Those organising this conference suggested that I should talk today about the applicability of international human rights laws in domestic cases, and the independence of the judiciary. After overcoming some doubt about whether these suggestions related to two sessions or one, I now attempt both. Of course they are interconnected. The vindication of human rights in actual cases is left to domestic courts because of the independence of the judiciary. But because human rights vindication may raise issues which are highly contentious and which impact upon the roles of the legislative and executive branches of government, they also entail risks to judicial independence.

It seems a little presumptuous for a New Zealand judge to offer thoughts on this topic in South Africa. This is a legal system operating under a written constitution supervised by a Constitutional Court which is admired throughout the world. I am from a jurisdiction in which the constitutional arrangements are largely unwritten and orthodox thinking ascribes plenary power to the legislature.

But the theme of law and the function of the courts in upholding it is common to all the jurisdictions represented at this conference. The differences between us should not be overstated and are shrinking. Our methods are moving together. Indeed, the impact upon judicial method of human rights litigation is the main theme of what I have to say. Seven years ago Lord Cooke of Thorndon, whose contribution to the development of human rights law in New Zealand has been immense, expressed the view that “[t]he world is moving ... towards an international law of human rights” but that the process would be “lengthy”.¹ I agree about the movement. But its pace has been rapid indeed.

Three years ago I was asked to speak to a conference about “the impact of international conventions on domestic law”. I said then that my initial reaction was “oh no, not again”. Today we should accept that the role of international instruments in domestic law is no longer contentious. That is true even of countries like mine in which, unlike under the Constitutions of South Africa or Fiji and statutes such as the United Kingdom Human Rights Act 1998, the courts are not directed to consider international materials in applying domestic human rights instruments.²

² See, in New Zealand, Tavita v Minister of Immigration [1994] 2 NZLR 257.
The fact of the matter is that our New Zealand Bill of Rights Act 1990, like many similar domestic measures in other countries, was adopted to fulfil obligations under international covenants, principally the International Covenant on Civil and Political Rights. For those countries which have ratified it, the Optional Protocol to that Covenant permits direct scrutiny by the Human Rights Committee. It would be inconsistent and wasteful for the domestic courts not to draw on the body of thinking being developed by the Human Rights Committee. Just as it is idle to suggest that the domestic courts should not gain what help they can from the decisions of other jurisdictions based on the same foundation. These standards now ‘march with the common law’. As Sir Anthony Mason put it plainly, in a speech to a New Zealand audience, a convention provision, like other legitimate material (whatever it may be), is something to be taken into account when formulating common law principles. It seems blindingly obvious - and makes all the brow furrowing about the theory upon which such material is to be received seem beside the point. My impression is that it is now standard practice for the courts of most common law countries to inform their decisions by reference to the authorities of international bodies and the decisions of national courts interpreting constitutions and legislation relating to human rights. In New Zealand it has been said that the New Zealand Bill of Rights Act has “internationalised” our rights jurisprudence as well as investing it with greater moral content.

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3 Cooke P in Tavita v Minister of Immigration at 267 suggested that since New Zealand’s accession to the Optional Protocol “the United Nations Human Rights Committee is in a sense part of this country’s judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it.” This is something of an overstatement. Certainly for the purposes of legal aid, the Human Rights Committee is not part of the judicial structure of New Zealand (Tangiora v Wellington District Legal Services Committee [2000] 1 NZLR 17 (PC)). But it is valid to remind us that the decisions of our courts are now taken upon an international stage.


The old requirement that there be an ambiguity in domestic law is irrelevant. These obligations ... are already obligations of English law. Just like other such obligations, they will be overridden by a clear contrary directive in a statute; and otherwise will be a consideration of great weight in identifying exactly what the common law is. In short, there is not international law and common law. International law is part of that which comprises the common law on any given subject.

... An un-incorporated treaty can always be looked at, so long as rights of individuals are not founded upon it alone and so long as it is not suggested that it takes away rights under common law

5 See R v Secretary of State for the Home Department, ex p McQuillan [1995] 4 All ER 400 at 422 per Sedley J.

The international judicial community has no doubts. At the Commonwealth Judicial Colloquium in 1998 at Bangalore, the principles of the Colloquium of 1988 were re-formulated to include the following statements:

3. It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.

4. Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of Judges to see to it that the law’s undertakings are realised in the daily life of the people.

