and simply created an ad hoc public law remedy sounding in the Bill of Rights Act (going on to indicate this remedy was distinct from the common law tort of breach of statutory duty). In effect, the New Zealand Court of Appeal, in the name of giving life and force to fundamental human

10 Moonen v Film and Literature Board of Review [2000] 2 NZLR 9. This was a judgment of a five member Court, delivered by Tipping J. Richardson P was also a member of this Court.
11 Ibid 16-7 (emphasis added).
12 Ibid 17.
13 Simpson v Attorney-General [Baigent's Case] [1994] 3 NZLR 667.
rights, ‘discovered’ that the Bill of Rights Act subjected the Crown to potentially unlimited liability for its breach.  

Need I say more to make the point that judges, at any rate New Zealand judges, can travel a remarkable distance in the name of ‘keep[ing] pace with civilisation’, not least because they see ‘basic human rights ... [as] inherent in and essential to the structure of society ... [and as] not depend[ing] on the legal or constitutional form in which they are declared’ will assume not. At any rate, suffice it here to say that the history of New Zealand’s seemingly enervated, statutory bill of rights amounts to this: in fewer than a dozen years the judges there have transformed the Bill of Rights Act into an instrument that allows them to do not that much less than their Canadian judicial brethren who operate an entrenched, overriding, fully justiciable model. New Zealand now has the possibility of declarations of inconsistency; judges there can indulge in potentially sweeping abridging inquiries (with the Brandeis Brief-type reliance on contestable social science which such inquiries necessitate); those same judges have simply created a sui generis ‘Baigent Bill of Rights Act cause of action’ subjecting the Crown to potentially unlimited liability for its breach; they have refashioned the common law to take account of the Bill of Rights Act: Astonishingly, judges on their highest domestic court are prepared to say that because of the Bill of Rights Act, it is no longer the case that later statutes impliedly prevail over earlier, inconsistent statutes. To an extent unimagined before the Bill of Rights Act’s passage, New Zealand now has the regular exercise of political value judgments by unelected judges.

That is all I intend to say in this article about the inflationary effect of the Bill of Rights Act in New Zealand. In essence, the interpretive techniques under s 6, where judges read down or read into other statutes, have become the not too distant functional equivalent of a United States or Canadian-style invalidating or striking down of primary legislation. Added to this use of s 6 is the judiciary’s power, which they simply gave to themselves, to issue declarations of inconsistency. While this latter power has not been used frequently, it nevertheless serves to raise the stakes. The judges in effect allege (inaccurately) that the legislature is breaching rights. This is much more difficult to respond to in practice than the accurate claim that the judges’ view of what a right requires differs from the legislature’s view of what that right requires.  

14 I discuss Baigent’s Case in the three last mentioned articles cited above n 2, and in the further papers cited in those articles.
16 Baigent’s Case, above n 13, 702 (italics mine) (Hardie Boys J).
17 See the two Lange cases: Lange v Atkinson & Australian Consolidated Press Ltd [1998] 3 NZLR 424 and then two years later after returning back from the Privy Council at [2000] 3 NZLR 385.
18 See R v Pora [2001] 2 NZLR 37. In Pora, three of the seven Court of Appeal judges took this rather revolutionary view. Three others disagreed, and the seventh judge and President of the Court, deciding the case on other grounds, remarkably, left open the possibility the revolutionary view might prevail. For an excellent analysis of the implications of the three rather revolutionary judgments, an analysis that comes to the conclusion that these three judges’ views undermine the rule of law, see Jim Evans, ‘Questioning the Dogmas of Realism’ [2001] New Zealand Law Review 145, 166.
19 See below n 27.
But enough of that summary. In the next section I would like to change focus to consider what sort of issues and value judgments were at stake in the leading bill of rights cases in New Zealand. How debateable—debateable in terms of rights, that is—were the outcomes favoured by the judges? Was there a clear answer dictated by rights a rights 'right answer' as it were? Are these cases more aptly characterised as i) judges protecting us from ourselves in a moment of widespread moral weakness; ii) judges protecting a vulnerable minority from the tyranny of the majority; or iii) unelected judges taking sides (and having a massively disproportionate say) on highly debateable social policy issues where both sides to the dispute are sincere and reasonable? This question, and one's answer to it, is likely to have no small influence on whether one approves of bills of rights.

