

THE DANCE OF LEGISLATION: WHY PARLIAMENTARY SOVEREIGNTY IS NOT A MEANINGFUL PUBLIC LAW METRIC

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"The dance of legislation" is a metaphor to capture the parliamentary–judicial dynamic in the creation, interpretation and application of legislation. Contrary to the edicts of classical sovereignty doctrine, Parliament is not the sole actor in (what I term) "law creation through legislation". Sovereignty doctrine champions the exclusivity of Parliament in enacting legislative text and discounts any constitutive role of the courts in bringing meaning to the legislative text. The courts deploy interpretive techniques that fix legal meaning in accordance with a range of institutional norms and understandings. These techniques debunk the notion that Parliament's word is the start and end point of what is law, irrespective of what the courts say is the law. The judicial role extends beyond filling gaps in statutory meanings: it extends even to the reconstruction of statutory meaning where institutional norms commend activist interpretive method. The symbiosis that joins the branches lies at the heart of the legislative enterprise. The parliamentary–judicial relationship is an interdependent, collaborative one that draws upon the distinctive, role-specific function of each branch. The quip "it takes two to tango" speaks perfectly to the dance of legislation imagined in this article.

I INTRODUCTION

The doctrine of parliamentary sovereignty is a staple of the law school curriculum. Parliament is the highest law-making authority and its enactments are the highest source of law.¹ Certain truths are self-evident: Parliament's powers of legislation are unlimited and illimitable; its legislation prevails

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¹ *Cheney v Conn (Inspector of Taxes)* [1968] 1 WLR 242 (Ch) at 246–247; *Haliburton v Broadcasting Commission* [1999] NZAR 233 (HC) at 238; and *Kereopa v Te Roroa Whatu Ora Custodian Ltd* [2013] NZCA 327 at [21].

over all other types of law and cannot be declared invalid by the courts.² Parliament is, at every moment in time, sovereign and cannot bind its successors (statutes later in time impliedly repeal earlier statutes).³ Whatever Parliament enacts *is* law, no matter how absurd, fantastical or unintelligible the statutory content. The courts must apply Parliament's enactments dutifully, without demur, according to their text, purpose and context.⁴

Parliamentary sovereignty is steeped in the rhetoric of a past age. Sir Edward Coke's *Institutes of the Lawes of England* labelled Parliament's powers "transcendent and absolute",⁵ while Sir William Blackstone's *Commentaries on the Laws of England* anxiously acknowledged "that absolute despotic power".⁶ The legal academy and the courts hold to this rhetoric, but is it a meaningful metric of today's constitutional understandings? Is it helpful to organise our public law taxonomy under the notion of a transcendent and absolute power? Liberal democratic theory is premised on the principles of the rule of law and limited government, not transcendent and absolute power.⁷ Absolute power is the language of Hobbes' *Leviathan* and is anathema to modern constitutionalism.⁸

This article distils the judicial role when courts interpret and apply legislation. The courts are not passive purveyors of legal meaning but are intimately involved in the process of (what I term) "law creation through legislation". They deploy interpretive techniques in statutory interpretation that fix legal meaning in accordance with a range of institutional norms and understandings. Judicially developed principles of statutory interpretation debunk the notion that Parliament's word is the start

2 *Proprietors of the Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710 at 725, 8 ER 279 (HL) at 285; *Lee v Bude and Torrington Junction Railway Co, ex parte Stevens and ex parte Fisher* (1871) LR 6 CP 576 (Comm Pleas) at 582; *British Railways Board v Pickin* [1974] AC 765 (HL) at 782 and 798; *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330; *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 484; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [13] and [15]–[18]; and *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91]–[95].

3 *Godden v Hales* (1686) 11 St Tr 1165 (KB) at 1197; *Dean and Chapter of Ely v Bliss* (1842) 5 Beav 574 at 582, 49 ER 700 (Rolls Court) at 704; *Vauxhall Estates Ltd v Liverpool Corp* [1932] 1 KB 733 (KB) at 746; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (CA) at 597; *Shaw v Commissioner of Inland Revenue*, above n 2, at [13]; and *Westco Lagan Ltd v Attorney-General*, above n 2, at [91]–[95].

4 Legislation Act 2019, s 10(1).

5 Edward Coke *The Fourth Part of the Institutes of the Lawes of England: Concerning the Jurisdiction of the Courts* (M Flesher, London, 1654) at 36.

6 William Blackstone *Commentaries on the Laws of England* (16th ed, Cadell & Butterworth, London, 1825) vol 1 at 160.

7 See the various dicta in *Regina (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [*Fox Hunting case*] at [102], [104], [107], [120] and [159].

8 Thomas Hobbes *Leviathan* (JCA Gaskin (ed), Oxford University Press, Oxford, 1996). Contrast John Locke *Two Treatises of Government* (Peter Laslett (ed), Cambridge University Press, Cambridge, 1988). Locke is the progenitor of the modern principle of limited government under the rule of law (governments hold power in trust for the people).

and end point of what is *law*, irrespective of what the courts *say* is the law. Legislation "speaks" from the moment of its enactment, but the statutory meaning remains contingent and defeasible throughout the life of the statute. The courts forever revisit the meanings of statutes when factual situations before them call for fresh rulings on statutory meaning. This article draws on the Supreme Court decisions in *D (31/2019) v New Zealand Police*⁹ and *Fitzgerald v R*¹⁰ to illustrate how courts may countenance radically new meanings where institutional norms counsel particular legal outcomes. It is lazy thinking to believe that legislation begins and ends with Parliament's enacted word.

The article ends on a challenge for the legal academy and the courts. If we have reached a tipping point, where we concede that parliamentary sovereignty disconnects from realities and ought to be jettisoned, then the imperative is to find new language and concepts that can fill the void. Relegating the absolutist language of sovereignty doctrine is the easy part; finding replacement language is the challenge. Any new understanding must capture the parliamentary–judicial dynamic in the creation, interpretation and application of legislation – that which we may call "the dance of legislation".¹¹

II MISLEADING ACCOUNT

The doctrine of parliamentary sovereignty proffers a misleading account of law-creation through legislation. The doctrine champions the exclusivity of Parliament in enacting legislative text and discounts any constitutive role of the courts in interpreting and applying legislative text. This is misleading dogma: the meanings the courts bring to Parliament's statutes transform abstract legislative text into operable "law". Meanings that fill the interstices of legislation are entirely judicially created through the processes of adjudication. Parliament and the courts are joined in an institutional relationship that none of the "high priests" (Hobbes, Blackstone and Dicey) deigned to acknowledge.¹² These theorists overlooked statements from the 17th century that courts could read statutes subject to reason and equity, and declare exceptions to them, and refuse to apply them if they were contrary to natural law.¹³ The historical precedents provided ample evidence of the contribution of courts to legislation as a source of law.

9 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213.

10 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

11 For the origin of the expression "the dance of legislation", see Eric Redman *The Dance of Legislation* (University of Washington Press, Seattle, 1973).

12 Heuston claimed that the doctrine of parliamentary sovereignty was almost entirely the work of Oxford men. He dubbed Thomas Hobbes of Magdalen College, and William Blackstone and Albert Venn Dicey of All Souls College, "the high priests of the mystery": see RFV Heuston *Essays in Constitutional Law* (2nd ed, Stevens, London, 1964) at 1.

