Impact of the New Zealand Bill of Rights Act 1990 on the freedom of expression before the Courts

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LAWS 520 – Freedom of Expression and Freedom of Information

Law Faculty
Victoria University of Wellington

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Abstract

Various cases will be examined, which concern the New Zealand Bill of Rights Act 1990 (BORA) and especially section 14 of this Act, which guarantees freedom of expression. The aim is to show the impact, which the BORA had on the judgments in regard to freedom of expression so far. Before analysing the present situation, an overview will be given on the protection of freedom of expression before the enactment of the BORA and on the history and status of the BORA.

The survey of the cases from different areas of law will lead to the conclusion that the BORA had a positive impact on the jurisdiction. Section 14 of the BORA can be recognised as a threat that runs through judgments in freedom of expression cases. The enactment of freedom of expression in statutory form results in consistency and uniformity of these judgments, although the way of application of the BORA by the judges varies from case to case. This is due to the different circumstances and facts of the cases. There is no one and only approach of the BORA, which can be applied for example, for the interpretation of statutes, the assessment of the exercise of powers by the executive and the adaptation of the common law.

Furthermore, the impact the BORA has on freedom of expression cases can also differ from case to case. In some cases, the BORA merely emphasise a rule, which was already developed, and in other cases, a BORA consistent interpretation leads to a new understanding of legislation. On the other hand, the examination of cases where the freedom of expression and the BORA did not find the required consideration, will illustrate that there is still an area of improvement.

Fundamental human rights and freedoms were already acknowledged in New Zealand before the enactment of the BORA and therefore, the BORA did not revolutionise the New Zealand legal system towards human rights. But the BORA caused a change in the awareness of these rights and especially freedom of expression, which results in a stronger emphasis on freedom of expression before the courts.
I INTRODUCTION

The New Zealand Bill of Rights Act 1990 (BORA) has been in force for 15 years now. This is only a short period of time when compared to similar legal affirmations of human rights and freedoms. In general, when statutes are in primary stages, it causes problems and challenges jurists.

During the last one and a half decades, important steps were taken by judges, lawyers and academics. They had to deal with the new legislation that is provided by the legislative, but it has to be interpreted by the courts. The necessarily abstract worded sections of the BORA became more precise by judgments, articles and statements concerned. The interpretation of the BORA by the courts will be emphasised, and in particular, on section 14 of the BORA, which guarantees freedom of expression.

Firstly, a historical review of the BORA will be provided, which dates back to the year 1985, when Parliament issued the “White Paper” for a Bill of Rights for New Zealand. This section will also deal with the main characteristics of the BORA, such as its status as non-superior legislation.

Furthermore, the operational sections 4, 5 and 6 of the BORA will be discussed, including the problems the courts faced, concerning these operational sections. The suggestions by the courts will be presented, as to how to understand these sections. Before the examination of the legal practice today, detail will be given to how freedom of expression was considered before the enactment of the BORA in the Anglo New Zealand law tradition. It will refer to cases, academic scripts and other sources through current and former times. This section will also demonstrate the development of the right of freedom of expression, which already began years before the first steps for an enactment for the BORA were taken.

The main section will survey various cases from the last 15 years, which concern freedom of expression and comparative references to similar pre-BORA cases will be made throughout the paper. This part will concentrate on cases where the courts interpret statutes under section 6 of the BORA in favour of freedom of expression, and on cases which illustrate the influence of the BORA on the exercise of powers in favour of freedom of expression. Additional cases will show the adaptation of the common law to be BORA-consistent. The most detailed part will deal with two examples, where the BORA was wrong and insufficiently applied in regard to freedom of expression.
The survey of the judgments will lead to the conclusion, that the BORA, although not superior law, had a significant positive impact for the freedom of expression. It can not be denied that mistakes of the approach of the BORA are made, as some cases will demonstrate, but generally, the freedom of expression found comprehensive and extra attention by the courts. Consistency was one of the aims of the BORA and it cannot be denied that section 14 of the BORA as the thread which goes through most judgments, can be determined. Therefore, the BORA serves the legal certainty and judges develop and define freedom of expression by applying section 14 of the BORA.

II THE NEW ZEALAND BILL OF RIGHTS

A History and Status of the New Zealand Bill of Rights

The BORA was enacted on the 28 August 1990 and was brought into force on the 25 September of the same year.¹

The BORA is not superior to other legislature. It is not imposed upon the legislature by the people as in the case of the United States Bill of Rights, nor is it imposed by superior legislature as in the case of the Canadian Charter of Rights and Freedoms. It is an Act of Parliament, passed, like any other such statute, by a simple majority of the House of Representatives. It can therefore be repealed in just the same way.²

However, a White Paper in 1985 recommended a Bill of Rights as superior law.³ If this had been realised, this would mean that any law, including existing law that is inconsistent with the BORA, would have no effect on the extent of the inconsistency.⁴

This caused great concern in the public, which deemed the power the judges would have as undemocratic, given that the judiciary is not democratically elected. Another reason why the Bill of Rights, as it was proposed in the White Paper, was not supported by the public was the inclusion of the Treaty of Waitangi. Many Maori feared

¹ The New Zealand Bill of Rights Act 1990.
⁴ White Paper, above n 3, 68.
that an inclusion of the Treaty of Waitangi would have a demeaning effect on this
document, since it could be changed through amendments of the BORA.

Therefore, the Select Committee recommended a Bill of Rights that was similar
to the White Paper draft, but different in these two major aspects. Firstly, it was an
ordinary statute by the Parliament and secondly, it had no reference to the Treaty of
Waitangi. 5

B Interpreting enactments by means of section 4, 5 and 6 of BORA

Sections 4, 5 and 6 of the BORA set out the operational aspects of the BORA. They
provide as follows:

4. Other enactments not affected – No court shall, in relation to any enactment (whether
passed or made before or after the commencement of this Bill of Rights), -
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way
invalid or ineffective; or
(b) Decline to apply any provision of the enactment –
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

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

6. Interpretation consistent with bill of rights to be preferred – Wherever an enactment can
be given a meaning that is consistent with the rights and freedoms contained in this Bill of
Rights, that meaning shall be preferred to any other meaning.

From the enactment of the BORA, there was confusion as to how to apply the
above cited sections. One problem which occurred regards the relationship of sections 6
and 4. Judges faced the question, of how far statutory words can be construed to be still
"consistent" under section 6 of the BORA, without violating section 4 by denying them
their intended purpose and effect.

Another problematic issue was the role of section 5, which troubled the judges
in Ministry of Transport v Noort 6. In this case, the judges had to deal with the question

of whether persons who are detained to take breath screening tests, evidential breath tests and blood tests under section 58 Transport Act 1962, ought to be advised of their right to a lawyer under section 23 (1) (b) of the BORA.

Section 5 BORA establishes that rights in the BORA are not absolute, but can be limited as long as it can be justified in a democratic society. The problem is, that section 5 is made “subject” to section 4, which states that an enactment which is inconsistent with the BORA prevails over the BORA anyway. Thus, the meaning of section 5 by referring to section 4 is that “subject to the fact that there can be unreasonable limits in rights, there can only be reasonable limits”. The fundamental question was whether section 4 of the BORA should be applied in isolation from or in tandem with section 5 of the BORA, as the majority of the judges held.