II. HOW TO CHARACTERISE WHAT IS HAPPENING WHEN JUDGES DECIDE BILL OF RIGHTS CASES

Under a Bill of Rights judges must give specific content to broad, indeterminate rights guarantees. Of course, on the plane of vague generalities these emotive guarantees inspire widespread (at times almost universal) agreement. Virtually all of us may hold our hands up high when asked if we are in favour of freedom of expression. We nod in agreement that society should ensure the right to life, the freedom of religion, no undue delay before trying an accused, and no unreasonable police searches. Here, on this plane, there is little contention and disagreement. Likewise, it is here that most of the selling of bills of rights is done, namely, under the guise of upholding and protecting universally desired and uncontentious rights. It is almost as though these instruments, with their judicial overseers, will be there to stop the elected organs of government from indulging in obviously wicked acts.

Of course, it may be that this sort of apocalyptic scenario is little more than a myth. It may be that when the broad and imprecise standards enunciated in a bill of rights are applied to specific situations, any notion of consensus or near universal agreement quickly dissolves, and widespread dissensus is in fact the reality. Similarly, in saying that "[a] Bill of Rights, drawn in open-textured terms, necessarily requires individual human rights to be defined with a content specific to the case in hand," it may be that the judges will end up deciding controversial questions of social policy over which sincere, intelligent, well-meaning people disagree—questions about where to draw the line when it comes to free speech, privacy, who can marry, police powers, abortion, religious practices, how refugee claimants are to be treated, and much else. In other words, it may well be that giving a content specific to the case in hand means that bills of rights are overwhelmingly about delivering from elected politicians to unelected judges power to decide highly contestable, debateable, social policy issues. The frequently painted picture of judges holding fast to obviously correct moral standards (embodied in the language of rights) against the attempted backsliding of grubby politicians solely concerned with where their next vote is coming from, therefore, may prove to be a remarkably inapt description of what actually happens under a bill of rights.

21 Ibid.
In the rest of this section I want to tackle this question of how best to characterise what is happening when judges decide bill of rights cases by considering the leading New Zealand cases.

Let us start with what is probably the most significant New Zealand Bill of Rights Act case to date, *Baigent's Case*.\(^{22}\) This was the case where the judges created a new sui generis cause of action, a public law remedy sounding in the Bill of Rights Act, subjecting the Crown to potentially unlimited liability for its breach. In doing this the judges overcame two obstacles. Firstly, not only did the Bill of Rights Act lack any provision for remedies for infringement, the remedies clause that had been in an earlier draft version had had to be removed, seemingly to ensure the Bill's passage. Secondly, there was a statutory immunity provision which seemed to apply and, if so, would trigger s 4 ('all other inconsistent statutes override the rights in this Bill of Rights') and so prevail. Needless to say, both obstacles were overcome by the judges.\(^{23}\) At the very least this was a clear example of judicial activism.\(^{24}\)

Our question, though, is what was at stake to give rise to all this judicial creativity. Stripped to the bone, it was this: should the police be held liable (by reason of the Bill of Rights Act's s 21 right to be secure against unreasonable search and seizure) where they, in good faith but erroneously, search the wrong house? Keep that query in mind as I précis the facts and elaborate on the main issue.

The *Baigent* appeal occurred at an interlocutory stage and the question before the Court of Appeal was whether the pleadings disclosed any cause of action. The relevant pleaded facts were these: A police officer seeking a drug offender obtained information (from a source that had been reliable in the past) that the suspect lived at 16 Main Road. On checking, the officer found there was no such address but that the likely address was one of two permutations. The officer made a mistake and sought and obtained a warrant for the wrong alternative. (The suspect in fact lived at the other of the two alternatives.) The pleadings then allege that, in executing the search, the officer was told he had the wrong house. Indeed, it was alleged that during the search the plaintiff's son called his sister, a barrister, and she told the officer he had the wrong address. Most damningly, the officer was alleged to have replied to the sister 'We often get it wrong, but while we're here we will look around anyway'.