5. Both civil and political rights and economic, social and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights. The implementation of economic, social and cultural rights is a primary duty for the legislative and executive branches of government. However, even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for Judges as they interpret their constitutions and ordinary legislation and develop the common law. Likewise, even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts.

We cannot be complacent about the performance of the common law in the domestic protection of human rights. In South Africa the inadequacy of the rule of law without the constitutionalism of human rights was manifest. But even in countries not subject to such strains, there was cause for concern. Those of us old enough to have practised in the early 1970s can recall the deference paid by the courts to authority of all types. In England, to which we looked largely for our common law at the time, the distinguished public lawyer, Sir William Wade, described the “deep gloom” that settled on English administrative law in the middle of the twentieth century. That mood changed from the 1960s as the courts realised “how much had been lost and what damage had been done to the only defences against abuse of power

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7 In New Zealand, for example, see Melser v Police [1967] NZLR 437 where freedom of expression came a distant second to the freedom of Members of Parliament to entertain their guests without the embarrassment of protesters chained to the pillars of Parliament.

which still remained”. Indeed, Taggart makes the point that administrative law “never lived up to the rule of law rhetoric”: 

The law presupposes that there are reasons for the decisions reached and that the administrative process is rational and not arbitrary, but did not insist on the statement of findings of fact and reasons for decision.

The New Zealand Bill of Rights Act, like the Human Rights Act 1998 (UK), is an ordinary statute and yields to other statutes. But it is clear from its international and common law roots and legislative history, as well as from its subject-matter and evocative title, that the Act was designed to operate within the sphere that may broadly be termed “constitutional”.

Like many comparable measures, the Bill of Rights Act in New Zealand applies “only to acts done:

(a) By the Legislative, Executive or Judicial branches of the Government of New Zealand; or
(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The scope of the English Human Rights Act is similar. The language of the provision suggests that the Bill of Rights Act applies to actions taken by the judiciary. It may well be that s 3 requires the Judges to develop the common law in conformity with the New Zealand Bill of Rights Act. The point has not yet arisen directly for determination in New Zealand (although it was assumed by Hardie Boys J in Baigent’s case and by me in Lange v Atkinson). If so, through a “cascading” effect, the Act will come to influence private as well as public law. That is a conclusion reached extra-judicially by Lord Cooke of Thorndon. Similarly, the Lord Chancellor had no doubts that the United Kingdom Human Rights Act has the effect of requiring the Courts to develop the common law in conformity with the Act.

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9 Ibid. at 19.
11 New Zealand Bill of Rights Act 1990, s 3.
12 Simpson v Attorney-General (Baigent’s Case) [1994] 3 NZLR 667 at 702
14 A concept used by Lord Justice Sedley in Freedom, Law and Justice (1999) 23, and which for the reasons he gives I consider is to be preferred to the “horizontal” effect described by other commentators.
16 Lord Irvine of Lairg “The Impact of a Bill of Rights on English Law” (Address to the 3rd Clifford Chance Conference, 28 November 1997).
Clause 6 makes it clear that “public authority” includes a court and a tribunal which exercises functions in relation to legal proceedings. That inclusion, as this audience will recognise, does more than asking the courts to interpret legislation compatibly with the [European Convention on Human Rights]. It imposes on them a duty to act compatibly with the Convention.

We believe it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention. They will be under this duty not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals.

Under s 6 of the New Zealand Bill of Rights Act, an interpretation consistent with the rights and freedoms contained in the Bill of Rights Act, must be preferred to any other meaning. By s 5 where legislation conflicts with the Bill of Rights Act, the Bill of Rights Act is subject to: 17

Such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

If the limitation cannot be justified, there is an inconsistency with the Bill of Rights, but the statutory provision because of s 4 still stands and must be given effect. 18 Some commentators have seen in discussions within the cases decided by the Court of Appeal an indication that the Courts will not assess whether a limitation is justifiable under s 5, but instead will simply apply it under s 4. 19 The Court of Appeal has however indicated preparedness to examine the justifiability of a limitation before applying it under s 4. 20

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 of the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

17 McLean believes this provision is best viewed as directed principally to the Legislature (see J McLean “Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act” [2001] New Zealand Law Review 421 at 442 to 448.