The BORA method which is set up by the above cited sections is not optional, but compulsory. However, no complete report of how to apply the Bill of Rights concerning the interpretation of cases was published through the judgement of a case. Nevertheless, a proposed guideline was given by the judges in the case Moonen v Film and Literature Board of Review, which they supposed to be “helpful”. This case concerns the determination by the Film and Literature Review Board that the book called “The Seventh Acolyte Reader” and various photographs were found objectionable in terms of section 3 Film, Video and Classification Act 1993. The book contains stories, describing sexual activity between men and boys under the age of sixteen. The Court of Appeal held among other things that the Board and the High Court did not consider section 5 BORA correctly and misconceived the importance of the BORA.

This guideline is subdivided into five steps. Ursula Cheer provides an accurate and concise rendering of this so called Moonen-Test in the article “Censorship and the Bill of Rights” which is presented here in full:

- First, possible different interpretations of the abrogating act are to be identified;
- Second, if only one presents itself, it must be adopted. If more than one is possible, the meaning which least limits the right in terms of s 5 is to be adopted under s 6;
- Third, the extent of the limits placed on the right by that meaning is to be identified;

9 Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA).
10 Moonen, above n 9, 16 – 17, Tipping J.
• Fourth, the s 5 question, whether that limitation can be demonstrably justified in a free and democratic society, must be answered. This is done by identifying the following things: the objective of the legislation and its importance and significance; whether the statute achieves the objective in a manner which is in proportion to this objective; whether these means are rationally related to the objective and interfere with the freedom as little as possible; and, ultimately, whether they are justifiable in light of the objective;

• Finally, if these requirements are not satisfied, inconsistency with the Bill of Rights exists, but the legislation is saved and given effect by s 4 of the Bill.

However, in the case where the court is obligated by section 4 of the BORA to apply a meaning, although it finds it inconsistent, the Court of Appeal states that the courts can accompany a declaration to their judgement, that they found the enactment inconsistent with the BORA. Such an indication would be of value if the matter is examined by the Human Rights Commission and could be of assistance to Parliament if it is concerned with that issue.12

The operational sections of the Bill of Rights are abstract and especially the terms “reasonable” and “demonstrably justified” in section 5 of the BORA, which require a creative judgement by the courts.13 This abstractness was often criticised. Indeed, legislation must not be so abstract that it becomes intangible and vague and opens the door for arbitrary judgements. On the other hand, legislation has to be partially abstract to cover different circumstances and to assure development of law by the courts. Regarding freedom of expression in particular, the courts have to reflect contemporary standards and limits of tolerance in New Zealand society.14 These standards change with time, but the abstract wording of the Bill of Rights makes it possible to adjust jurisdiction to the shifting standards and to find the right balance between contradictory rights.

The Moonen approach is only one way of applying the BORA. It is not a binding guideline. Other Courts and Judges might find their own way of understanding the operational section and how to put weight on the fundamental rights and freedoms contained in the BORA. This complicates the assessment of whether the BORA is properly applied by the courts, since different approaches regarding different

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12 Moonen, above n 9, 17, Tipping J
14 Burrows and Cheer, above n 13, 462.
circumstances have to be compared to find out whether they fulfil the minimum requirements.

**III FREEDOM OF EXPRESSION BEFORE THE BILL OF RIGHTS**

Freedom of Expression has long been recognised as a fundamental right in the Anglo New Zealand law tradition and consequently, the BORA did not introduce this right to the New Zealand law for the first time. This value found even earlier recognition in 1644 by John Milton’s Areopagitica, in which he refers to the ancient Greek poet Euripides.

In the 19th century, it was James Mill and his son John Stuart Mill who identified freedom of expression as a core value. James Mill describes freedom of the press, which is part of freedom of expression, as the instrument which is regarded in civilised countries as an indispensable security and as the greatest safeguard of the interests of mankind.

The Universal Declaration of Human Rights (UDHR) from 1948 and the International Covenant on Civil and Political Rights (ICCPR) from 1966 were ratified by New Zealand, and each contains a statement regarding the importance of freedom of expression. The BORA also serves as the affirmation of New Zealand’s commitment to the ICCPR.

However, freedom of expression was rarely used by the judiciary as an express ground of decision. Freedom of expression and similar liberties occurred more as a conduct, which was not prohibited by law. Before the affirmation in the BORA, freedom of expression was more a negative virtue or residual freedom.

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15 New Zealand Bill of Rights, above n 8, 2.
16 Burrows and Cheer, above n 13, 461.
17 <www.bartleby.com> (last access 1 October 2005).
18 Euripides (480 B.C – 406 B.C.) : This is true Liberty when free born men / Having to advise the public may speak free, / Which he who can, and will, deserv’s high praise, / Who neither can nor will, may hold his peace; / What can be juster in a State than this?
21 John Mill, above n 20, 18.
22 Article 19 UDHR, <www.unhchr.ch> (last access 1 October 2005).
23 Article 19 (2) ICCPR, <www.unhchr.ch> (last access 1 October 2005).
24 The ICCPR was signed by New Zealand on the 12th November 1968 and ratified on the 20th December 1978.
Before the first steps for the BORA were taken, judges and academics in England and New Zealand paid more attention to freedom of expression as a right, which should be defended. In the absence of a Bill of Rights or a constitution, freedom of expression was judicially less protected as a principle, which could be taken into account to limit the application of other principles whose operation would disproportionately affect the free expression of views, ideas or information.26

English judges who had to deal with breach of confidence or contempt of court cases, considered freedom of expression explicitly from about the 1970s.27 The courts had to balance the public interest in information against the breach of confidence.28 In such a case, judges stated that there were circumstances where the public would have the right to receive, and the media would have the right and even the duty to publish confidential information, even if that information was obtained unlawfully.29 In cases where the press raised the defence of public interest, they also recognised that there is an obligation of the court to appraise the public interest critically. On the other hand, if the court were to be convinced that a strong case of public interest had been made out, the press should be free to publish.30

The right of freedom of expression was also the crucial argument to deny the application of the contempt of court doctrine, to prohibit comments on tribunals other than courts.31 The judge stated that in balancing the competing interests, the right of freedom of speech and the press has priority over any suggested interference of a fair trial in a civil action.32 A judicial pioneer in freedom of expression and freedom of the press matters was Lord Denning MR. He described the media as the “watchdog of justice”33 and articulated freedom of the press as of fundamental importance in society. He also argued that this freedom would not only cover the right of the press to impart information of general interest or concern, but also the right of the public to receive it.34

References to freedom of expression are not only found in English, but also in New Zealand cases. Two New Zealand cases will be described in more detail. The first case is from the early 1960s and therefore, it is not from a time where freedom of

26 Alan Boyle Freedom of Expression as a public interest in English law in Public Law 3, 574.
27 Freedom of the Press under the New Zealand Bill od Rights Act, above n 25, 287.
29 Lion Laboratories, above n 29, 282, Stephenson LJ.
30 Lion Laboratories, above n 29, 295, Griffith LJ.
31 Attorney-General v Broadcasting Corporation [1979] 3 All ER 45.
32 Attorney-General v Broadcasting Corporation, above n 32, 54, Lord Denning MR.
34 Schering v Chemicals Ltd v Falkman Ltd [1981] 2 WLR 848, 865 Lord Denning MR.
expression found generally more recognition. The second case is from the 1980s and illustrates the more recent pre-BORA period.