I include that alleged quote just because it is so damning. But notice something straight off. Five causes of action were pleaded, four in tort and one in the Bill of Rights Act. If, when the action eventually reached trial, this damning statement by the officer could have been proved, the plaintiffs had a perfectly orthodox tort action open to

\(^{22}\) Above n 13.

\(^{23}\) See the last three articles cited above n 2 for more detail.

\(^{24}\) Professor Michael Taggart, friendlier than I to bills of rights, describes the case as follows: 'Baigent's Case gives some indication of the potential potency of the technique known as 'reading down' (and its travelling companion 'reading in'). My colleague, Paul Rishworth, has championed the use of these techniques in the context of the [Bill of Rights Act] from the beginning. In essence, his argument is that in respect of statutes which affirm fundamental rights the courts are justified in departing from even clear words by reading the statute down (or reading words in) so as not to infringe rights as long as by so doing the legislative purpose is not frustrated. This well-supported thesis opens up considerable scope for attaining rights-respecting outcomes by the judiciary.' See Michael Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] Public Law 266, 284.
them. The search, continuing after the officer knew he had the wrong house, would have been conducted in bad faith and the statutory immunity would not have applied.

But, by creating this new ad hoc Bill of Rights Act cause of action, the judges broadened liability to instances where the damning alleged reply to the sister could not be proven. Liability under this new Bill of Rights Act cause of action did not require the search to have been conducted in bad faith as the tort actions did. Instead, it only required that the search be unreasonable under s 21.

So what the judges effectively decided in Baigent is that (a statutory immunity notwithstanding) the police would henceforth be liable for a good faith, lawful search provided it was also unreasonable. In other words, the judges used the Bill of Rights Act to extend police (and vicariously Crown) liability beyond mere bad faith searches to those that are also good faith but unreasonable.

Is that an uncontentious, obviously good outcome? Is it a decision that needs to be taken out of the hands of the legislature? Does the understanding of all right thinking people demand that liability be imposed for lawful, good faith police searches that are unreasonable? My guess (backed up by yearly student polls) is that many people in society would be prepared, probably for the sake of a more effective police force, to take the risk of suffering the inconvenience of such good faith, but erroneous and unreasonable, searches (remembering that no one would have to suffer a bad faith search). More to the point here though, the sort of judge-made liability that emerged in Baigent hardly seems open to being characterised as uncontentiously appropriate, obviously a good thing, transcendentally needed or anything remotely similar. Making the Crown (and so taxpayers) liable for good faith but unreasonable searches (to say nothing of simply announcing liability for breaches of the Bill of Rights Act generally) is a highly debateable outcome. It is a question of public policy on which sensible, well-intentioned people could (and do) take opposite sides. In fact I, for one, fail to see why unelected judges should have a special, privileged say on such an issue. Therefore, in terms of the three classifying options I offered at the end of section one, this case seems clearly to fall under iii).

The Moonen Case25 is another leading New Zealand Bill of Rights Act case, and one—I have suggested above—in which the Court of Appeal justices were verging on the audacious in the manner in which they inflated the status and potency of the Bill of Rights Act. The case involved the classification by the Film and Literature Review Board of certain publications as 'objectionable' in terms of s 3 of the Films, Videos and Publications Classification Act 1993. At issue was a book and various photographs belonging to Mr Moonen. The book was described by the Board as containing stories outlining sexual activity between men and boys under the age of 16. The relevant photographs were of naked children, mostly boys. Section 3 of the Act set out the meaning of 'objectionable'. In particular, s 3(2)(a) reads: 'A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes'.

Moonen appealed the classification to the New Zealand High Court on the basis of error of law. His appeal was dismissed. He then appealed to the Court of Appeal,

25 Above n 10.
which allowed his appeal and sent the matter back to the Board. The judgment of the five-justice court rested on the claimed impact of the Bill of Rights Act (in particular ss 13 and 14 dealing with freedom of thought and expression) on the correct interpretation and application of the Films, Videos and Publications Classification Act 1993, in particular s 3 of that Act.