13 *Dr Bonham's Case* (1610) 8 Co Rep 113b at 118a, 77 ER 646 (Comm Pleas) at 652. See also *Day v Savadge* (1614) Hobart 85 at 87, 80 ER 235 (KB) at 237; *Thomas v Sorrell* (1674) Vaughan 330 at 336, 124 ER 1098 (KB) at 1102; and *City of London v Wood* (1701) 12 Mod 669 at 687–688, 88 ER 1592 (KB) at 1602. For

Sovereignty doctrine is oblivious to the symbiosis that defines the parliamentary–judicial relationship.¹⁴ The courts and Parliament engage in an enterprise that is genuinely *collaborative* – Parliament enacts legislative text and courts fix it with "meaning" in actual cases. There is not, as sovereignty doctrine portrays, a vertically organised relationship, with Parliament ascendant speaking down to courts. It is a horizontally organised relationship founded on principles of comity, interdependence and reciprocity.¹⁵ The courts and Parliament are each *operationally* independent of the other,¹⁶ but they are *functionally* interdependent. The courts are the authoritative expositors of the law and actively contribute to legal meaning founded on legislative text. They interpret and apply legislation against a backdrop of common law principles, precepts and values that are antecedent to the law itself. These principles, precepts and values are committed to protecting basic human rights and democratic ideals from legislative overreach.

III NEW ZEALAND BILL OF RIGHTS ACT 1990

A Interpretive Direction

The courts have developed their interpretive principles as common law method under their constitutive authority to develop the law. However, one significant rule of statutory interpretation is of Parliament's own making.¹⁷ Under the New Zealand Bill of Rights Act 1990 (BORA), Parliament enacted an interpretive direction that courts, wherever possible, must opt for rights-consistent meanings when interpreting legislation.

Section 6 of BORA reads:

discussion, see Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [16.2.3].

14 For the classical understanding, see AV Dicey *Introduction to the Study of the Law of the Constitution* (ECS Wade (ed), 10th ed, Macmillan Press, London, 1959) at chs 1–3.

15 Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 322 and 332–335.

16 For their mutual independence, Parliament looks to the law of parliamentary privilege and the principle against judicial interference in the legislative process, and the courts look to the constitutional guarantee of judicial independence, the inherent or statutory jurisdiction courts enjoy and the sub judice rule.

17 Parliament has enacted successive Interpretation Acts but these have tended to codify principles of statutory interpretation already developed by the courts. Section 22 of the Legislation Act 2019, for example, codifies the common law principle affirmed in *British Coal Corp v The King* [1935] AC 500 (PC) at 519 (no Act binds the Crown unless the Act expressly provides so). The rule against retrospectivity in s 12 of the Legislation Act 2019 is a further example of a codified common law principle. So, too, is the cardinal principle of statutory interpretation, that the meaning of legislation must be ascertained from its text, purpose and context. This principle is now codified in s 10(1) of the Legislation Act 2019.

6 Interpretation consistent with Bill of Rights to be preferred

Whenever 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.

B Constitutive Role

Section 6 mandates the courts to exercise a constitutive role in fixing legislative meaning that is BORA-consistent. A judicial ruling on the text that aligns it with BORA becomes determinative of the law and its application. Usually, the courts ascertain statutory meaning from the legislative text, in light of Parliament's purpose and the statutory context.¹⁸ However, s 6 displaces that interpretive method where legislation encroaches on BORA-protected rights. In that event, the courts must prefer meanings that are consistent (or less inconsistent) with the protected rights. Legislative text acquires a common law hue when courts align it with judicially developed rights that BORA has codified.

The decision in *Re Application by AMM and KJO to adopt a child* exhibited a rights-bias that is consonant with the s 6 interpretive mandate.¹⁹ This decision exemplifies the constitutive role the courts exercise, even to the extent of reconstructing Parliament's original meaning. The question for the Full Court was whether the definition of "spouse" in the Adoption Act 1955 included de facto couples. The Court noted that Parliament had amended several statutes expressly to recognise de facto relationships, although it had not amended the definition in the Adoption Act 1955. That, however, was not a reason to reject a rights-consistent interpretation.²⁰ Their Honours interpreted "spouse" to include de facto couples, which they acknowledged was contrary to Parliament's intended meaning of married couples. The Court sought a rights-consistent meaning under BORA which vouchsafed freedom from discrimination on the ground of marital status.²¹

C Sections 4–6

Section 6 operates as a statutory direction to the courts, but the courts are not unconstrained in their interpretive role. The s 6 mandate must be calibrated in light of s 4 of BORA, which pulls in the opposite direction to s 6.²² Section 4 is designed "to confirm Parliament's legislative sovereignty";²³

18 Legislation Act 2019, s 10(1).

19 *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC).

20 At [56]–[72]. See also *D (SC 31/2019) v New Zealand Police*, above n 9, at [77]–[82] and [159] where the majority found that parliamentary materials suggesting a rights-infringing purpose were insufficient to abridge protected rights under BORA. Only express words in the statute, or a necessary implication arising from them, could exclude a rights-consistent meaning.

21 New Zealand Bill of Rights Act 1990 [BORA], s 19(1).

22 *Fitzgerald v R*, above n 10, at [185].

23 *R v Poumako* [2000] 2 NZLR 695 (CA) at [81].

it sets "the outer limits of what is possible".²⁴ The section preserves the primacy of legislation that cannot be reconciled as a justified limit under s 5 or made BORA-consistent under s 6. Under s 4, no court may hold an enactment to be impliedly repealed or revoked, or made invalid, inoperative or ineffective, by reason of inconsistency with BORA. The question is: how far might a court depart from the natural meaning of an enactment and/or Parliament's intended meaning so as to arrive at a BORA-consistent meaning?²⁵

Under s 6 a BORA-consistent meaning shall be preferred wherever such a meaning *can* be given. Read literally, the word "can" invites linguistically strained meanings, including meanings that depart from Parliament's intended meaning. Former Chief Justice, Dame Sian Elias, consistently treated s 6 as authorising activist interpretive method. Her Honour did not balk at linguistically strained interpretations in order to achieve rights-consistent meanings.²⁶ Section 6 was an interpretive rule of universal application, even for legislation whose meaning appeared apparent on its face. It was, Elias CJ claimed, the correct approach to search for the least rights-infringing meaning.²⁷

Elias CJ was alone on the Supreme Court in championing this expansive role for s 6.²⁸ In *R v Hansen*, the majority viewed s 6 as a "fall-back" provision.²⁹ This decision established a methodological sequence that is prone to leaving s 6 marginalised and without a function. Under the "*Hansen* sequence", s 5 is deployed in order of preference to determine whether a statutory limit on a protected right is reasonable and justified. A rights-consistent meaning under s 6 is sought only if the limit cannot be reconciled under s 5. If a legislative limit on a right is reasonable and justified, there is no "inconsistency", and no need to search for an alternative s 6 interpretation.³⁰ Moreover, even where a legislative limit cannot be reconciled under s 5, the s 6 interpretive exercise is not without limits. A BORA-consistent meaning must be "genuinely open",³¹ "tenable",³² "fairly open and

24 *Fitzgerald v R*, above n 10, at [60].

25 *Re Application by AMM and KJO to adopt a child*, above n 19, at [23]. See generally Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis NZ, Wellington, 2015) at ch 7 "Interaction with other enactments".

26 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [13].

27 At [15]–[24].

28 See *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [221], where Elias CJ distanced herself from her judicial colleagues concerning the application of s 6.

29 See *R v Hansen*, above n 26 (a majority comprising Blanchard, Tipping, McGrath and Anderson JJ).

30 At [57]–[60] per Blanchard J, [90]–[92] per Tipping J and [189]–[192] per McGrath J.

31 At [61].

32 At [179].

tenable",³³ "reasonably or properly open",³⁴ "viable",³⁵ and "intellectually defensible".³⁶ The majority emphasised there must be a legitimate process of construction which did not operate "as a concealed legislative tool".³⁷

D Diversity of Approach

The majority approach in *Hansen* has not received universal acceptance.³⁸ The courts have developed diverse approaches, depending on the nature of the right engaged, the nature of the breach that is sought to be avoided, and the justice of the case.³⁹ In 2016 alone, three reported Court of Appeal decisions accorded primacy to the interpretive obligation under s 6, without addressing questions of proportionality under s 5.⁴⁰ Moreover, it is "common ground" that textual ambiguity is not a prerequisite to adopting a rights-consistent meaning under s 6.⁴¹ Nor are s 6 interpretations constrained by the natural meaning of legislative text,⁴² or by Parliament's intended meaning,⁴³ or by the need for *reasonable* interpretive alternatives.⁴⁴ In *Re Application by AMM and KJO to adopt a*

33 At [150].

34 At [150].

35 At [252].

36 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [67] as cited in *R v Hansen*, above n 26, at [156], n 189 per Tipping J. See *Fitzgerald v R*, above n 10, at [181] for the various expressions used in *R v Hansen*, above n 26.