*In re Lolita*[^35] raised the question of the relationship between freedom of expression and censorship, whereas *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*[^36] is about the issue how far media are allowed to protect their sources.

### A In re Lolita

The judges faced the question of whether the book *Lolita* offends the provisions of the Indecent Publications Act 1910 (Publications Act) as it was amended by the Indecent Publications Amendment Act 1954. Section 6 of the Publication Act prohibits the publication of material that “unduly emphasises matters of sex”.

The majority of the judges saw in the publication an offence against the Publications Act, while the dissenting Justice Gresson J did not find the emphasis in the book “undue”. He agrees that the book is mostly about sex and also about sex in an abnormal way, which people found perverted, but the author had avoided crude or vulgar expressions and had treated the topic with skill and artistry.[^37] In his judgment, he remarkably approaches freedom of expression as a contradicting right. He states, thirty years before the enactment of the BORA, that freedom of expression extends to every field of human conduct, including sexual behaviour.[^38] He construes the relevant sections 5 and 6 of the Publications Act in the light of freedom of expression, and holds that the expression “unduly” is to be understood in a narrower meaning. According to him, an extensive emphasis was required. He underlines this with the example that if there was a book about cricket, it could be described as unduly emphasising cricket.[^39] His approach is similar to the interpretation of statutes under *Moonen*, which is provided by sections 4, 5 and 6 of the BORA.

The approach in *Lolita* was an approach on the basis of common law. The common law interpretation is influenced by values which are deemed to be important, such as the principle of freedom of speech. Primarily, courts should refer to these

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[^36]: Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd [1980] 1 NZLR 163.
[^37]: In re Lolita, above n 35, 548, Gresson J.
[^38]: In re Lolita, above n 35, 515, Gresson J.
[^39]: In re Lolita, above n 35, 548, Gresson J.
principles of legality, where the meaning of the statutory text is unclear, and where the purpose of the statute is not self-evident. Courts may also resort to these principles when the text and purpose seem to be clear, to examine other considerations.\(^{40}\)

The purpose of these common law principles is to provide an indication for the judges to determine the intention of the legislator. If the interpretation by the judges results in the finding that the intention of legislator was indeed to restrict freedom of speech for example, the common law principles would not question this result.

The BORA on the other hand, forces the courts to consider freedom of expression for example, independent from the intention of the legislator. Consequently, courts are always obligated to apply the BORA and not only in the case where the intention of the legislator is uncertain. Therefore, a finding of a court under the BORA must not comply with the clear purpose of the legislator, although such an inconsistent finding by the court is not enforceable.

These distinctions between the BORA and the common law principles, and the fact that the majority of the judges did not refer to freedom of speech, shows that these principles only have subordinate influence.

Freedom of expression only played a minor part in this case. Nevertheless, it should not be forgotten that standards of morality were different more than 40 years ago from nowadays. It is hard to say whether a court in that time, under full application of the freedom of expression as it is guaranteed these days from the background of the zeitgeist of the 1960s, would have found another result in the judgement.

**B Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd**

Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd\(^{41}\) concerned the broadcasting of a programme, in which the quality of a certain type of roofing tile was criticised. These roofing tiles were manufactured and distributed by the plaintiff. The plaintiff companies sued the Broadcasting Corporation for defamation and slander of goods before the Supreme Court (now the High Court). An affidavit of documents was filed for the defendant, in which references were made to material relating to the sources of information of the Broadcasting Corporation, which the defendant utilised for the programme. The Corporation refused to create and hand out documents which would disclose the source of information. After the plaintiff sought it, the judge ordered


\(^{41}\) *Broadcasting Corporation*, above n 36.
that the documents had to be made available by the Broadcaster. The Corporation appealed against this decision.

The Court of Appeal did not follow the previous judgment and allowed the appeal. It stated that the newspapers rule also applies to the broadcasting services. The newspaper rule gives a defendant at the pre-trial stage of an action for libel published in a newspaper the right not to disclose its source of information. The Court of Appeal justifies its decision on the basis of public interest in the dissemination of information.

This so-called newspaper rule is an exception in favour of publishers, proprietors and editors of newspapers, who are sued for defamation, from the general rule that a party to a suit must produce for inspection all relevant documents to the action, and answer all relevant interrogations. This rule was already established in *Hennesy v Wright* in 1888.42 It has been updated in other decisions that the newspaper rule also applies to television.43

Court of Appeal Judge Richardson J emphasises that the reason for applying the newspaper rule cannot be found in the simple needs of the particular broadcaster, which in this case, is the Broadcasting Corporation. It has a broader purpose, which is to encourage the flow of information to the public and thereby, facilitate free trade in ideas. Furthermore, he recognises that this flow is vital for the reporting of matters of public interest to the news media. The possibility of disclosure of the source in a trial would limit the flow of information because the contributors of information would be in fear of being identified.44

The judgment illustrates how freedom of the press, which is not particularly mentioned in section 14, but guaranteed by the BORA anyway, was protected and affiliated in pre-BORA times. It is a case law decision that is based on a case from the late 19th century, but it also shows its own developments. It cannot be denied that the idea of freedom of expression and the recognised freedom of the press had major influence on the decision.

However, the judgment does not contain any express reference to freedom of expression. Consequently the survey does not base its argumentation on freedom of expression. Therefore, the judgment does not develop the right of the media to not disclose their sources against the background of freedom of expression. The basic rights were not established expressly and they were considered on a gut level and marginally only.

42 *Hennesy v Wright* (No 2) [1888] 24 QBD 445, 449, Lindly LJ.
43 *Brill v Television One* [1976] 1 NZLR 683, 687, White J.
44 *Broadcasting Corporation*, above n 36, 172, Richardson J.
One can say that freedom of expression was crucial for this judgment, but it was not the centre of considerations. The fundamental importance and extraordinary value of freedom of expression does not become clear and obvious. The right of the broadcaster and the interest of the public were not circumstantially compared to the right of the manufacturer. No rule or statute required such an appreciation of values from the Court because the whole emphasis was on their discretion.

It can be assumed that this case would have been decided with the same result under the application of the BORA. Nevertheless, a court would have found other and stronger arguments in the judgment, by putting emphasis on freedom of expression as a fundamental right as it is required by the BORA.

C Summary

Freedom of expression had been recognised in cases, articles and international treaties before the enactment of the BORA. However, this recognition was more ad hoc and not principled or rigorous. Freedom of expression was rarely articulated by the courts as an express ground for a decision. It was more the case that the law consisted of various prohibitions and freedom of expression was only a conduct which had not been prohibited. The common law principles should assist the courts in determining the intention of the legislator primarily when the statutory text is ambiguous. They are not principles under which the courts must subordinate their decision. This large area of discretion by the judges, in how far they give relevance to freedom of expression, bears the danger in a lack of uniformity, consistency and legal certainty.

VI FREEDOM OF EXPRESSION AND BORA – DEVELOPMENTS

Freedom of expression is guaranteed in section 14 of the BORA. Section 14 of the BORA states as follows:

14. Freedom of Expression – Everyone has the right to freedom of expression, including the right to seek, receive, and impart information and opinions of any kind in any form.