Leave aside the implausibility of judges using this case to give themselves the authority to issue declarations of inconsistency and ask yourself whether my characterisation iii)—unelected judges taking sides (by telling the Board to reconsider) on a highly debateable social policy issue where reasonable and sincere people can disagree—is again the most apt. Even after calm deliberation, all but the most rabid libertarians would want some limitations on paedophiliac pornography, so i) seems inapt. Nor does the Moonen Case seem in any way analogous to one in which, say, a group of fellow citizens is being shipped to detention centres because of their race. So ii) is also inapposite.

Here again it is not immediately obvious, to me at least, why we (and the Board) would want guidance from unelected judges when it comes to decisions about what is and is not objectionable, about who should and should not be able to publish sexually explicit photos of men and boys, on the basis of little more than the emotionally stirring quality of the phrase 'everyone has the right to freedom of expression'. Quilter is another case worth considering. There the issue was gay marriage and s 19 'freedom from discrimination' the right in play. Three of the five Court of Appeal justices took the view that the prohibition on same-sex marriages in the Marriage Act 1955 (NZ) did not infringe the s 19 discrimination provision. (For two of these three this was an obiter holding.) The other two, both in obiter, held the prohibition did

---

26 The Board ultimately came to the same conclusion as it had originally.

27 The five justices said that the purpose of s 5 of the Bill of Rights Act 'necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights …'. Not only is this incredibly far-fetched in terms of interpreting s 5 (a sort of finding-the-purpose-that-best-allows-you-to-reach-the-outcome-you-want exercise), it is simply untrue in its last assertion. The Courts will not be indicating inconsistency with the Bill of Rights Act. In fact, what courts will be doing is indicating that some statutory provision is inconsistent with their view (i.e., the judges' view) of what the Bill of Rights Act covers or of what is a reasonable or unreasonable limitation on some right. However, it is simply fallacious to assume that judges' views are a better indication of truth (about what a Bill of Rights does or does not require) than are the views of elected legislators. This point is made by Jeffrey Goldsworthy, 'Legislation, Interpretation and Judicial Review' (2001) 51 University of Toronto Law Journal 75 and by Grant Huscroft, 'Rights, Bills of Rights and the Role of Courts and Legislatures' in Grant Huscroft and Paul Rishworth (eds), Litigating Rights: Perspectives from Domestic and International Law (2002) 3. In the New Zealand context the assumption is doubly fallacious, given that the New Zealand Bill of Rights Act is—or was passed on the basis that it was meant to be—a parliamentary bill of rights, one that reserves the power to the legislature to determine the meaning of rights in the event of a dispute with the courts.

28 In my opinion, in any imaginable scenario in which elected legislators would contemplate the sort of things most of us today (when times are good and there is no external threat) would consider wicked, the judges too would contemplate the same measures. Cf. the plight of Japanese Americans in World War II. See Korematsu v US, 323 US 214 (1944).

discriminate against the appellant lesbian couples, though one of these two left open the question whether it is justifiable discrimination. All five justices agreed however, that the Marriage Act 1955 was intended to confine marriages to those between a man and a woman, and that whatever s 19 of the Bill of Rights Act might imply about discrimination for lesbian couples wanting to marry but being unable to do so, s 4 ('all other inconsistent statutes over-ride the rights in this Bill of Rights') dictated that the Marriage Act 1955 must prevail.

The point for us is not that this is one of the very, very few cases in New Zealand where the judges have actually used s 4 to say, in effect, that this sort of social policymaking is for Parliament. Nor is the point the cynical one, namely that there was no explicit prohibition of same-sex marriage in the Marriage Act 1955 and so— compared to cases such as Baigent and others where the judges managed to ignore or interpret away blatantly clear statutory inconsistencies—room enough here for otherwise rarely deferential judges to find in favour of the lesbian couples. No, the point is again that gay marriage is a highly contentious issue over which reasonable, sincere, even nice, people disagree. Is it really beyond the Pale to think such an issue should be decided democratically, by 'letting the numbers count' as Jeremy Waldron would say? Do we really need first to be told as much (grudgingly, and very infrequently) by the unelected judges themselves?