37 *R v Hansen*, above n 26, at [156]. Contrast *Fitzgerald v R*, above n 10, at [56] and [58].

38 See for example *Re Application by AMM and KJO to adopt a child*, above n 19, at [13]; *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [65]; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [143]; and *Greenpeace of New Zealand Inc v Electoral Commission* [2014] NZHC 2135, [2014] 3 NZLR 802 at [18].

39 *Fitzgerald v R*, above n 10, at [59] and [120].

40 *Mangawhai Residents and Ratepayers Assoc Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [182]–[182], [186] and [189]; *Harrison v R* [2016] NZCA 381, [2016] 3 NZLR 602 at [119]–[120]; and *Electoral Commission v Watson* [2016] NZCA 512, [2017] 2 NZLR 63 at [25]. For comment see David AC Bullock "The wane of s 5 of the New Zealand Bill of Rights Act 1990" [2017] NZLJ 164.

41 *Re Application by AMM and KJO to adopt a child*, above n 19, at [25]. See also *R v Hansen*, above n 26, at [13]; and *New Health New Zealand Inc v South Taranaki District Council*, above n 28, at [221].

42 *Re Application by AMM and KJO to adopt a child*, above n 19, at [31].

43 *R v Poumako*, above n 23, at [37]; *R v Hansen*, above n 26, at [12] and [149]; and *Re Application by AMM and KJO to adopt a child*, above n 19, at [31]. Contra *R v Phillips* [1991] 3 NZLR 175 (CA) at 177; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272; *Simpson v Attorney-General* [1994] 3 NZLR 777 (CA) [Baigent's case] at 674; *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 542; and *R v Hansen*, above n 26, at [56] and [290].

44 *Fitzgerald v R*, above n 10, at [58].

child, the Full Court acknowledged that "resulting awkwardness in language must be an inherent consequence of adopting a s 6 alternative meaning".⁴⁵ This was so, their Honours explained, "for the very reason that by definition the s 6 meaning will not be the ordinary or primary intended meaning".⁴⁶ In that decision, the Court prioritised the interpretive mandate under s 6 over the statutory prohibition under s 4 on modifying legislative text. The Full Court reconstructed Parliament's original meaning of "spouse" (meaning a married person) to include de facto couples.

The judgment of Winkelmann CJ in *Fitzgerald v R* represents the high-water mark of activist statutory construction.⁴⁷ Her Honour firmly rejected the majority's conservative approach in *Hansen*. A rights-consistent meaning under s 6 need not be a "reasonable" interpretive alternative and need not be "even a likely meaning".⁴⁸ Rather, courts must proactively presume rights-consistent meanings, unless the legislative text positively discourages such meanings. Her Honour did not ask whether the statutory limit on the protected right was reasonable and justified under s 5, as a precursor to applying s 6. The right not to be subjected to disproportionately severe punishment in issue in that case was so fundamental that no limit on it could be justified.⁴⁹ The Chief Justice's use of the interpretive mandate illustrates the ability of courts to supplement or reconstruct legislative text in the pursuit of rights-consistent meanings.

E Subordinate Legislation

The courts apply s 6 when subordinate legislation trenches on BORA-protected rights. They typically read down the scope of empowering provisions so as to preserve rights intact.⁵⁰ In *Drew v Attorney-General*, a prison inmate successfully challenged a statutory regulation that prohibited legal representation in all prison disciplinary proceedings.⁵¹ The Court held that the Regulation was ultra vires by reason of both the common law and BORA. The Regulation was contrary to common law principles of natural justice and the generally-worded empowering provision, under which the

45 *Re Application by AMM and KJO to adopt a child*, above n 19, at [31].

46 At [31].

47 *Fitzgerald v R*, above n 10.

48 At [58].

49 At [78] per Winkelmann CJ, [160] per Arnold and O'Regan JJ, and [241] and [244] per Glazebrook J. Quære whether Winkelmann CJ would have bypassed s 5, regardless of the finding that no limit on the right could be justified.

50 *Fitzgerald v R*, above n 10, at [62]–[65] and [182]. "Reading in" was thought to be a more accurate characterisation when a provision was interpreted as being subject to an unexpressed exception or limitation.

51 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

Regulation was made, did not authorise BORA-inconsistent regulations. A regulation was an "enactment" within the meaning of s 4, but the section could not save the Regulation:⁵²

[T]he regulation is invalid because the empowering provision, read, just like any other section, in accordance with s 6 of the Bill of Rights, does not authorise the regulation. The Court merely gives [the empowering provision] a meaning that is consistent with the rights and freedoms contained in the Bill of Rights.

In *Cropp v Judicial Committee*, the Supreme Court endorsed the discipline that BORA imposed.⁵³ The Court affirmed that empowering provisions will be "read down" in conformity with BORA and "the basic rights of the individual".⁵⁴ The Court explained: "Where the Bill of Rights is a relevant consideration ... the Court gives the generally expressed empowering provision a tenable meaning that is consistent with the right or freedom."⁵⁵ That dictum deftly captures the parliamentary–judicial dynamic: the courts and Parliament jointly fix the scope of empowering legislation – Parliament through legislative text, the courts through interpretive method.

Since *Drew*, a clutch of decisions has recanted the expansive application of s 6 in challenges to subordinate legislation. These decisions include the challenge to the legality of the 2020 national lockdown,⁵⁶ and what are colloquially termed the vaccine mandate cases.⁵⁷ These decisions are notable for two reasons: they opted for an ordinary interpretive approach to the empowering legislation (in accordance with text, purpose and context),⁵⁸ and they scrupulously observed the *Hansen* sequence of going directly to a s 5 analysis under BORA. This approach put the cart before the horse; s 6 was not "reached".⁵⁹ The s 5 finding of a justified limit on a protected right obviated the need to search for an alternative, rights-consistent meaning under s 6.

52 At [68].

53 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

54 At [27] (albeit the BORA challenge failed as the empowering provision clearly authorised the impugned rule promulgated to regulate horse racing).

55 At [25].

56 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864; and *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356.

57 *GF v Minister of COVID-19 Response* [2021] NZHC 2526, [2022] 2 NZLR 1; *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65; *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291; *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716; and *Four Members of the Armed Forces v Chief of Defence Forces* [2022] NZHC 2497.

58 Some decisions cited the standard principle of statutory interpretation set out in s 10(1) of the Legislation Act 2019.

59 *Drew v Attorney-General*, above n 51, at [68].

It was common ground that the statutory instruments trenched on BORA-protected rights. By holding fast to the *Hansen* sequence, each decision avoided the logically prior question: did the empowering legislation actually authorise what the delegate had promulgated? *Drew* established that that question directly engages s 6 of BORA. For the Supreme Court, that question might equally engage the common law principle of legality,⁶⁰ whose purpose is "to protect and uphold certain rights and values that the common law has identified as fundamental".⁶¹ The principle of legality as a constitutional principle is examined separately below.⁶² Here, it suffices to observe that that principle, too, was held not to apply when subordinate legislation limits BORA-protected rights. In *Four Midwives v Minister for COVID-19 Response*, the Court determined that the limit on the BORA-protected right (to refuse medical treatment) was a reasonable and justified one under s 5.⁶³ On this account, the Court reasoned, there was no need to search for an alternative, rights-consistent meaning under the principle of legality.⁶⁴ This ruling is questionable, and may even be per incuriam. In *Fitzgerald*, the Chief Justice emphasised that the principle of legality is common law method that exists independently of BORA, and "is not displaced or confined by the Bill of Rights".⁶⁵ These dicta countermand the ruling in *Four Midwives*.