18 GA Moonen v Film and Literature Board of Review [2000] 2 NZLR 9.


20 Moonen at 17.
The Court said that on an appropriate occasion it may be necessary for it to declare that a limitation cannot be demonstrably justified in a free and democratic society.\(^{21}\) In this, it has assumed a power specifically conferred upon the English Courts as a significant remedy under the Human Rights Act.

I do not speak here of the remedies the Courts in New Zealand have fashioned under the New Zealand Bill of Rights Act. But in developing them, the New Zealand Court of Appeal has invoked the decisions of the constitutional courts of other jurisdictions, as well as the growing body of case-law generated by international bodies such as the European Court of Justice.

The New Zealand Bill of Rights Act was many years in gestation. Original proposals for a statement of rights foundered on a belief that the legislative system in New Zealand was to be trusted and fears that judges lack democratic legitimacy. That view still has its adherents. And the question of democratic legitimacy is a general topic I will return to. But in New Zealand by the 1980s there was sufficient support for change, although it was insufficient to achieve the judicial review of legislation provided for in the original bill. Sir Kenneth Keith, one of the architects of the New Zealand legislation, believes that there nevertheless came to be a recognition that a bill of rights does not entail a choice between parliament and the courts, or elected politicians and non-elected judges. Rather, it is directed “at the law-making process as a whole”.\(^{22}\)

> It has wider public and educational value. It is a beginning for public debate. It is a marker.

The Bill of Rights Act promotes democratic debate. The requirement in s 7 that the Attorney-General must inform Parliament of any inconsistency in proposed legislation, though not in the positive form imposed by s 4 of the Human Rights Act (UK), is directed at better legislative processes. And the Court of Appeal expressly reserved a power to declare that legislation is in breach of the Bill of Rights Act because it thought such declaration had value in Parliament “if the subject arises in that forum”.\(^{23}\) Although this decision has been criticised, it is difficult to see any democratic objection to a process which aims to inform the legislature, to whose actions the Bill of Rights Act applies by s 3. As Sir Kenneth Keith puts it:\(^{24}\)

> The enterprise of protecting rights should generally be seen as a cooperative rather than a divisive one.

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\(^{21}\) Cooke P had earlier expressed some doubts as to whether such a remedy was available in New Zealand: *Temese v Police* (1992) 9 CRNZ 425 at 427.


\(^{23}\) Moonen at 17.

\(^{24}\) Keith, above at n 22.
In March 1995 the United Nations Committee on Human Rights expressed regret that the New Zealand Bill of Rights Act “has no higher status than ordinary legislation and does not repeal earlier inconsistent legislation.” It recommended that the Act be revised to “give the courts power as soon as possible to strike down or decline to give effect to legislation on the ground of inconsistency with covenant rights and freedoms as affirmed in the Bill of Rights.”

Whether granting the courts power to strike down legislation would transform the protection of human rights is not clear. The policy of leaving protection as a cooperative enterprise between Parliament and the courts may be as effective. The requirement that legislation is to be interpreted where possible to give effect to the rights contained in the legislation is a powerful tool. The infrequent recourse to the striking down powers in countries where review of legislation is possible illustrates that. Janet MacLean notes that “functionally the systems [in the United States and New Zealand] seem to be operating in much the same way” and makes the point that while s 4 has tended to be the focus of critical attention in New Zealand, in fact s 6 of the New Zealand Bill of Rights is the central provision in terms of judicial engagement. The requirement to construe legislation in conformity with the Bill of Rights Act is a potent one. Human rights requires both courts and legislatures to deliver protections and proper remedies.

The focus should not be on what powers the courts have but what effect their decisions have in terms of administrative and legislative action and response. The converse is also true.

The same point has been made by Lord Bingham in Brown v Stott. Judicial supervision of human rights is a complement for the processes of democratic government.