45 Freedom of the Press under the New Zealand Bill of Rights Act, above n 25, 287.
Section 14 of the BORA in its broad meaning influences various legal areas. Freedom of the press is not explicitly mentioned in section 14 of the BORA, but it is an important adjunct of the rights concerning freedom of expression, which is affirmed in this section.\(^{46}\)

The following survey will illustrate the impact of section 14 and the BORA on the interpretation of statutes, on the exercise of powers and on the common law. Additionally, it will demonstrate wrong and insufficient applications of the BORA by the courts, in regard to freedom of expression.

\[A\ \text{Interpretation under section 6 of the BORA in favour of freedom of expression}\]

The interpretation of a statute under section 6 of the BORA was the main focus in well-known BORA cases that concerned freedom of expression. The already discussed Moonen case is one of them. The following two cases will illustrate the impact the BORA had on the construction of legislation by the courts. Both interpretations were in favour of freedom of expression.

1. Hopkinson v Police

In \textit{Hopkinson v Police},\(^{47}\) section 6 and section 14 were the central issue before the Court. Hopkinson appealed in this case against his conviction under section 11 (1) (b) of the Flags, Emblems, and Names Protection Act 1981 (FENPA) for burning the New Zealand flag in front of the Parliament during a demonstration against the war in Iraq.

Section 11 of the FENPA reads:

11. Offences involving the New Zealand Flag – (1) Every person commits an offence against this Act who,—

(a) Without lawful authority, alters the New Zealand Flag by the placement thereon of any letter, emblem, or representation:

(b) In or within view of any public place, uses, displays, destroys, or damages the New Zealand Flag in any manner with the intention of dishonouring it.

\(^{46}\) \textit{Television New Zealand Ltd. v Attorney-General} [1995] 2 NZLR 641, 646, Cooke P.

\(^{47}\) \textit{Hopkinson v Police} [2004] 3 NZLR 704.
In this section "the New Zealand Flag" means any flag of the design depicted in Schedule 1 to this Act or of any other design that so closely resembles it as to be likely to cause any person to believe that it is the design depicted in that Schedule.

In any prosecution for an offence against this section the onus of proving that any alteration of the New Zealand flag was lawfully authorised shall be on the defendant.

Justice France of the High Court held, that the conviction under section 11 (1) (b) FENPA was prima facie a breach of Hopkinson’s right of free expression, since the scope of that right is broad and well-established and includes non-verbal conduct such as flag burning. France J disagreed with the judgment of the District Court on two points. Firstly, in the assumption that the limitation of freedom of expression by section 11 (1) (b) FENPA is “demonstrably justified in a free and democratic society” in the sense of section 5 BORA and secondly, regarding the required “intention of dishonouring it”.

Justice France points out that the reasonableness test of section 5 of the BORA was not met by the District Court and that the prohibition of Hopkinson’s conduct was not a justified limit on free speech.

France J continues with interpreting the section concerned in a way that is consistent with the BORA, as it is stated in section 6 of the BORA. Crucial for the decision of the District Court was the term “with the intention of dishonouring it.” France J argues that “dishonouring” has to be understood narrower as “vilifying” and that a vilifying intention requires some additional action beyond a symbolic burning, which was not performed by Hopkinson.

This procedure of France J is a good example in how to interpret words or terms of an enactment, which would be inconsistent otherwise. France J works creatively by construing the expression “dishonouring”, its purpose and what it has to mean from the background of the fundamental right of section 14 of the BORA. She states the general and abstract rule, that “dishonouring” in the sense of the FENPA requires some additional action. She updates the FENPA and gives a guideline for similar cases.

But the case shows also major differences between the District Court and High Court decision regarding the determination of what is a demonstrably justified limitation.

Furthermore, this case demonstrates that there are changes of law through the BORA and not only on the surface.

48 Hopkinson v Police, above n 47, 711, France J.
49 Hopkinson v Police, above n 47, 717, France J.
50 Hopkinson v Police, above n 47, 717, France J.
This illustrates the following assessment of the circumstances of this case in the assumption that BORA did not exist: The text and the purpose of the FENPA seem to be clear. An interpretation of the FENPA in the light of the common law principle of freedom of speech to determine the purpose of lawmaker, would lead to the result that the legislator aimed to prohibit such conduct as burning the New Zealand flag. Consequently, a conviction under section 11 (1) (b) of the FENPA for burning the New Zealand flag would be an appropriate result if there was no BORA.

Without the BORA, it is up to the discretion of the judges as to whether and to which extent they put emphasis on freedom of expression, beside the common law principles which merely provide a determination of the intention of the legislator.

However, the judgment of Justice France was just within the limit of what is possible to construe by means of the operational sections of the BORA. This is an extreme example but nevertheless, it is an example in how the BORA can possibly impact judgments in favour of freedom of expression.

2 Living Word Distributors Ltd v Human Rights Action Group Inc

Living Word Distributors Ltd v Human Rights Action Group Inc\(^5\) concerned an appeal to the Court of Appeal regarding a High Court judgment about a decision of the Film and Literature Board of Review (Board of Review).

(a) Facts of the case

Living Word Distributors Ltd appealed successfully against the decisions of the High Court and the Board of Review, which classified two videos objectionable under section 3 (1) of the Films, Videos, and Publications Classifications Act 1993 (Films Act). The first video is named “Gay Rights/Special Rights inside the Homosexual Agenda” and the second one is called “Aids: What you haven’t been told”. The first video deals with the alleged political and social consequences of claims made by gay, lesbian, bisexual and transgender people, for equal rights and the right to not be discriminated against. The other video discusses political and social effects of the spread of HIV and Aids, and presents the opinion that homosexuality is one of the reasons for the spread of these

\(^5\) Living Word Ltd v Human Rights Group Inc (Wellington) [2000] 3 NZLR 570.
diseases. The message of both videos is opposed to the entitlement of gay and lesbian people to further rights.

The Film and Video Labelling Body labelled the videos R 16, before the restricted age was increased to R 18 by the Films, Videos, and Publications Classification Office. In the end, the Board of Review classified both videos as objectionable.52

(b) High Court decision

Section 58 of the Films Act states that decisions of the Board of Review can be appealed to the High Court, but only on a question of law. Consequently, the High Court only determines, whether the Board of Review acted within their powers and followed the correct procedure.

Section 14 and section 19 of the BORA and section 3 (1) of the Films Act played an important role in the judgment of the High Court.

Section 19 BORA states as follows:

19. Freedom from discrimination -
(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act.

Section 3 Films Act reads:

3. Meaning of objectionable -
(1) For the purpose of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

The High Court did not find an error of law in the classification of the Board of Review. It states that the videos deal with “sex” as a subject matter, which is part of section 3(1) of the Films Act. The judges affirm their point of view by defining “sex” in the sense of the Films Act according to a dictionary, that sex is physical contact between individuals involving sexual stimulation of the genitals, sexual intercourse, spec copulation, coitus. The court admits that homosexual sex itself is not the central

52 Living Word, above n 51, 572, Richardson J.
part of the videos, but that the quota is not crucial and that the expression “such as” in section 3 (1) shows that it is applicable in a broader and more general way. The other requirement of section 3 (1) of the Films Act, which is that the availability of publication is likely to be injurious to the public good, is also approved by the High Court.53

The High Court found it unhelpful to refer to section 6 of the BORA because section 19 of the BORA would incorporate the protection which the decision of the Review Board is about. Therefore, this decision would be consistent with that right (section 19) of the BORA. They treated section 19 of the BORA as prevailing over section 14 of the BORA. 54 Furthermore, the question of whether the videos deal with sex in a manner that is injurious to the public good would be a matter of interpretation for the Board of Review, and not a question of law to be appealed to the court.