We could go on and on. Instead, let us consider the only New Zealand Bill of Rights Act case of which I am aware that comes anywhere close to falling under the rubric of characterisations i) or ii). This is the Pora Case. The facts there are as good as it gets for believers in strong judicial review and powerful bills of rights. If you cannot make a case for delivering the final say from elected politicians to unelected judges there, you are unlikely ever to succeed.

The gist of Pora revolves around a form of retrospective legislation. A 1999 Act amended an earlier 1985 Act so that one sort of murder, murder involving 'home invasion', had to result in a minimum term of imprisonment of at least 13 years. That 1985 Act had been amended in 1993 to provide for a minimum term of 10 years for murder. Pora was first convicted of a murder committed in 1992. This conviction came in 1994 but was set aside in 1999 and a new trial ordered. At the re-trial, Pora was again convicted. He was sentenced in 2000, after the 1999 Act had come into force. By this stage, Pora was arguably subject to a harsher minimum non-parole period than he would have been at the time of the offence, thereby potentially breaching s 25(g) of the New Zealand Bill of Rights Act.

---

30 As it happened, within a couple of years a new government had been elected that passed legislation putting all de facto couples in the same position as married couples, save for the 'symbolism' of being married.
31 Above n 18.
32 Section 2(4) of the 1999 Act reads: 'Section 80 of the principal Act (as amended by this section) applies in respect of the making of any order under that section on or after the date of commencement of this section, even if the offence concerned was committed before that date.'
33 Section 25(g) reads: 'Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty'. See too the International Covenant on Civil and Political Rights.
If the 1999 Act were held to apply, then the question was whether this sort of retrospectivity applied back to 1993 (when the 1985 Act had been amended), or applied back indefinitely. The only other possibility was a refusal to apply s 2(4) of the 1999 Act, in effect to say that because of the Bill of Rights Act the provisions of the earlier 1985 Act defeat the inconsistent provisions of the 1999 Act.

As I noted above, the justices split 3–3 on whether the doctrine of implied repeal is now, because of the Bill of Rights Act, outmoded. As the three justices who stood up for orthodoxy had found that retrospectivity carried back only to 1993, the deciding justice was able to agree that the 1999 amendment did not apply before 1993 (thereby leaving Pora unaffected) without having to take a stance on the revolutionary view that an earlier statute can prevail against a later, inconsistent statute.

At this point it may be worth reminding readers that New Zealand’s Bill of Rights Act is not entrenched or constitutionalised, and that the sovereignty of Parliament is supposed still to be alive in New Zealand. All obfuscation aside, had the revolutionary view prevailed, that would now be debateable:

[W]hen there is stark conflict [between an earlier provision and later provision], as there is in this case, the doctrine of implied repeal between provisions enacted at different times, is not a mechanical rule [as the three revolutionary justices asserted], but a consequence of the sovereignty of Parliament.

Leave to one side the merits of any such revolutionary view however, and look at what was at stake in Pora. In fact, let us put the case as strongly as possible for bill of rights advocates. In Pora, the elected legislature had passed a law increasing, by three years, the minimum non-parole period for a certain type of murder. And these same elected legislators had determined that that increased non-parole period would apply retrospectively to murders committed before the new law came into force. On these facts, the most favourable to the case for a bill of rights that we can find after nearly a dozen years of the Bill of Rights Act being in force, do we want unelected judges overruling the elected legislators? Is there a clearly ‘right answer’ here, one so clear that democratic decision-making needs second-guessing? (I ignore the much harder question for bills of rights enthusiasts of whether, if this is the best they can point to after twelve years, it is worth giving judges a say on all the myriad other cases just so they can have a say here.)