Borrowdale v Director-General of Health and the vaccine mandate cases take their context from the COVID-19 pandemic and intrusive measures taken to contain the virus. These were extraordinary times which called for extraordinary responses. Now, as the community learns to live with the virus, s 6 should be reinstated to its rightful place – as a "weapon of justice" in the hands of the judges.⁶⁶ Ascertaining the scope of Parliament's delegation naturally engages s 6 when subordinate legislation encroaches on BORA-protected rights.

F Creative Interpretive Techniques

The courts have cautioned that BORA-consistent meanings must comport with the purposes of the enactment and be available on its text.⁶⁷ But subject to that caveat, s 6 invites courts to adopt

⁶⁰ *D v New Zealand Police*, above n 9, at [77]–[82] per Winkelmann CJ and O'Regan J, and [159] per Ellen France J; and *Fitzgerald v R*, above n 10, at [51]–[55] per Winkelmann CJ.

⁶¹ *Fitzgerald v R*, above n 10, at [51] per Winkelmann CJ.

⁶² See Part V below, titled "Principle of legality".

⁶³ *Four Midwives v Minister for COVID-19 Response*, above n 57, at [53].

⁶⁴ At [62]–[64].

⁶⁵ *Fitzgerald v R*, above n 10, at [51].

⁶⁶ Robin Cooke "A sketch from the blue train" [1994] NZLJ 10 at 10.

⁶⁷ *Re Application by AMM and KJO to adopt a child*, above n 19, at [31].

creative and innovative interpretations that can achieve rights-consistency. There are no definitive criteria laying down any clear formula for undertaking the s 6 interpretive exercise.⁶⁸

At times, the courts have come perilously close to flouting s 4. In *R v Poumako*, the Court of Appeal ruled on a provision that retrospectively increased the minimum non-parole period for the offence of murder involving home invasion.⁶⁹ For two dissenting Judges, the provision was "clear, unambiguous and certain in its retrospective effect",⁷⁰ and, in the circumstances, was a "constitutional privation".⁷¹ These Judges held that the provision could not be given a meaning that comported with the BORA right not to be penalised by retrospective criminal penalties.⁷² However, the majority, although not required to make a final ruling, preferred a less rights-infringing meaning that stonewalled the parliamentary purpose.⁷³ This approach commendably promotes rights-observance but leaves little, if any, role for s 4. A BORA-reconciliation could be achieved only by reconstructing the legislative text, contrary to Parliament's avowed purpose.

Section 6 might drive alternative statutory meanings, notwithstanding established principles of statutory interpretation. *R v Pora* addressed the same statutory provision in issue in *Poumako*, directing the retrospective application of a mandatory non-parole period for the same offence.⁷⁴ Section 2(4) of the Criminal Justice Amendment Act (No 2) 1999 increased the minimum non-parole period from 10 years to 13 years.⁷⁵ Section 2(4) was expressed to apply even if the offence was committed before the date of commencement of the section, if the sentencing occurred after that date. The question was whether Pora was subject to the mandatory non-parole period for an offence committed before the commencement of the amended s 2(4).

In a joint judgment, Elias CJ and Tipping J (Thomas J concurring) eschewed orthodox principles of statutory interpretation. Their Honours plumped for a radical reading of s 2(4) in accordance with s 6 of BORA, and held that the provision was "irreconcilable" with, and "subordinate" to, s 4(2) of the Criminal Justice Act 1985.⁷⁶ Section 4(2) enacts a general prohibition against criminal statutes having retrospective effect. Their Honours ruled that s 4(2) was the "dominant" provision and

68 At [32].

69 *R v Poumako*, above n 23.

70 At [55] per Henry J.

71 At [70] per Thomas J.

72 BORA, s 25(g).

73 *R v Poumako*, above n 23, at [37]–[38].

74 *R v Pora* [2001] 2 NZLR 37 (CA).

75 Section 2(4) of the Criminal Justice Amendment Act (No 2) 1999 amended s 80 of the Crimes Act 1961 by the insertion of new subs (2A).

76 *R v Pora*, above n 74, at [49].

prevailed over s 2(4): "This interpretation, being tenable, is one the Court is required by s 6 of the New Zealand Bill of Rights Act to adopt."⁷⁷ It mattered not that s 2(4) was later in time and specific in application. Under orthodox principles of statutory interpretation, a later specific statute pro tanto impliedly repeals the earlier, more general statute. For their Honours, s 6 supplied the justification for reversing the usual interpretive sequence. The statutory prohibition against retrospective penalties was of a higher legal order than the criminal justice amendment that sought to flout it.⁷⁸

The courts are *constitutively* involved in law-creation when they reconcile legislative text and protected rights. No decision exemplifies this more than *Fitzgerald*. For the majority (William Young J dissenting), s 6 invited a purposive approach to the "three strikes" legislation under the Sentencing Act 2002.⁷⁹ The appellant had been convicted of a "third-strike" offence, and the question was whether the sentencing Judge was bound to impose the maximum sentence. On a literal interpretation of the legislation, the Judge was mandated to do so, but the majority ruled otherwise. The Draconian sentencing regime was to be construed in a manner that was BORA-consistent, which required importing the proviso that a maximum sentence should not be imposed where it would entail a breach of s 9 of BORA. Imposing the maximum penalty would have breached the s 9 guarantee not to be subjected to disproportionately severe punishment.⁸⁰ This right is so fundamental, the majority held, that no limit on it could be justified.⁸¹

The Chief Justice commended activist principles of statutory interpretation. For her Honour, s 6 is a "powerful interpretive obligation" that complements and strengthens common law purposive interpretation.⁸² The courts must approach the interpretive exercise "proactively" and "presume a rights-consistent purpose", "unless the language of the statute clearly excludes that possibility".⁸³ Section 6 justifies reading down otherwise clear statutory language, adopting strained or unnatural meanings of legislative text, and reading limits into statutory provisions so as to achieve BORA-consistent meanings.⁸⁴

77 At [50].

78 For further discussion, see Philip A Joseph "The Principle of Legality: Constitutional Innovation" in Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (The Federation Press, Annandale (NSW), 2017) 27 at 30.

79 *Fitzgerald v R*, above n 10. See for example at [49], [127]–[131], [135] and [139] per Winkelmann CJ.

80 At [132], [134], [140], [219] and [227].

81 At [78], [160], [241] and [244].

82 At [73].

83 At [49], [55]–[56] and [124] per Winkelmann CJ. Compare O'Regan and Arnold JJ at [185] commenting that s 6 cannot ascribe a meaning to a statute that is inconsistent with the statute's purpose.

84 Jason NE Varuhas "Conceptualising the Principle(s) of Legality" (2018) 29 PLR 187 at 202 as quoted in *Fitzgerald v R*, above n 10, at [56] per Winkelmann CJ.

Fitzgerald relegates the *Hansen* interpretive method and strengthens the s 6 interpretive mandate. In *Hansen*, the question posed was whether an enactment "can be given" a rights-consistent meaning (*passive* interpretive method); in *Fitzgerald* such a meaning was a fortiori presumed (*proactive* interpretive method). The question then is whether the statutory text is capable of excluding that meaning.⁸⁵ In *Fitzgerald*, it was not so capable, even though grafting on the proviso to the three-strikes legislation altered both its scope and application. The Court would not be complicit in breaching a protected right under BORA, or acting in breach of New Zealand's international obligations.⁸⁶ Arnold J observed that, were it Parliament's purpose that the courts should act in that way, "it is reasonable to expect that it would have been stated explicitly".⁸⁷

G Reflections

This examination shows that courts contribute to law-creation through legislation in manifold ways – some subtle, some not so subtle. This returns the focus on to parliamentary sovereignty and the exclusivity it assigns to Parliament: the doctrine extols Parliament as the sole actor in legislation and discounts courts as partners in the enterprise. Yet, it is patently not true that law-creation through legislation is a function that is exclusively Parliament's. Proper account must be taken of the courts' constitutive role under BORA and the common law presumptions. From the moment legislation is enacted, it has legally binding meaning ascertained through text, context and purpose.⁸⁸ But that meaning is defeasible when courts interpret legislation in cases that come before them: ultimately, legislative text means what the courts say it means. Legislative text is the metaphorical skeleton and judicial construction the metaphorical flesh that transforms the skeleton into operable law. The parliamentary–judicial relationship is an interdependent, collaborative one that draws upon each branch's distinctive, role-specific function.