(c) Court of Appeal decision

The Court of Appeal allowed the appeal and remitted the decision for reconsideration to the Board of Review. It states that the BORA is applicable here, since the censorship bodies perform a public function under the Films Act, as it is required by section 3 (b) of the BORA. In regard to section 3 (1) of the Films Act, they state that this section has two purposes. The first one is to define the scope of censorship in terms of the subject matter of the publication and the second is to set the test “injurious to the public good”, as a standard to determine whether a publication, which is qualified in terms of the subject-matter, can be classified as objectionable. The subject-matter provision is a precondition and designed to form an immediate limitation on the scope of the censorship laws.

Sex, horror and the other words listed in section 3 (1) of the Films Act would establish a class of relevant publication, and although the words “such as” allowed other examples, these would have to be of the same kind as the words in the class established in the statute. Furthermore, the Court of Appeal holds that these words in subsection (1) relate to activities and not to attitudes or sexual orientation. The Court of Appeal negates that the content of the videos fulfils the requirement “matters such as sex” in section 3 of the Films Act.56

53 Living Word, above n 51, 577, Richardson J.
54 Living Word, above n 51, 578, Richardson J.
55 Living Word, above n 51, 583, Richardson J.
56 Living Word, above n 51, 581, Richardson J.
The Court of Appeal continues that section 3 of the Films Act would require a balancing after the finding that the publication contains “matters such as sex.” They state that section 14 of the BORA was not taken into account by the High Court, and that they wrongly took into account section 19 of the BORA instead, which would not have been directly applicable. Section 21 (1) of the Human Rights Act would not apply because section 3 of the Films Act could not be activated, as there were no depictions et cetera of matters such as sex.57

The Court of Appeal clarifies that the purpose of the BORA is to protect the public from conduct by the authorities or rather by the government, and not by private people or bodies. In this respect, Section 14 of the BORA protects the distributors and publishers of videos or other material from unreasonable censorship. Section 19 of the BORA protects certain groups or minorities from discrimination by the government, but not from discrimination by private persons or bodies. In this case, the alleged discrimination was within the videos, which the private body Living Word Distributors Ltd sought to publish. For this reason, section 19 of the BORA could not directly impact the decision, as the High Court assumed.

The opinion of Court of Appeal Judge Thomas J differs slightly from the majority. He also allows the appeal, but quashes the decision of the Board of Review beforehand. He argues that the purpose of the Films Act is not to protect minorities or to prevent discrimination and therefore, cannot be applied in this way by the Board of Review and the High Court. Thomas J admits that the videos can cause harm, but says that a connection between the harm or the injuriousness for the public, and the depiction of sex or a matter such as sex is required. The opinion itself would cause the injuriousness, and not in the way of presenting it.

(d) Analysis

The constituent elements of section 3 (1) of the Films Act, which can be described as the crucial section of this Act for this case, are not fulfilled. The regulation was not activated and consequently, could not apply. The Court of Appeal was correct when it stated that there is no such rule that generally allows the right of being free from discrimination to prevail over the right of freedom of expression.

Furthermore, it was correct that the Court of Appeal did not give section 19 of the BORA the same direct impact as they gave to section 14 of the BORA. In this case,

57 Living Word, above n 51, 584, Richardson J.
section 14 and section 19 of the BORA operate in different ways. The right that is contradicting to censorship is freedom of expression. Consequently, it is mainly section 14 of the BORA that has to be balanced against the objectives of censorship, such as the protection of the public good. The right to freedom from discrimination receives only a minor consideration under section 3 (3) (e) of the Films Act for the determination of objectionable. Therefore, the unequal treatment of freedom of expression and freedom from discrimination is justified, since the conduct of the censorship bodies is primarily opposed to freedom of expression and not to freedom from discrimination.

However, the reasoning of the Court of Appeal judgment was criticised, although the critic agrees with the finding that the videos were not objectionable.

The first part of the critic does not directly concern the application of the BORA. Ursula Cheer holds that the interpretation of the term “such as” in section 3 (1) of the Films Act by the Court of Appeal is incorrect. She argues that the words sex, horror, crime, cruelty and violence do not have so much in common that they could be understood as examples of one class. She suggests describing the list as containing separate and reasonably disparate subject headings. Furthermore, not all words in subsection (1) of section 3 of the Films Act would obviously tend to point to activity. This would demonstrate the word “horror”, as a general expression of human emotion. The list of the words would be closed in that there can be no other categories, but open in that each category heading establishes a separate class into which material must fall. The attempt to suggest that the Films Act does not cover the expression of ideas or opinions would be oversimplified. Instead of holding that the Films Act does not apply to particular opinions such as sexual orientation, Cheer prefers an emphasis that in case it applies to political opinion, freedom of expression must be given great weight.

Regarding the BORA, the critic acknowledges correctly the prevention of a clash of BORA rights by the Court of Appeal. Indeed, the decision elevates the place of freedom of expression in the censorship process above other human rights, when it precisely says that section 19 of the BORA has no direct influence.

However, one point of criticism remains. The judges explain for this particular case, why there is no direct clash of section 14 and section 19 of the BORA, but on the

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59 *More Censorship, Discrimination and the Bill of Rights*, above n 58, 474.
60 *More Censorship, Discrimination and the Bill of Rights*, above n 58, 475.
61 *More Censorship, Discrimination and the Bill of Rights*, above n 58, 475.
other hand, they do not provide a guideline in how to resolve a clash in the context of censorship.

In conclusion, the judgment might not be accurate in interpreting section 3 (1) of the Films Act and it lacks a guideline in how to resolve a clash of rights, but the Court of Appeal prevents competently a clash of the BORA rights, which are guaranteed in the sections 14 and 19 of the BORA, in favour for freedom of expression.

**B  The influence of the BORA on the exercise of powers in favour of freedom of expression**

Section 3 of the BORA states that the BORA applies to acts not only by the jurisdiction, but also to acts by the legislation and the executive. Furthermore, the section provides that the BORA applies to 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 following cases concern the exercise of powers by the jurisdiction and the executive because it is mostly this exercise that is an issue before the courts.

However, the BORA also has influence on the exercise of power by the legislation. One example which illustrates this is the Local Electoral Act 2001 (Electoral Act). This example will not be discussed in detail because it did not involve the courts. The Royal Assent received the Electoral Act in May 2001, but it did not come into force instantaneously because it was argued that it contained an offence which would operate as a media gag. It was to be an offence for anyone to publish or broadcast any material promoting the election of any candidate without the written authority of the candidate or the agent of the candidate.

Thereupon, the Minister obtained legal advice on the matter and concluded that an amendment was necessary because there could be room for the suggestion that freedom of expression was limited in breach of the BORA. The offending provision was removed by the Order-in-Council, who provided for the Electoral Act to come into force. This resulted in an uncommon situation where the Parliament had before it a Local Government Bill that brought the provision into effect at the same time as a new section which repealed it.

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The first of the next three cases concerns the additional requirements which the BORA imposes on the conduct of persons acting in a public function as part of the executive. The other two cases will illustrate the impact of the BORA on another field of activity by the courts, instead of settling disputes between two parties. Many statutes give the courts the power to make different orders. For instance, the courts are empowered to decide as to whether court records or other details concerning a court procedure should be made available to the public. The last two cases will demonstrate what influence section 14 of the BORA has on these decisions of the courts.