I suspect some will say yes. For them, retrospective legislation can never be justified. I disagree. There are two grounds for my disagreement. Start with the narrower point first. What the legislature did here was to change the non-parole period for an offence that was already an offence. The legislature did not retrospectively make criminal conduct that, at the time, had been perfectly legal. Murder, unsurprisingly, was illegal even in 1992. So what was happening in Pora was that parole conditions were being changed with retrospective effect. This is important to get clear because I suspect that many who would object virtually automatically to criminalising conduct retrospectively would be much less averse to altering parole conditions during the term of incarceration. And the Pora scenario falls much closer to that latter end of the

---

34 See above n 18.
35 Evans, above n 18, 169.
36 Lon Fuller would appear to fall into this category. ‘[I]t is generally more important that a man have a clear warning of his legal duties than that he should know precisely what unpleasantness will attend a breach; a retroactive statute creating a new crime is
spectrum than to the archetypical retrospective-criminalisation-of-hitherto-legal-conduct end of the spectrum. Add to that the fact that a thirteen year non-parole period for murder is still very much on the low side in international terms and you have my first ground for asserting that even the Pora Case is best characterised as iii), as an issue of social policy-making on which reasonable people can differ and not one we need unelected judges to decide for us.

As it happens I also have a wider ground for coming to that same conclusion. Let us go back to the basic issue of retrospective legislation and consider, in the abstract, whether such legislation can ever be justified. Frankly, I think it can. Here, I am much of HLA Hart’s mind. Retrospective laws are an evil that have to be weighed against the evil sought to be remedied. So, for example, I too think—like Hart—that that was what was happening after World War II when the top Nazis were tried, convicted and executed. The Allies, in effect, simply passed retrospective laws, dressed up in natural law clothes. In addition, I suspect most of us today, in undertaking any balancing exercise, would agree that the evils perpetrated by the top Nazis outweighed any evil attached to the passing of retrospective laws enabling their prosecution. A broadly similar analysis would apply to the prosecution of East German border guards after the fall of the Berlin Wall, though there the weighing of evils may well, in my view, point against prosecution. The point is that I believe retrospective laws, even the archetypical sort that make illegal backwards in time what had been perfectly within the law as it then stood, even this most extreme sort of retrospective law-making, can be justified in some situations.

In Pora, of course, nothing remotely similar to the extreme sort of retrospecitivity was involved. But let us ask, nonetheless, what the balancing exercise would involve. We would have to ask how the evil of this law, which after the fact added three years to a minimum sentence for murder, compared to the evil of home invasion murders. Or, more accurately, we would have to ask whether, in balancing the two competing evils, the retrospective minimum non-parole change is so obviously wicked that we need judges to protect us from our elected representatives’ proclivity to pass such a law. Is i) the best characterisation of what the justices were doing in Pora? (I think it safe to rule out ii) on the grounds that murderers convicted after a fair trial, whose sentences would still remain on the low end of any international comparison, hardly fit easily into what is generally understood by ‘a vulnerable minority’.) Or is it, even here, iii)? Is this, yet again, just another example of a highly debateable social policy issue over which reasonable people can and do disagree and over which unelected judges

thoroughly objectionable, a similar statute lengthening the term of imprisonment for an existing crime is less so’ in The Morality of Law (revised ed, 1969) 93. A special thanks to the referee of this journal for this citation.

37 See HLA Hart, The Concept of Law, (2nd ed, 1994) ch 9. See also, Jeffrey Goldsworthy, ‘Legislative Sovereignty and the Rule of Law’ in Tomkis, Ewing and Campbell, above n 2, 67ff, for a powerful defence of the claim that ‘[l]egislation that changes the law retrospectively can often be justified, sometimes by the rule of law itself’. Ibid, 67.

38 Indeed, anyone tempted to condemn all retrospective law-making in some blanket fashion must either also condemn all international war crimes prosecutions (until very recently, at least) or make a case for there having been laws in existence at the time outlawing the misdeeds. The latter seems to me to be a very difficult task indeed, requiring the full battery of natural law assumptions that many find highly implausible.
have no obvious advantages in terms of greater moral perspicacity, intuition or insight?