IV SENTENCING AND RETROSPECTIVITY

Statutory rights-guarantees are not confined to BORA. Section 6 of the Sentencing Act 2002 guarantees the right not to be subject to retrospective criminal penalties. Section 6(1) replicates the wording of s 25(g) of BORA: it guarantees an offender 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". Section 6(2) declares that subs (1) applies "despite any enactment or rule of law".

85 *Fitzgerald v R*, above n 10, at [55].

86 At [118]–[119], [203] and [218]. Section 9 of BORA codifies art 7 of the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) to which New Zealand is a State Party.

87 *Fitzgerald v R*, above n 10, at [203]. See also at [119] and [218].

88 Legislation Act 2019, s 10(1).

Section 6 of the Sentencing Act 2002 extends to courts the same invitation as BORA to apply legislation notwithstanding the parliamentary purpose. In *D (SC 31/2019) v New Zealand Police*, three members of the Supreme Court quoted academic commentary that s 6 is a "significantly more powerful protection than s 25(g)" as it overrides other inconsistent enactments.⁸⁹ In *D v New Zealand Police*, s 6 prevailed, notwithstanding Parliament's expressed intention when it enacted the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Registration Act). The appellant had been in possession of pornographic images of young children and was convicted of the offences of making and possessing an objectionable publication (registrable offences under the Registration Act). He was sentenced to home detention and placed on the Child Sex Offender Register. The Supreme Court granted D leave to appeal after the courts below had dismissed his challenge to the making of the registration order.

The appellant argued that a registration order could not be made because it was a retrospective punishment contrary to s 6(1) of the Sentencing Act 2002. This argument was advanced despite the tolerably clear parliamentary purpose: the Registration Act was intended to cover persons in the position of the appellant, who had committed registrable offences before the commencement of the Act. The Court conceded that the Act was intended to apply retrospectively "on a comprehensive basis".⁹⁰ The responsible Minister's speech on introducing the legislation was explicit: it was to cover all offending committed prior to the commencement date of the Act.⁹¹ But, notwithstanding that purpose, Winkelmann CJ, O'Regan and Ellen France JJ ruled that the Registration Act did not displace the s 6 presumption against retrospective criminal penalties.⁹² Parliamentary materials suggesting a rights-infringing purpose (notably, the Minister's introductory speech) were insufficient to achieve Parliament's purpose. Only express statutory words or a necessary intentment could bring about that result.⁹³

D v New Zealand Police reveals a steadfast resolve to protect rights when threatened by intrusive legislation. As with *Fitzgerald*, *D* exemplifies the interplay as between courts and Parliament. It was what the Court *said* the Act means that was determinative, not what Parliament thought it was

89 Butler and Butler, above n 25, at 707 as quoted in *D v New Zealand Police*, above n 9, at [54] per Winkelmann CJ and O'Regan J, and [172] per Glazebrook J.

90 *D v New Zealand Police*, above n 9, at [67].

91 (15 September 2015) 708 NZPD 6634 (Hon Anne Tolley MP) as quoted in *D v New Zealand Police*, above n 9, at [67].

92 *D v New Zealand Police*, above n 9, at [77] and [159] (William Young and Glazebrook JJ dissenting). For the stark differences in judicial attitude of mind as between the majority and minority Judges, see Edward Willis "'D v New Zealand Police': A comment on rights-consistent statutory interpretation in New Zealand" (2021) 32 PLR 190 at 193–194.

93 See *Fitzgerald v R*, above n 10, at [53] per Winkelmann CJ reflecting on *D v New Zealand Police*, above n 9.

enacting. The dance of legislation is more subtle and nuanced than abstract legislative text and must move in synch with the state's institutional norms, which judges enunciate and apply.

Parliament may still insist on having the last word. The judgment in *D* was delivered on 9 February 2021. On 22 March 2021, the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021 received the Royal Assent and became operative the following day.⁹⁴ The Amendment Act reversed *D* and made it palpably clear that persons in the position of the appellant may be the subject of registration orders. The Act also post-validated registration orders that had been made but rendered invalid in accordance with the decision in *D*. The specificity of the Amendment Act left no room for judicial manoeuvre. The parliamentary response attests to the formal superiority of the legislature in the collaborative enterprise as between courts and Parliament.

V PRINCIPLE OF LEGALITY

A Constitutional Principle

The principle of legality is a universally recognised construct throughout the common law jurisdictions.⁹⁵ The principle erects a barrier against legislative override of the panoply of human rights and institutional values that identify the modern liberal democracy. The House of Lords has described the principle as "a presumption of general application operating as a constitutional principle".⁹⁶ The principle is founded on the presumption that Parliament does not intend general or ambiguous legislation to abrogate or override basic rights and values. Lord Hoffmann's encapsulation of the principle in *Regina v Secretary of State for the Home Department, Ex parte Simms* is the most well-known formulation.⁹⁷ His Lordship explained:⁹⁸

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

The principle of legality protects rights and principles that the common law identifies as fundamental. It is not displaced or confined by BORA but operates to protect common law rights and freedoms not

94 Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021, s 2.

95 See generally Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (The Federation Press, Annandale (NSW), 2017).

96 *Regina v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 (HL) at 130.

97 *Regina v Secretary of State for the Home Department, Ex parte Simms*, above n 96.

98 At 131.

affirmed under it.⁹⁹ The principle is a precautionary one to guard against the risk that the full implications of general or ambiguous legislation might pass unnoticed in the parliamentary process. Basic rights and principles must be protected, notwithstanding apparent legislative text or parliamentary purpose. In *D v New Zealand Police*, the majority acknowledged that the parliamentary purpose was to make the Registration Act retrospective and applicable to persons in the position of the appellant.¹⁰⁰ But in the absence of express words or a necessary intentment, the legislation could not rebut the presumption that criminal penalties apply prospectively, not retrospectively. Section 6 of the Sentencing Act 2002, s 6 of BORA and the principle of legality all commended that outcome.¹⁰¹ Parliamentary materials suggesting a rights-infringing purpose could not trump the interpretive presumption.¹⁰²

The Supreme Court has given the principle of legality expansive application. The principles of the Treaty of Waitangi have assumed the equivalent standing of human rights under the common law principle. In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, the Supreme Court applied the interpretive methodology of the common law principle (but without alluding to it by name) to uphold the Crown's obligation to respect Treaty principles under statutory schemes.¹⁰³ Williams J cautioned: "If Parliament intends to limit or remove the Treaty's effect in or on an Act, this will need to be made quite clear."¹⁰⁴ The Court accorded tikanga principles the same protected status, and explained there would need to be "a very good reason" not to treat these principles as part of the statutory context.¹⁰⁵ The principles in issue in *Trans-Tasman Resources* – mana, whanaungatanga and kaitiakitanga – denoted tikanga-based, customary rights of Māori that fell within the statutory phrase "applicable law".¹⁰⁶ Thus again, judicial supplementation embellishes legislative text in ways Parliament would not have anticipated.

99 *D v New Zealand Police*, above n 9, at [81]. See also *Fitzgerald v R*, above n 10, at [51], n 72 (instancing the right to privacy and the right not to be deprived of property without just compensation). See BORA, s 28 "Other rights and freedoms not affected".

100 *D v New Zealand Police*, above n 9 (discussed above).