Sir Stephen Sedley has said that “how much or little Judges make of human rights seems to have not a lot to do with the tools the Legislature hands them’. He points to the earlier unhappy experience in Canada with the 1960 Bill of Rights. He suggests:

But it is of only if you stand back, with the variegated experiences of Canada, Australia, South Africa and New Zealand (to take just the commonwealth examples) in your

26 Although in New Zealand the case of R v Pora [2001] 2 NZLR 37 “has been condemned from all sides” (both in respect of the strained interpretations to avoid breach of the Act and the inability to strike down a retrospective penalty), McLean, above at n 17, points out that the result was that the legislature acted to remove the problem.
27 McLean, above at n 17, 448.
hand, that you start to see that there is probably little direct cause or correlation between a Bill of Human Rights and judicial interventionism. New Zealand acquired in 1990 a Bill of Rights Act which is modest in the extreme, giving not even an interpretative nudge, much less a judicial over-ride on existing legislation: but in the hands of judges who wanted to make a reality of human rights it has taken wing. A peevish essay here by James Allen [in Campbell, Ewing and Tompkins (eds.) Skeptical Essays on Human Rights (Oxford, 2001)] criticises them for deciding that, even though they cannot interfere with incompatible legislation, they can at least declare that it is incompatible. For such critics I doubt whether judges can do anything right.

Such critics voice concerns about the legitimacy of judicial determination of rights. “Unelected” and “unaccountable” judges in their view usurp the functions of the legislative and executive branches of government. These criticisms need to be taken seriously. They are easy to make and difficult to answer simply. They have the capacity to shake confidence in the administration of justice and thus threaten judicial independence, ultimately based on public confidence.

The more simplistic criticisms can be taken head-on. Judges are highly accountable, through reasons given in public and through the appellate system. Accountability through readier dismissal for unpopular decisions risks, as Sedley points out, “the central attribute of judicial office: independence”. No one with any experience of judicial elections and who believes that independence is central to judicial function would seriously suggest that model.

But there are more thoughtful concerns. Carol Harlow has raised the dangers of “campaigning litigation”, which human rights litigation opens up and which may result in, “colonisation of the legal by the political process”. 30

If we allow the campaigning style of politics to invade the legal process, we may end up by undermining the very qualities of certainty, finality and especially independence fore which the legal process is esteemed, thereby undercutting its legitimacy.

Her concern is with the extension of standing to allow campaigning groups to argue for particular outcomes and the readier invocation of techniques such as the Brandeis brief to ascertain legislative facts. This may “push courts into areas of policymaking to which their processes are inherently ill-adapted”. In addition, it escalates the scrutiny of judicial officers for association with the causes advocated, as Pinochet and Locabail31 illustrate. Harlow echoes TR

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Allan in expressing concern that the triumph of pressure groups or factions or special interests may mark a corruption of the legal process: “To put this important point differently, too close a relationship between courts and campaigning groups may result in a dilution of the neutrality and objectivity of law”.\(^\text{32}\) Statements of human rights recognise that politics cannot do everything. It is important to recognise that neither can law. The distinctiveness of law and politics needs to be recognised.

Lord Hoffman too has cautioned that it is important for courts to show restraint in interpretation of the limits which human rights impose upon democratic institutions. Particular care is needed in decisions, whether in application of human rights law or outside it, where the outcome is likely to impact upon public expenditure. Judges must recognise that they are “not appointed to set the world to rights”.\(^\text{33}\)

However slow, obtuse and maddening the democratic process may be, there is a legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim.

I do not doubt the need for some circumspection, both in procedure and substantive review in human rights cases, particularly where public moneys are involved. And I certainly would agree that judges cannot expect to set the world to rights. But the role of the courts is to uphold legality. The doctrine of separation of powers was devised as an auxiliary safeguard,\(^\text{34}\) not to promote the efficiency of government or even to uphold majoritarian democratic process, but to prevent the exercise of arbitrary power.\(^\text{35}\) As Lord Steyn has argued, that function, the rule of law, itself serves a democratic ideal.\(^\text{36}\)

The democratic ideal involves two strands. First, the people entrust power to the government in accordance with the principle of majority rule. The second is that in a democracy there must be an effective and fair means of achieving practical justice though law between individuals and between the state and individuals. Where a tension develops between the views of the majority and individual rights a decision must be made and sometimes a balance has to be struck. The best way of achieving this purpose is for a democracy to delegate to an impartial and independent judiciary this adjudicative function. Only such a judiciary acting in accordance with principles of institutional integrity, and aided by a free and courageous legal profession, practising and academic, can carry out this task, notably in

\(^{32}\) Harlow, above at n 30, 13.
\(^{33}\) Separation of Powers (The Comber Lecture, 2000).
\(^{34}\) James Madison writing in Bixby (ed.) The Federalist (No 51, 1992) 266.
\(^{35}\) Myers v US 272 US 52 (1926) per Brandeis J (dissenting).
\(^{36}\) Lord Steyn Democracy through Law (Inaugural Lord Cooke of Thorndon lecture, Victoria University of Wellington, 18 September 2002).
the field of fundamental rights and freedoms. Only such a judiciary has democratic legitimacy.