I do not doubt that many, perhaps most, lawyers, judges and legal academics think the rights enunciated in a bill of rights are too precious to be left to 'the tyranny of the majority', even if that means such rights are simply transferred over to a different set of overseers who, as it happens, also reach their decisions about them purely procedurally by voting. But whether one thinks this or not, one must concede that the effects of a bill of rights are felt not up in the Olympian heights of rights guarantees which are so broad, indeterminate and emotionally appealing that nearly all can support them, but rather down in the quagmire of detail. Down there, where these rights have to be given a content specific to the case in hand, there is always disagreement, debate and dispute about how they should play out. Nor can those who disagree with one's own views about how rights should rank against one another, who is to possess them, and whether and when they should lose out to broader social interests be easily dismissed as unreasonable, morally blind, uninformed, evil, in need of re-education, or some such other comfortable categorisation that eliminates the need to take one's opponents' views seriously.

It is naïve (at least in a democracy) to expect to be on the winning side of every argument, even arguments about rights. The same point is true of bills of rights, at least if one agrees with me that they throw up debateable case after debateable case. In New Zealand, after a dozen years in force, supporters of the Bill of Rights Act can point to no more than one case, and that too is debateable, that seems remotely like the sort of scenarios on which such instruments are sold to the public. I would say the same is true in Canada and, in all likelihood, the US too. That realisation, perhaps, might just affect whether one approves of bills of rights, with their transfer of immense power from elected politicians to unelected judges.

III. REASONS FOR OBJECTING TO BILLS OF RIGHTS

For a sustained, powerful critique of strong judicial review under bills of rights one could not do better than to read the works of Jeremy Waldron. Here, however, I shall be very brief and simply set out a summary of those arguments against the adoption (or retention) of bills of rights that I find most persuasive. Some degree of overlap can be expected.

1. Bills of rights diminish democracy. Few today believe that how rights should play out, including how they should rank against one another and who is to

39 Jeremy Waldron makes this point in various places. See, for one instance, Jeremy Waldron, 'Freeman's Defense of Review' (1944) 13 Law and Philosophy 27. See too Section III below.

40 In particular, start with Waldron's Law and Disagreement (1999). Note however, that Waldron has not (to the best of my knowledge) considered the cases of override clauses or of statutory bills of rights. On the former, see Jeff Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' in Tom Campbell, Jeffreyy Goldsworthy and Adrienne Stone (eds), Protecting Human Rights: Instruments and Institutions (2002 forthcoming) and the Concluding Remarks of my Sympathy and Antipathy, above n 2. Goldsworthy is more ambivalent about override clauses than I am. But the point is that claim '10' below (see text accompanying n 42) does not rest on arguments made directly or indirectly by Waldron.
possess them and when, is self-evident. So, put in place a bill of rights and what the judges end up deciding are controversial questions of social policy over which sincere, intelligent, well-meaning people disagree.

2. Bills of rights transfer too much power to unelected judges.

3. Resolving disagreement about rights (or indeed about morality generally) is in no way analogous to resolving disputes about what is happening in the external causal world, the world of science if you like. In the latter there is an imposed, external reality, however much it may be filtered and interpreted by humans. In the former, there simply is nothing remotely equivalent. Therefore, rights 'right answers' must be understood quite differently from right answers in the world of medicine, aviation or engineering. The implications for bills of rights are obvious.

4. Bills of rights undercut citizens' participation in decision-making. As most supporters of rights these days reject utilitarianism and support rights on non-consequentialist bases, they would put this point in terms of the undermining of a right to participate, tying that right to the notion of humans as autonomous, self-governing beings. However, under a bill of rights, the overwhelming majority of the population is disenfranchised (in favour of a select few judges) on a significant number of major social policy questions, indeed on basic rights questions. At the very least it is highly ironic if the only defence such non-utilitarian rights advocates can give for the diminishing of the right to participate is a thoroughly utilitarian justification (viz, the unelected judges get the 'right' answer more frequently than the elected branches of government).

5. In fact, judges do not deliver noticeably better rights outcomes.

6. The Sirens analogy defence of bills of rights fails. Adopting a bill of rights and handing over the policing of such rights to an unelected elite is not analogous to having yourself strapped to a mast now because you know you will be weak—dangerously weak—later.