101 At [82].

102 At [81]; and *Fitzgerald v R*, above n 10, at [53] and [55].

103 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2022] 1 NZLR 801. See also *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116, [2022] NZRMA 612 at [91] (the principle of legality embraces the principles of the Treaty).

104 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 103, at [296].

105 At [297].

106 At [154], [169] and [297].

B Relationship of Principle of Legality and s 6 of BORA

In *Fitzgerald*, Winkelmann CJ mused expansively about the relationship between the principle of legality and s 6 of BORA.¹⁰⁷ For her Honour, s 6 is not merely a statutory embodiment of the principle of legality.¹⁰⁸ Section 6 mandates a "more proactive" approach and, in a good many cases, will "go further" than the principle of legality.¹⁰⁹ A BORA-consistent interpretation under s 6 "need not be the most likely or even a likely meaning".¹¹⁰ Courts must presume rights-consistent meanings which may require them to manipulate legislative text and even depart from Parliament's apparent meaning.¹¹¹ The Chief Justice emphatically rejected the moderating language endorsed in *Hansen* that only "reasonable" BORA-consistent meanings may be adopted.¹¹² Section 6, her Honour explained, contains no reference to *reasonable* meanings; on the contrary, the section mandates more proactive, rights-consistent interpretation.

Extemporising about the relationship between s 6 and the principle of legality may, in the end, be an unrewarding exercise. These are equally emphatic principles of statutory interpretation which operate in unison, each adopting the same "protective approach".¹¹³ Each yields rights-consistent (or more rights-consistent) meanings, even where there is no textual ambiguity and Parliament's apparent meaning is clear. In *Ex parte Simms*, Lord Steyn drew sustenance from Sir Rupert Cross's classic work on statutory interpretation. There was, his Lordship said, a presumption of general application – the principle of legality – that applies "even in the absence of an ambiguity".¹¹⁴ Likewise, Elias CJ believed that all legislation must, wherever possible, be interpreted in a rights-consistent manner: "[A]pparent linguistic meaning" will yield to "less obvious meaning" under "common law presumptions that are protective of bedrock values".¹¹⁵ Both the common law principle and s 6 legitimise activist interpretive method where legislation encroaches on rights or threatens "bedrock

107 *Fitzgerald v R*, above n 10.

108 For the commonly held view to the contrary, see *Fitzgerald v R*, above n 10, at [218] per Arnold J.

109 *D v New Zealand Police*, above n 9, at [81]; and *Fitzgerald v R*, above n 10, at [56]–[57]. See also at [251] and n 363 per Glazebrook J.

110 *Fitzgerald v R*, above n 10, at [58].

111 See for example *Re Application by AMM and KJO to adopt a child*, above n 19 (discussed above).

112 *Fitzgerald v R*, above n 10, at [59].

113 At [209], [217] and [218] per Arnold J.

114 John Bell and George Engle (eds) *Cross on Statutory Interpretation* (3rd ed, Butterworths, London, 1995) at 165–166 as cited in *Regina v Secretary of State for the Home Department, Ex parte Simms*, above n 96, at 130. For the original edition, see Rupert Cross *Statutory Interpretation* (Butterworths, London, 1976) at 142–143.

115 *R v Hansen*, above n 26, at [13]. For the constitutional implications of the Steyn/Elias approach, see Joseph, above n 78, at 39–41.

values". The judicial role extends beyond filling gaps in statutory meanings: it extends even to the reconstruction of statutory meaning itself where the institutional values of the legal system so commend.

C Stark Relief

These principles of statutory interpretation place parliamentary sovereignty in stark relief. The doctrine is a historically placed idea that is fundamentally misplaced in the modern age. As Lord Steyn observed in *Regina (Jackson) v Attorney General*: "The classic account given by Dicey of the supremacy of Parliament, pure and simple as it was, can now be seen to be out of place in the modern United Kingdom."¹¹⁶ The up-tempo dance of legislation exposes the shortcomings of sovereignty doctrine and quickens its retreat.

The decisions in *Re Application by AMM and KJO to adopt a child, D v New Zealand Police and Fitzgerald* are tantalisingly thought-provoking for public law aficionados. These decisions raise fundamental questions about the courts and Parliament, and ultimately the theory of the constitution. The imperative to conceptualise the dance of legislation calls for more imaginative and nuanced thinking than sovereignty doctrine can conjure. The image of an all-powerful sovereign (Parliament), bestriding the constitutional stage with absolute, undiminished power, is comically deficient. In an increasingly complex, variegated world, the doctrine's sole redeeming feature is its apparent lack of complication. But that, itself, speaks to the shortcomings of the doctrine, which cannot account for the intricate choreography of the dance of legislation.

VI COMMON LAW PRESUMPTIONS

Lord Hoffmann's speech in *Ex parte Simms* is a "celebrated passage",¹¹⁷ but it did not "invent" the principle of legality. The principle of legality draws upon deeply embedded values of the common law that have informed legal developments through successive generations.¹¹⁸ These values spawned a raft of interpretive presumptions that pre-date the principle of legality, but which today find generic expression in it.

Sir Rupert Cross popularised the idea of interpretive presumptions operating as constitutional principles.¹¹⁹ Nineteenth century decisions established a general presumption that operated as a precursor to the principle of legality. Parliament was presumed not to override the general law without using unmistakably clear words (general statutory words will not alter the existing policy of the

¹¹⁶ *Fox Hunting case*, above n 7, at [102].

¹¹⁷ *Chief Executive of Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 at [35].

¹¹⁸ See Joseph, above n 78, at 30–33.

¹¹⁹ Cross, above n 114, at 142–143. See now Bell and Engle, above n 114, at 165–166.

law).¹²⁰ Likewise, 19th century decisions established that the common law will remedy any statutory omission to grant the protections of natural justice. In *Cooper v Board of Works for the Wandsworth District*, Byles J's renowned dictum has passed into judicial folklore ("the justice of the common law will supply the omission of the legislature").¹²¹ Supplementation is a time-honoured judicial technique to mitigate the harshness of legislative text.¹²²

Today, the interpretive presumptions are manifold. These presumptions protect the right to observance of the principles of natural justice,¹²³ the right of access to the courts,¹²⁴ the right to a fair trial,¹²⁵ the right to the presumption of innocence,¹²⁶ the right to freedom of expression,¹²⁷ the right to be free from retrospective criminal penalties,¹²⁸ the right to privacy in the home,¹²⁹ the right not to be taxed by implication,¹³⁰ the right to solicitor-client privilege,¹³¹ the right to the free flow of

120 *Minet v Leman* (1855) 20 Beav 269, 52 ER 606 (Rolls Court).

121 *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 at 194, 143 ER 414 (Comm Pleas) at 420.

122 See Joseph, above n 13, at [25.2.3].

123 *Cooper v Board of Works for the Wandsworth District*, above n 121, at 194, 420; *Board of Education v Rice* [1911] AC 179 (HL) at 182; *John v Rees* [1970] Ch 345 (Ch) at 401; and *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577 at [20].

124 *Chester v Bateson* [1920] 1 KB 829 (DC); *R & W Paul Ltd v Wheat Commission* [1937] AC 139 (HL) at 153; *Raymond v Honey* [1983] AC 1 (HL); *Regina v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198 (CA) at 210; *Regina v Lord Chancellor, Ex parte Witham* [1998] QB 575 (DC); *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [32]; and *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [140].

125 *Brown v Stott* [2003] 1 AC 681 (PC).

126 *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL); and *Brown v Stott*, above n 125, at 694–695.

127 *Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248 (HL) at 1296–1297; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) at 283–284; and *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 543 (HL) at 551.

128 *R v Poumako*, above n 23; *R v Pora*, above n 74; *D v New Zealand Police*, above n 9, and *Fitzgerald v R*, above n 10, at [53].

129 *Morris v Beardmore* [1981] AC 466 (HL).