A judge cannot evade deciding a case just because it is controversial. Nor can the Judge decline to exercise a jurisdiction conferred by Parliament or the Constitution and properly invoked by a litigant. Abstention is itself a judicial determination with political repercussions. The courts are themselves subject to the rule of law. They cannot usurp powers lawfully exercised by other agencies, including Parliament. They operate at the boundaries, making sure that power is exercised only according to law. But that responsibility they cannot constitutionally shrug.

The principal answer to suggestions of judicial overreaching lies in scrupulous adherence to judicial method. An important part of that method is attention to the limits of judicial scrutiny. While I have in my time done my share of railing against *Wednesbury* as a standard for review, it represents an enduring and important issue. Whether the limits of review are set at *Wednesbury* unreasonableness (a point which shades into bad faith, as Lord Greene in that case noted), or proportionality, or some stricter standard, boundaries are required wherever there is a legitimate area of discretion lawfully conferred upon someone other than the court. A great virtue of human rights litigation is that it demonstrates why there can be no single touchstone. Judicial method has only been enhanced by human rights litigation. And it is a benefit obtained by our legal systems which will not be confined to human rights cases. I need to explain.

The excitement that attends discussion about legislative compliance with human rights and how it is to be enforced has obscured the revolution that rights have brought to judicial methodology. Where official conduct is challenged by judicial review, the most difficult cases do not arise where the claimed illegality is manifest because the power purportedly exercised falls outside the purpose of the statute. That question may raise difficult points of interpretation, but ultimately it is a question of the statutory meaning. The greater difficulties rather arise where the claimed unlawfulness is that the decision-maker has struck the wrong balance among competing interests or where the attack on the decision is one of degree (as in challenges based on standards such as reasonableness or proportionality). The Courts have been largely adrift in such challenges. They have had to seek answers in the statute, in the international context where applicable, and in enduring community values. Inevitably, the result has been deference to the decision-maker and a lack of clarity and persuasiveness in judicial reasoning where, as Professor Taggart has put it, judgments are too often “characterised by assertions of unreasonableness or unfairness, and little else”.

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38 See *Tavita v Minister of Immigration*.
Where a margin of wide appreciation may be appropriate for an international tribunal, it may inappropriate for a domestic tribunal able to weigh competing demands in a local context. Limitations of rights under human rights statements must be "demonstrably justified" or "necessary" in a free and democratic society. This is the language of onus of proof. It invokes the idea of proportionality. The three-part approach adopted by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries and Housing* and adopted by Lord Steyn in *ex parte Daly* points in a direction most of us are likely to travel.

First, the objective of the measure must be sufficiently important to justify limiting a fundamental right. Secondly, the measure must be reasonably connected to the objective. Thirdly, the limitation upon the right must be no more than is necessary to accomplish the objective.

The important judgment of the House of Lords in the *Alconbury* case indicates the extent to which traditional administrative law methodology is turned around by the context of human rights. Although the House of Lord upheld the determination of a Minister agreed not to be an impartial tribunal, it was on the basis that judicial review is sufficient protection of the right to the determination of an impartial tribunal under Article 6. Such review requires fairness and the correction of mistake of an established and relevant fact. Lord Slynn indicated that it is time to recognise that the principle of proportionality is part of English administrative law:

> not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the Human Rights Act however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.

It remains to be seen whether this view will prevail. It has, however been foreshadowed for some considerable time. It is consistent with Lord Steyn’s approach in *ex parte Daly*.