1 Police v Beggs

(a) Facts of the case and judgment

Before Hopkinson burned the New Zealand flag in front of the Parliament, there was another demonstration at the same place which also had legal consequences. In Police v Beggs, about 300 students marched onto the Parliament grounds to protest against possible changes to education funding and structure. They protested loudly but peacefully and assembled behind crowd control barriers. They called for the Minister of Education to appear and when this did not happen, a leader of the students told them to take “one small peaceful step forward” for every minute the Minister did not appear. They were requested five times to leave the Parliament grounds and warned by the Speaker of the House of Representatives as the lawful occupier. Seventy five of the protesters were arrested and charged for trespass. The information was dismissed and the police appealed against this decision. The High Court ordered stay of the prosecution against the respondents.

The relevant provisions of the Trespass Act 1980 (Trespass Act) are:

2. (1)... “Occupier”, in relation to any place or land, means any person in lawful occupation of that place or land; . . .

3. Trespass after warning to leave — (1) Every person commits an offence against this Act who trespasses on any place and, after being warned to leave that place by an occupier of that place, neglects or refuses to do so.

...
13. Savings — Nothing in this Act shall derogate from anything that any person is authorised to do by or under any enactment or by law, or restrict the provisions of any of the following enactments or instruments:

(c) Any enactment or instrument conferring a right of entry on any land.

The judge held that the Speaker of the House of Representatives (Speaker) is the lawful occupier of the Parliament grounds. The judge also held that the Speaker may exercise the occupier's powers under the Trespass Act or delegate these powers. This power may also be delegated to a police officer.\textsuperscript{64} Furthermore, the Speaker's action was a public act under section 3 of the BORA, which is a precondition for its application.\textsuperscript{65}

The rights of the protesters, which are affirmed in sections 14, 16, 17 and 18 of the BORA, fall foul with section 3 of the Trespass Act. Consequently, the procedure of the court has to focus on the operational sections 4, 5 and 6 of the BORA.

According to the previously discussed \textit{Moonen} approach, an interpretation and a construction of the sections of the Trespass Act concerned would have to follow.

Instead of interpreting the Trespass Act at the beginning of their judgment, the judges refer to common law. They substantiate their procedure by citation of \textit{Simpson v Attorney-General [Baigent's case]}.\textsuperscript{66} Justice Gault states there that:

\textit{Flexibility necessarily will be valuable in those circumstances. In the absence of entrenched supreme law there is no imperative to accord greater status to the rights affirmed in the [Bill of Rights]. It can be said that ss 4 - 6 probably go little further than the common law presumption of statutory interpretation that where possible statutes are not to be interpreted as abrogating the common law rights of citizens.}

The Court refuses to give a formula to determine reasonableness in respect of section 3 of the Trespass Act because the factual situations would be infinite, and such a formula would be an inconvenient shackle.\textsuperscript{68} However, the judgment contains a consideration of standards regarding how to find a balance between the contradictory rights. In an appreciation of values, the court states that aspects such as the size and

\textsuperscript{64} \textit{Police v Beggs}, above n 63, 624 Gendall J.
\textsuperscript{65} \textit{Police v Beggs}, above n 63, 626 Gendall J.
\textsuperscript{66} \textit{Simpson v Attorney-General [1994] 3 NZLR 667}.
\textsuperscript{67} \textit{Simpson v Attorney-General}, above n 52, 712, Gault J.
\textsuperscript{68} \textit{Police v Beggs}, above n 63, 627 Gendall J.
duration of the assembly, and the rights and freedoms of other people enjoying the privilege of being on Parliament grounds, have to be considered. Furthermore, the interest of the Crown, the right of the occupier and those whose duties or business takes them to Parliament, should not be overlooked. Normally, the content of what is expressed should not be taken into account. This may only be possible if the message is of hatred, racial abuse, intolerance or obscenity because unlimited tolerance could lead to intolerance. Additionally, the Court sets up minimum standards of how the Speaker has to act. According to these minimum standards, the Speaker has to act in good faith, exercise his power for the purpose for which it is conferred and exercise it reasonably in all circumstances, when balanced against the rights and freedoms contained in the BORA. He should also exercise the power with due regard to wishes of others present, and consider the rights of the Speaker and the Crown to operate, manage and control its property effectively.

The High Court discussed the action of the Speaker in consideration of the above described standards, and concluded that the Speaker acted reasonably.

(b) Analysis

As explained above, the Moonen approach is not mandatory. Each court and judge can still decide how he or she wants to give the required consideration to the BORA rights and freedoms.

However, under the Moonen five steps test, the judges would have to inquire whether the concerned sections of the Trespass Act have an ambiguous meaning, or whether these limitations could be justified in a democratic society. The Court did not examine the text of the Trespass Act for ambiguity.

The judges did not pick single terms or words of the Trespass Act and search for alternative meanings, which was the issue in the Hopkinson case regarding the term “intention of dishonouring it”. The Trespass Act is not the Flags, Emblems and Names Protection Act, and the situations in both cases are different from each other. Not in every case can a solution be achieved by construing the wording of an enactment. The Court recognised this and did not apply section 6 of the BORA, which was the situation in Hopkinson. Consequently, the BORA did not directly influence the wording of the enactment but the conduct, which the enactment allows.

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69 Police v Beggs, above n 63, 629 Gendall J.
70 Police v Beggs, above n 63, 630 Gendall J.
71 Police v Beggs, above n 63, 631 Gendall J.
While section 3 of the Trespass Act describes the right of the occupier, this right is limited under section 13 (c) of the Trespass Act. The legislator intended section 13 of the Trespass Act to let the rights of the occupier recede in emergency situations. Section 13 (c) of the Trespass Act means such rights as the police, the fire department, public authorities or as private persons could have in a state of emergency or situations, where trespass is justified due to a danger for health or life.

It is an advantage that the Moonen approach is just a suggestion and not a compulsory scheme. The wording of the statute concerned is not open for an interpretation under section 6 of the BORA. Section 13 (c) of the Trespass Act does not give the right to enter land under freedom of expression.

However, the Court enforced freedom of expression in another way, which is not based on the wording of the Trespass Act.

In a detailed consideration, the Court sets up criteria in how to exercise the right of section 3 of the Trespass Act. It is a list of general aspects and standpoints that the Court finds important in regard in such cases. The Court recognised in their consideration that the lawful occupier exercises rights under section 3 of the Trespass Act and at the same time, fulfils a public act.

The determination of the code of behaviour illustrates an alternative approach of the BORA from the Moonen or the Hopkinson case. One might argue that different approaches of the BORA will not lead to uniformity or consistency in the jurisdiction. On the other hand, it cannot be denied that different circumstances and facts of a case might need different approaches. As long as the courts give the necessary weight and consideration to the single rights and freedoms, uniformity and consistency can be achieved and preserved.

The foundation of criteria or the code of behaviour that the Court established in the judgment can be understood as a guideline for other cases. This is due to its more abstract wording that can also be applied to other cases where the Trespass Act is involved. Thus, this judgment is a development of law, although it does not construe the Trespass Act as it was done with other Acts in other cases.

In conclusion, the decision of the High Court is a reasonable limitation of the rights of the protesters. The Court considered and assessed the rights and freedoms of the protesters comprehensively and correctly, as well as the contradictory rights of the Speaker and the other people on Parliament grounds involved.
2 Police v O’Conner

Freedom of expression also has effect on the decision making of the courts, as to whether the publication of names should be prohibited under the Criminal Justice Act 1985. In contrast to the suppression of names, it is section 14 of the BORA that finds expression in the principle of open justice.