7. Arguments in favour of bills of rights that disparage the deciding of rights cases and rights outcomes by means of a purely procedural system, such as the counting of legislators' votes, miss the fact that bills of rights also establish a purely procedural dispute resolution system, not a substantive, 'best answer wins' system. In the event of disagreement under a bill of rights regime, the judges vote and 4 votes beat 3, full stop. As Waldron notes, without a bill of rights the rule would be 6 million electors beat 5 million or 80 legislators beat 70.

8. Bills of rights bring with them the danger of an excessively politicised judiciary.

9. Bills of rights are usually accompanied by interpretive techniques which do not constrain judges to deciding in accord with the original intent of the enactors nor to the original understanding at the time of passage. Instead, such instruments are often interpreted as 'living trees', where judges pay heed to what they think are 'contemporary values'. 'Ancestor worship' is the name
given to such forsworn originalism constraints, and it is derided. The result is an interpretive regime that places few, if any, constraints on the judiciary. 41

10. Attempts to find refuge in non-entrenched, statutory models, or in over-ride clauses, fail. At least they fail if one is a consequentialist defender of rights themselves.42 There is little evidence that I have seen to show that either of these devices do anything much to curb the power of unelected judges. Relatedly, the metaphor of a ‘dialogue’ to describe the power relations between the elected Parliament and the unelected judiciary in Canada seems manifestly inaccurate.

These arguments against the adoption of a bill of rights take on extra force in a country such as Australia with a long, and comparatively excellent, democratic history. The notion of democracy is no doubt protean. A cursory glance around the globe reveals the myriad different combinations possible when selecting from a menu of republicanism or constitutional monarchy, bicameralism or unicameralism, federal or unitary structure, written or unwritten constitution (and the methods for altering the former), presidential or parliamentary executive, flexible or inflexible dates for elections, and of course the host of different voting systems on offer. However, for those who think that the essence of democracy is self-government by the people, then Australia is one of the most democratic countries in the world. From its preferential voting system for lower house elections, to its differently constituted, genuine House of Review second chamber, to its forcing recourse to referenda (and so to all the electors) in order to change the Constitution, to its compulsory voting requirement, Australia is a remarkably democratic country. And this matters because, if I be persuasive in my arguments thus far, then the last refuge for supporters of a bill of rights is one that concentrates on institutional design flaws—crudely put, something along the lines that however bad throwing one’s lot in with the judges may be, the status quo is worse. In Australia’s case (unlike, say, Hong Kong’s) I believe that argument fails too.43

It follows, therefore, that the fact Australia is now the only country in the western world without some kind of bill of rights—be it a constitutional or statutory model, series of Basic Laws, or incorporation in justiciable form of the European Convention on Human Rights—is nothing to be ashamed of. Indeed, I hope Australia continues to

41 For a thorough skewering of one Australian High Court judge who rejects originalism as a basis for interpreting the Constitution see Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 Melbourne University Law Review 677, 684: ‘Taken to the extreme, this [judge’s] non-originalism argument entails that “this Constitution” is a meaningless text, a mere assemblage of marks on paper, which can be given any meaning at all by those entrusted with its “interpretation”’: See too Mirko Bagaric, ‘Originalism: Why Some Things Should Never Change—Or At Least Not Too Quickly’ (2000) 19 University of Tasmania Law Review 173, 203: ‘[Non-originalism] is ultimately an argument for either not having a written constitution, or for making constitutions as minimalist as possible.’

42 And I argue exactly that, the case against some sort of institutional design argument, in my chapter ‘Protecting Human Interests’ in Campbell, Goldsworthy and Stone (eds), above n 40. For a strongly made case that this institutional argument in favour of judges also fails in the US context see Mark Tushnet, ‘Scepticism about Judicial Review: A Perspective from the United States’ in Tomkins, Ewing and Campbell, above n 2.
set its face against the world-wide trend of the last half-century in favour of such instruments. Were Australia to opt for a bill of rights, the judges would certainly end up deciding controversial questions of social policy over which sincere, intelligent, well-meaning people disagree. The judges, in other words, would end up drawing many of the lines currently drawn by elected politicians. None of those lines would be about stopping politicians and the rest of us from indulging in obviously wicked acts. Simply put, the adoption of a bill of rights would diminish Australian democracy.