130 *Attorney-General v Wilts United Dairies Ltd* (1992) 91 LJ KB 897 (HL); *Congreve v Home Office* [1976] QB 629 (DC); *Congreve v Home Office* [1976] QB 629 (CA); *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 466; and *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 at [163]–[165].

131 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA); and *Rosenberg v Jaine* [1983] NZLR 1 (HC).

information between solicitor and client,¹³² the right of convicted prisoners to assert their civil rights,¹³³ and the right not to be subjected to disproportionate penalties.¹³⁴ Those presumptions are erected in order to protect *rights*, but the presumptions also operate to preserve constitutional comity. The courts presume that Parliament does not intend to legislate in breach of the principles of the Treaty of Waitangi,¹³⁵ or New Zealand's international treaty obligations,¹³⁶ or principles of customary international law.¹³⁷ If a statute can reasonably bear more than one meaning, courts will prefer the meaning that comports with the principles of the Treaty, or New Zealand's international obligations.

Statutory interpretation under the common law presumptions reconstructs legislative meaning. The presumptions apply even if it was Parliament's purpose to override a protected right. The decisions in *Re Application by AMM and KJO to adopt a child*, *D v New Zealand Police* and *Fitzgerald* are telling endorsement: in none of these decisions did Parliament's intended purpose prevail. Legislation and common law interact so as to produce legal meaning that is consonant (or more or less consonant) with core values of the legal system. In *Fitzgerald*, Arnold J conceded that applying the common law presumptions had, on occasion, "cut across the apparent legislative purpose".¹³⁸ However, his Honour was quick to deflect any anticipated criticism by alluding to the fundamental nature of the rights in question. It is incumbent on the courts to adopt, he said, "a

132 *Regina v Secretary of State for the Home Department, Ex parte Leech*, above n 124.

133 *Raymond v Honey*, above n 124, at 10; *Regina v Secretary of State for the Home Department, Ex parte Leech*, above n 124, at 209–212; and *Regina v Secretary of State for the Home Department, Ex parte Simms*, above n 96.

134 *Nelson City v Howard* [2004] NZAR 689 (HC) at 700; and *Fitzgerald v R*, above n 10, at [250]–[251].

135 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 656; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [72]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 103, at [296]; and *Students for Climate Solutions Inc v Minister of Energy and Resources*, above n 103, at [91].

136 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA); *New Zealand Airline Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; *Hela v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143]; *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96]; *Fitzgerald v R*, above n 10, at [119], [203] and [218]; and *Students for Climate Solutions Inc v Minister of Energy and Resources*, above n 103, at [91].

137 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 430 and 438.

138 *Fitzgerald v R*, above n 10, at [209]. His Honour instanced, as illustration, *Commissioner of Inland Revenue v West-Walker*, above n 131 (solicitor-client privilege); *Rosenberg v Jaine*, above n 131 (solicitor-client privilege); *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 (solicitor-client privilege); *Clancy v Butchers' Shop Employes Union* (1904) 1 CLR 181 (right of access to the courts); *Potter v Minahan* (1908) 7 CLR 277 (right of access to the courts); and *New Zealand Waterside Workers' Federation Industrial Assoc of Workers v Frazer* [1924] NZLR 689 (SC) (right of access to the courts).

protective approach".¹³⁹ The strength of the presumptions is relative: the more important the right and/or the more intrusive the legislation, the stronger the presumption against the statutory abrogation or limitation of the right.¹⁴⁰

The constitutional role of the common law presumptions has long been documented. A 1938 study concluded that they were not simply aids to interpretation.¹⁴¹ On the contrary, the presumptions embrace bedrock common law values that inform legislative meaning itself: "[The presumptions] have no longer anything to do with the intent of the legislature; they are a means of controlling that intent."¹⁴² "Together", the study observed, "they form a sort of common law 'Bill of Rights'".¹⁴³ In *Hansen*, McGrath J cited the 1938 study and observed that words alone lack precision as conveyors of meaning.¹⁴⁴ The common law presumptions supplement the legislative purpose so as "to mould legislative innovation into some accord with the old notions".¹⁴⁵ The common law curates legal meaning in accordance with the institutional morality it enshrines. The parliamentary–judicial dynamic choreographs the dance of legislation, which whirls and twirls with deft purpose and effect.

VII IMPLIED REPEAL

The doctrine of implied repeal is the concomitant of parliamentary sovereignty. The doctrine guarantees that the latest expression of the parliamentary will prevails: *leges posteriores priores contrarias abrogant* ("later Acts repeal earlier inconsistent Acts").¹⁴⁶ The doctrine operates where Parliament legislates in ignorance of an earlier Act, or declares that an Act shall prevail notwithstanding a later Act (the later Act pro tanto impliedly repeals the earlier Act). Once the power of express repeal is conceded, there is no basis for excluding implied repeal: "[I]t is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal."¹⁴⁷

The doctrine of implied repeal draws upon Sir William Blackstone's *Commentaries on the Laws of England* published in 1765. In every system of government, Blackstone wrote, there must reside a

139 *Fitzgerald v R*, above n 10, at [209].

140 *Regina v Secretary of State for the Home Department, Ex parte Simms*, above n 96, at 130.

141 John Willis "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1.

142 At 17.

143 At 17.

144 Willis, above n 141, as cited in *R v Hansen*, above n 26, at [250], n 279.

145 *R v Hansen*, above n 26, at [250].

146 *Dean and Chapter of Ely v Bliss*, above n 3, at 582, 707; *Vauxhall Estates Ltd v Liverpool Corp*, above n 3, at 597; and *Ellen Street Estates Ltd v Minister of Health*, above n 3, at 597. See Joseph, above n 13, at [16.4.6].

147 *Ellen Street Estates Ltd v Minister of Health*, above n 3, at 597.

Sovereign, invested with sovereign power, whose commands are law.¹⁴⁸ These views have dominated the Westminster constitutional narrative to this day.¹⁴⁹ Parliament was the place "where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms".¹⁵⁰ The full impact of these views was not realised until the 18th century writers, John Austin and Albert Venn Dicey, articulated the modern doctrine of parliamentary sovereignty.¹⁵¹ Theirs was a conception of *continuing* sovereignty: Parliament, at every moment in time, is *sovereign* and capable of enacting any legislation, whatever the pretensions of an earlier Parliament. Blackstone explained that Parliament, "being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth".¹⁵²

The doctrine of implied repeal is a vital mechanism to preserve inviolate the ideal of *continuing* sovereignty. The courts acknowledge Parliament's absolute (continuing) sovereignty and dutifully give effect to the latest expression of its will. That is, until 20 years ago: in *Thoburn v Sunderland City Council*, the High Court of England and Wales recast the boundaries of the doctrine.¹⁵³ Laws LJ pithily stated: "Ordinary statutes may be impliedly repealed. Constitutional statutes may not."¹⁵⁴ For Laws LJ, a constitutional statute was one that: (a) conditioned the legal relationship between citizen and state in a general or overarching manner; or (b) enlarged or diminished the scope of what are commonly conceived as fundamental constitutional rights.¹⁵⁵ His Lordship instanced a slew of historical and contemporary United Kingdom enactments that could not be repealed by implication.¹⁵⁶ Parliament must manifest an "*actual* – not imputed, constructive or presumed – intention" in order to amend or repeal constitutional or human rights statutes.¹⁵⁷ The test is met only by express statutory words, or words giving rise to an "irresistible" inference.¹⁵⁸

148 Blackstone, above n 6, at 160.

149 These views were first advanced by Thomas Hobbes in *Leviathan*: see Hobbes, above n 8.

150 Blackstone, above n 6, at 160.

151 John Austin *The Province of Jurisprudence Determined* (Richard Taylor, London, 1832); and AV Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, London, 1885).