Taggart sees the Bill of Rights methodology as:

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40 See *Brown v Stott*.
41 [1999] 1 AC 69 at 80
42 [2001] 3 All ER 433.
43 *R (on the application of Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions and other Cases* [2001] 2 All ER 929.
44 See Lord Nolan, Lord Clyde, and Lord Slynn.
45 *Alconbury* at 976.
46 Only Lord Clyde explicitly supported it in *Alconbury*.
47 *M v Home Office* [1993] 3 All ER 537 per Lord Templeman.
a more focused, consistent and transparent methodology than that prevalent in administrative law adjudication, where ‘rights’ issues can be swept over in conclusionary findings that the exercise of the power was or was not Wednesbury unreasonable ..... As Professor Jowell and Lester demonstrated a decade ago [in “Beyond Wednesbury: Substantial Principles of Administrative Law” (1987) Public Law 368] the concept of unreasonableness in administrative law has obscured the underlying role of protecting rights.

Statements of rights therefore provide content to the standards by which the supervisory jurisdiction of the Courts is to be exercised and give judges a framework for reasons why executive action is or is not within the boundaries of proper administrative discretion.

But it does more than that. Where human rights are engaged, they can be expected to prevail unless the statute under which the authority is exercised requires a result inconsistent with the human right or unless the right claimed comes into conflict with another human right. This development is a logical extension of the principle that Parliament is not to be presumed to intend that discretionary powers created by it will be exercised inconsistently with its international obligations. It conforms with the view expressed by Lord Justice Thorpe that, where fundamental human rights are engaged, the margin of appreciation permitted to the decision maker will be correspondingly reduced. In human rights legislation Parliament has made explicit an approach the common law was already coming to through experience.

Values which the courts have identified with difficulty or glossed over are now accessible in legislation. As a result, recourse to them has gained legitimacy and has obtained organising principles. The courts have a register against which to assess whether the incursion upon rights in an actual case can be justifiable. As others have pointed out, the methodology of traditional judicial review has been profoundly affected. Review now starts with the right. If the right has not been limited in accordance with law, any public authority is required to give effect to the right. In Taggart’s words, it becomes a “constitutional trump”.

Sedley points out that this enhanced focus is having a profound effect.
The effect of the Human Rights Act has been to focus the sometimes fuzzy concept of reasonableness through a lens of proportionality, and so to make judicial reasoning about it both more structured and more intelligible. The liberal scattering of restrictive bail or parole conditions is likewise now having to be thought through in terms of proportionate restraints on freedom of movement. Courts and public administrators are still getting accustomed to this re-orientation, and it does not make headlines: but it affects hundreds of thousands of people every year, and to them it matters a great deal.

Statements of human rights in domestic law therefore provide a measure against which executive action can be readily tested. It would be naive to think that they will not ultimately come to exercise a huge influence on the interpretation of all statutes and the development of the common law. As Cooke P remarked in *R v Goodwin*:\(^{54}\)

The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance.

I do not underestimate the challenges that such legislation brings to the Courts when its application moves beyond the criminal law to which it has till now been mostly confined, at least in my jurisdiction. Human rights adjustments may be complex. Where there are a range of valid outcomes, the case will not always be easy for judicial determination. But where a case is properly brought before the courts, they cannot avoid grappling directly with the issues.

As MacLean has persuasively argued, there is no illegitimacy in this. The courts act in dialogue with the legislature, not pulling against it. The function is democratic and judicial.\(^{55}\)

What is developing is an elaborate system of deference depending on the right at risk——not all rights will be treated the same, and some rights, such as that to be free from unreasonable search and seizure, contain their own modifiers——over time, one would hope that a more explicit methodology will develop — adapting some version of proportionality doctrine, *Wednesbury* doctrine or a domestic version of the margin of appreciation doctrine. Such an approach has the potential to combine a sensitivity to democratic judgments, as well as providing a means by which to make quite forceful normative statements in a proper case. The existence of doctrines by which courts pay

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\(^{54}\) [1993] 2 NZLR 153 at 156.

\(^{55}\) McLean, above at n 17, 447.
deference to legislative judgments does not depend on whether or not there is a striking down power. Equally, however, the normative force of a court’s judgments will diminish the more contestable the “reasonableness” component, and according to the susceptibility of an issue to a legal analysis.

In developing standards, the judiciary of today is fortunate indeed in the comfort of an international register provided by comparable jurisdictions. As I have indicated, I do not think it matters greatly whether we operate under constitutional instruments which fetter legislative action or statutes which must yield to unambiguous legislation. We all work to convince by reason if we are to retain the confidence of the communities we serve.