In Police v O’Conner, 72 anti-abortion protesters made a sit-in at a hospital and were charged with trespass. The accused were silent through the process as a form of protest. The District Court Judge forbade the publication of names and details of the accused, based on section 138 of the Criminal Justice Act 1985, to deny the accused the publicity that they sought after.

In the appeal decision before the High Court, Thomas J determined a clear change in the balancing of freedom of expression and the interests of justice through the enactment of the BORA, and allowed the appeal. He holds that it is a misapprehension because of the enactment of section 14 of the BORA, to believe that interests of justice would generally prevail over freedom of expression if a conflict between these two values occurs. 73 He continues that these rights and interests have to be balanced, and the freedom of expression would be subordinated, only if the court’s capacity to ensure justice is significantly endangered. 74

Thomas J takes the opportunity to give an elaborate analysis on freedom of expression in suppression cases, 75 and develops the law through this.

Similar approaches in other cases concerning the suppression of names established that there has to be strong reasons for a suppression order, and that the starting point must always be the importance of freedom of speech, which is recognised by section 14 of the BORA. 76

3 Television New Zealand Ltd v R

(a) Facts of the case and decision

Various cases concern section 14 of the BORA, regarding the fair trial principle and the principle of an open justice. In Television New Zealand v R, 77 the High Court had to deal with an application by a broadcaster to search court records about a certain trial.

73 Police v O’Conner, above n 72, 99 Thomas J.
74 Police v O’Conner, above n 72, 100 Thomas J.
75 Freedom of the Press under the New Zealand Bill of Rights Act, above n 25, 300.
76 Lewis v Wilson & Horton Ltd [2000] NZLR 546, 558 Elias CJ.
The BORA requires the court to observe freedom of expression in decisions regarding the access to court records also.

A criminal trial that was about an accused that was found guilty of murder and rape preceded the Television New Zealand case. The appellant, Television New Zealand, applied to search court records about this trial. Such applications to search the court record of the trial of the accused are provided under the Criminal Proceedings (Search of Court Records) Rules 1974 (Proceedings Rules). The applicant did not only want to search, inspect and take copies of the entire transcript, and record of the evidence and exhibits adduced by the Crown and by the accused, but also wanted the videotaped interviews of the accused by police. The application regarding the videos was denied by the High Court judge Anderson J.

Rule 2(5) of the Criminal Proceedings Rules 1974 states:

Except as expressly provided in subclauses (1) to (3) of this rule, no person may search, inspect or copy
(a) ...
(b) Any file, or part of a file, or document relating to a criminal proceeding without the leave of a Judge and subject to such conditions as the Judge may impose."

The general prohibition of this rule, with dispensation in subclauses (1) and (3), causes that the appellant had the burden of proof to persuade the court to grant leave. TVNZ had to show sufficient reasons why the records should not remain private. Whether a reason is sufficient must be determined in a broad sense, according to the interests of justice.\(^78\)

Anderson J names the principle of open justice and freedom of expression as it is stated in section 14 of the BORA as interests of justice, but also the right of personal privacy and matters affecting the administration of justice in general.\(^79\) The High Court is only concerned about the videos and not about other material requested by TVNZ. Justice Anderson J sees the danger of handing out such tapes to a commercial television station that provides the possibility that a distorted picture be expressed by broadcasting only a part of the videos. He also sees the risk that other people under suspicion would not consent to videotaping their interviews in the future, if they had to fear that these videos were to be broadcasted. Furthermore, Anderson J considered issues of privacy of the suspected, as well as of the police officer who did the interview and other persons

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\(^{78}\) Television New Zealand v R, above n 77, 464, Anderson J.

\(^{79}\) Television New Zealand v R, above n 77, 465, Anderson J.
who were directly involved in the videotaping. Anderson J declined leave to search, inspect or copy the videotaped interview, but granted leave to the applicant regarding the other court material.

(b) Analysis
In this case, other diverse values limit the freedom of expression that goes hand in hand with the principle of open justice, such as the interests of the justice and the right of privacy.

The Court recognized section 14 of the BORA and the contradictory rights, and subsumes its judgement under these aspects. The balancing of the High Court gives both sides consideration when it only denied the application for the videotaped interviews. Anderson J achieves a good result in this regard.

However, it should be noted that the denied access to the videotaped interviews is indeed a limitation of the right to receive information in section 14 of the BORA. But this limitation is demonstrably justified by the aspects, which Anderson J correctly considered.

Nevertheless, the court did not look at the Proceedings Rules in how far they fall under section 3 of the BORA. It may have been obvious for the Court that such delegated legislation must be covered by the BORA also, but an asserting statement regarding this matter would have been clarifying and trend-setting.

After all, the legitimacy of the Proceedings Rules was already questioned in pre-BORA times 80 and an assessment of these Rules under the BORA seems to be appropriate.

In a similar case, a Court of Appeal decision shows consistency with the judgment above. 81 Freedom of expression is seen as an important consideration, but it has to be outweighed by other factors. It is the possible deterrent effect on future interviews as to why the courts are reluctant in allowing the media to copy videos of police interviews. 82

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80 Anerry v Mafarr [1988] 2 NZLR 754.
82 Mahanga, above n 81, 647 McGrath J.
However, in a recent decision, the Court of Appeal holds that the decision of a High Court judge under the Proceedings Rules cannot be subject of an appeal. In this case, TVNZ sought leave successfully from a High Court judge, to search and copy videotapes that showed committal proceedings. The appeal against this decision was dismissed by the Court of Appeal for want of jurisdiction.

Although this case did not result in a restriction of freedom of expression, the fact that such decisions of a High Court cannot be reviewed by the Court of Appeal gives reason for concern. Even if the Proceedings Rules do not have the same significance as “normal” laws, the decisions which the High Court makes on the basis of these Rules have significance, in regard to freedom of expression. For this reason, the possibility to appeal such decisions to the Court of Appeal should be available, as it was the case in R v Mahanga.

4 Summary

The cases illustrate the broadness of the BORA, which imposes consideration of freedom of expression on members of the executive when they perform powers, as well as on the courts when they make orders of various kinds.

Police v Beggs is a good example in how the performance of the executive has to subordinate under the requirements of the BORA, and how the importance of the BORA for the conduct of the executive is recognised by the courts.

The latter cases show the restrictive allowance of the courts in suppression of relevant information. The prevention of prejudice and the administration of justice were the main arguments to allow suppression. These arguments also justify the limitation of freedom of expression under section 5 of the BORA. Similar arguments were also raised in pre-BORA times, but in particular, Police v O'Connor illustrates how judgments of today are oriented towards section 14 of the BORA. The analysis of TVNZ v R shows reasons which justify a limitation of freedom of expression when making orders under the Proceedings Rules. A correct application of the BORA does not always result in an affirmation of freedom of expression. On the other hand, it also gives an outlook on recent developments, which deny the possibility to appeal freedom of

83 Mafart v Television New Zealand Ltd (4 August 2005) CA 92/05.
84 The video tapes showed the committal proceedings of the two French espionage agents Mafart and Prieur, who sank the vessel Rainbow Warrior in 1985 and killed one crew member by this.
85 Mafart v Television New Zealand Ltd, above n 83, para 46, Anderson J.
86 Broadcasting Corporation of New Zealand v Attorney General [1982] 1 NZLR 120.
expression concerning orders of the High Court made under the Proceedings Rules to
the Court of Appeal.