152 Blackstone, above n 6, at 90.

153 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

154 At [63].

155 At [62].

156 At [62].

157 At [63] (emphasis in original).

158 At [63].

Our courts have adopted *Thoburn* as their own. In *Fitzgerald*,¹⁵⁹ Arnold J observed that the decision was approved by the United Kingdom Supreme Court, most recently, in *Regina (Privacy International) v Investigatory Powers Tribunal*,¹⁶⁰ and ruled that it applied with equal force in New Zealand.¹⁶¹ Earlier, Elias CJ had adopted the *Thoburn* reasoning but did not expressly allude to the decision. In *Attorney-General v Taylor*, her Honour rejected the Crown's argument that BORA was susceptible to implied repeal.¹⁶² The Act, her Honour observed, is "properly described as 'constitutional'" and could not be repealed by implication.¹⁶³

Thoburn repudiates the premise on which the edifice of sovereignty doctrine is erected. Constitutional and human rights statutes displace the principle of continuing sovereignty and the attendant doctrine of implied repeal. *Thoburn* promotes higher-order values ("a hierarchy of Acts of Parliament") over formalist legal method.¹⁶⁴ Laws LJ did not mince his words. For his Lordship, this development:¹⁶⁵

... accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes ...) will pay more or less deference to the legislature ... according to the subject in hand.

The courts play a critical and creative role *according to the subject in hand*. The dance of legislation gyrates with differing intensities depending on the potential outcomes and public law implications.

VIII PRIVATIVE CLAUSES

Parliament is especially vulnerable to activist statutory interpretation when courts construe privative clauses. Such clauses seek to oust judicial review of public decision-making, which understandably draws the indignation and ire of courts. These clauses have not deterred courts from discharging their historic constitutional role of upholding the rule of law and holding public decision-

159 *Fitzgerald v R*, above n 10, at [221]–[224].

160 *Regina (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491 at [120]. See also *Regina (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 at [207]–[208]; and *Regina (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [66]–[67]. But see *Allister and Peebles, Re Application for Judicial Review (Northern Ireland)* [2023] UKSC 5 at [66] where the Court treated as "academic" the question whether or not a statute was categorised as "constitutional". The "clearly expressed will of Parliament" prevails regardless of how a statute is categorised.

161 *Fitzgerald v R*, above n 10, at [224].

162 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [102]–[103].

163 At [102].

164 *Thoburn v Sunderland City Council*, above n 153, at [62].

165 At [64].

makers to account.¹⁶⁶ Parliament breaches the institutional accord whenever it instructs courts to "keep out": the courts acquired their adjudicatory powers independently of Parliament, and they may assert these powers even in the face of Parliament's attempt to exclude them. In the great case of *Anisminic Ltd v Foreign Compensation Commission*, Lord Wilberforce was emphatic about the judicial mandate to superintend public decision-making:¹⁶⁷

The question, what is the [decision-maker's] proper area, is one which it has always been permissible to ask and answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability upon its decisions.

Modern courts view privative clauses through a constitutional lens.¹⁶⁸ It is not what these clauses enact, but what the rule of law *as interpreted by the courts* requires. In *Regina (Privacy International) v Investigatory Powers Tribunal*, the rule of law imposed limits on legislative power to oust judicial review.¹⁶⁹ The United Kingdom Supreme Court observed:¹⁷⁰

[I]t is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to exclude [judicial] review ... The question in any case is "the level of scrutiny required by the rule of law".

The courts conceal their antagonism whenever they pay lip-service to the possibility that a privative clause might successfully achieve its purpose.¹⁷¹ But the reality is that Parliament is neither institutionally mandated nor practically competent to prevent courts from intervening to correct manifest errors of law.¹⁷² They might defer only where Parliament specifically provides some alternative avenue for redress, such as a comprehensive right of appeal or challenge.¹⁷³ The statutory

166 See for example *Ortmann v United States of America*, above n 136; and *H (SC 52/18) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.

167 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 207.

168 See Joseph, above n 13, at [22.9.2].

169 *Regina (Privacy International) v Investigatory Powers Tribunal*, above n 160. See also *Peters v Davison* [1999] 2 NZLR 164 (CA) at 188; *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 642 at [201]; *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [3]; *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [27]; and *Gibson v Accident Compensation Corporation* [2015] NZHC 221, [2015] 3 NZLR 136 at [54].

170 *Regina (Privacy International) v Investigatory Powers Tribunal*, above n 160, at [131]–[132].

171 See *Anisminic Ltd v Foreign Compensation Commission*, above n 167, at 207 ("in theory perhaps"); *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133 and 136; *O'Regan v Lousich* [1995] 2 NZLR 620 (HC) at 627; *Regina (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120 at [31]; and *Regina (Privacy International) v Investigatory Powers Tribunal*, above n 160, at [111].

172 *H (SC 52/18) v Refugee and Protection Officer*, above n 166, at [78].

173 *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 169, at [57]–[59]; and *H (SC 52/18) v Refugee and Protection Officer*, above n 166, at [59]–[66], [71], [74], [77], [78], [86] and [87].

appeal or challenge procedure must be sufficiently comprehensive and effective as to render judicial review unnecessary.¹⁷⁴

The judicial disdain for privative clauses speaks the lie to Parliament's absolute powers of legislation. The High Court's jurisdiction to review is inherent, not prescribed (Parliament did not bestow it on courts), and it is not institutionally within Parliament's remit to regulate or curtail it. With privative clauses, the courts – not Parliament – are leading in the dance of legislation.

IX CONCLUSION

This article issues a challenge to the academy and the courts: what is to replace sovereignty doctrine should we resolve to jettison it, which one day we will?¹⁷⁵ The legal community will need to follow in the footsteps of the scientific community when Albert Einstein announced his breakthrough theory of relativity: Einstein did not oblige his fellow scientists by providing the mathematical proof of his theory. That had to await the discovery of New Zealand mathematician, Professor Roy Kerr, who provided the "Kerr solution" to the Einstein field equation of general relativity.¹⁷⁶ Likewise, the legal community will need to join the dots between what this examination shows (Parliament is not the exclusive actor in law-creation through legislation) and the symbiosis that defines the parliamentary–judicial relationship.

I have a rudimentary model that might lay the groundwork. It depicts a horizontally organised relationship between courts and Parliament, founded on three elementary principles: comity, interdependence and reciprocity. These principles coalesce in what I explored 20 years ago – a collaborative enterprise in the creation, interpretation and application of legislation.¹⁷⁷ Parliament and the courts are mutually interdependent, with each branch astutely respecting the role-specific function and freedom of action of the other.¹⁷⁸ The quip "it takes two to tango" speaks perfectly to the dance of legislation imagined in this article. It is a dance that is never-ending, whirling and twirling throughout the ages.

174 *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 169, at [57]–[59]; and *H (SC 52/18) v Refugee and Protection Officer*, above n 166, at [86]–[87].

175 Compare the critical dicta in *Fox Hunting case*, above n 7, at [101], [102], [104], [107], [120] and [159], relegating parliamentary sovereignty in the modern age.

176 See Editors of Encyclopedia Britannica "Roy Kerr: New Zealand Mathematician" Britannica <www.britannica.com>. Kerr was teaching at the University of Texas at Austin (1962–1971) when he devised the Kerr solution, but returned to the University of Canterbury in 1971 where he had spent his undergraduate years. He retired as Emeritus Professor in 1993.

177 Joseph, above n 15.

178 These attributes have long been recognised: see *British Railways Board v Pickin*, above n 2, at 799.

A final plea: please spare us the binary response of committed sovereignty protagonists.¹⁷⁹ These protagonists promote the contest of extremes, the either/or choice: either we have *parliamentary* supremacy or perforce we have *judicial* supremacy. We have neither of these things, as this examination shows. The binary response is blunt, unhelpful scholarship. Parliament and the courts are joined at the hip in reciprocating the other's role-specific function. The epistemological imperative is to conceptualise the dance of legislation and revel in the understanding this brings to public law.

¹⁷⁹ I critiqued this response in Joseph, above n 15, at 323–326.