C Adaptation of the common law to be BORA-consistent

The BORA also has influence on the various common law legal institutes and principles. In a situation where the common law overlaps with the BORA rights and freedoms, the common law is not substituted by the BORA but needs to be adapted to the BORA.

1 Lange v Atkinson

In the decisions of Lange v Atkinson,\(^7\) it was the common law qualified privilege that had to be adapted to BORA requirements. The decisions resulted in an extension of the common law qualified privilege. The defence of qualified privilege allows statements regarding the performance of politicians, although they are defamatory and therefore, protects the maker of the statement.

The former Prime Minister David Lange appealed to the Court of Appeal against the High Court decision that allowed the defence of qualified privilege of a magazine publisher, which published an article criticising Lange.

The Privy Council allowed the following appeal of Lange and remitted the case back to the Court of Appeal for re-consideration by taking the case Reynolds v Times Newspaper Ltd\(^8\) into account. In their second decision, the Court of Appeal modified their judgment and decided more in favour for the right of protection against defamation, although they expressly upheld their first decision. The judges developed standards that a publisher has to take into account and consider in proportion to the statement, such as a degree of responsibility.\(^9\) For example, this requires that the statement must be published on a qualified occasion to attract privilege.\(^9\) The decisions in Lange can also be described as a two-steps-forward-one-step-back approach.

In Lange 1998, the court refers to section 14 of the BORA at lengths. There is one chapter that deals with the section 14 of the BORA, and another that deals with freedom of expression without special regard to the BORA. In the latter chapter, the court discusses the history and development of freedom of expression without any


\(^8\) Reynolds v Times Newspaper Ltd [1999] All ER 609.

\(^9\) Lange 2000, above n 87, 401, Tipping J.

\(^9\) Lange 2000, above n 87, 393, Tipping J.
allying references to the case at hand.\textsuperscript{91} The chapter that deals with section 14 of the BORA mainly refers to cases where other courts have applied the BORA, after the background and history of the BORA is explained.\textsuperscript{92} Therefore, it is not really an application of section 14 of the BORA on this particular case. However, the court states that section 14 of the BORA has to be given effect by the courts when applying common law.\textsuperscript{93} In \textit{Lange 2000}, such circumstantial references to section 14 of the BORA are missing. Therefore, the influence of the BORA is not obvious initially, but nevertheless, the \textit{Lange} decisions are decisions under the BORA, and result in a balancing of reputation and freedom of expression.

The BORA approach was not recognised initially because the adaptation of common law to the BORA requires another appraisal of the BORA, which is mentioned in the cases above. Approaches akin to those in the cases of \textit{Living Word}, \textit{Beggs} or \textit{Hopkinson} for example, are not appropriate for the adaptation of common law to the BORA.

The decision in \textit{Lange} could still have the same outcome if the BORA did not exist because similar trends could be determined in the United Kingdom and Australia, which also affect the development in New Zealand as well. However, section 14 of the BORA added its own weight and emphasis to the issue in New Zealand.\textsuperscript{94}

One can argue that \textit{Lange 2000} was not such a victory for freedom of expression as \textit{Lange 1998} was. On the other hand, \textit{Lange 1998} was quite unbalanced, while \textit{Lange 2000} provides an accurate balance between freedom of speech and reputation, although this decision is less clear in its operation.\textsuperscript{95}

In general, the judgments in \textit{Lange} are decisions made under section 14 and the BORA. All the decisions in \textit{Lange} are characterised by the attempt to balance freedom of expression against contradictory rights in the awareness of the significance of freedom of expression, in order to adapt the common law to be BORA consistent.

The decision finding under the outcome of \textit{Lange 2000} may challenge judges who apply the common law qualified privilege, as it was modified by \textit{Lange} to be BORA consistent. But the decisions are a landmark advance in the protection of freedom of expression.\textsuperscript{96}

\begin{thebibliography}{96}
\bibitem{91} \textit{Lange 1998}, above n 87, 460 Blanchard J.
\bibitem{92} \textit{Lange 1998}, above n 87, 465 Blanchard J.
\bibitem{93} \textit{Lange 1998}, above n 87, 431 Blanchard J.
\bibitem{94} Burrows and Cheer, above n 13, 644.
\bibitem{95} Bill Atkin and Steven Price \textit{Lange 2000} NZLJ 2000 236, 238.
\bibitem{96} Atkin and Price, above n 95, 238.
\end{thebibliography}
In *Hosking v Runting*, Hosking appealed against the refusal of the High Court to grant an injunction to prevent a magazine from publishing pictures of his wife and their young twin daughters taken in a public place. The appeal was dismissed. The main issue of this case was whether a tort of privacy exists. The majority judgment held that there is a tort of invasion of privacy, although they decided in this case, in favour of freedom of expression.

The BORA does not contain an express provision for the right of privacy akin to the provision for freedom of expression in section 14 of the BORA. The judges did not understand this fact as an obstacle from developing a common law right to privacy as a justified limitation under section 5 of the BORA. However, the Court of Appeal was divided by 3:2 and the dissenting judges found that privacy was not a justifiable limitation on freedom of expression.

The decision of the Court of Appeal states that there is a tort of privacy that restricts freedom of expression, but the judgment is clearly aligned with the BORA and in particular, with section 14 of the BORA. The judges take into account the importance of freedom of expression, especially under the BORA, and fairly successfully dealt with this. They state that privacy protection should not exceed such limits on the freedom of expression, as they are justified in a free and democratic society. Privacy protection should not be possible when a legitimate public interest in the publication exists. Consequently, the importance of freedom of expression has to be related to the extent of legitimate public concern in the information publicised.

This balancing might be a bit vague for a general approach, but the fear that a privacy tort would be an unacceptable inroad into the right to freedom of expression in a democracy is not appropriate. Furthermore, it is argued that the majority judgment would only give lip-service to the BORA, by providing a cursory examination as to

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97 *Hosking v Runting* [2005] 1 NZLR 1.
98 *Hosking*, above n 97, 31 Gault P.
99 Katrina Evans *Was Privacy the winner of the day?* NZLJ 2004 181, 182.
100 Section 5 BORA.
101 *Hosking*, above n 97, 35 Gault P.
102 *Hosking*, above n 97, 36 Gault P.
103 Rosemary Tobin *Privacy: one steps forward, two steps back!* NZLJ 2003, 256, 258.
whether a tort of privacy would be a reasonable limit on the right that can be demonstrably justified in a free and democratic society.\footnote{104}

In the end, the privacy question is evidence that the balancing process does often not result in any inevitable conclusion, and that different minds can reach different results.\footnote{105} But it cannot be denied that the majority Court of Appeal judgment had sufficiently taken freedom of expression into account for the decision of this case also.

Some parts of the judgment lack further explanations such as the issue of the horizontal effect of the BORA, which describes the direct application of the BORA to private parties in a dispute.\footnote{106} The majority judgment does not generally provide a thorough discussion of the relationship of a tort of privacy with freedom of expression. Nevertheless, the reasoning is sufficient for the present case, although a more foresighted judgment would have been desirable for a more effective BORA consistent development of the law.

In conclusion, the scope of this tort still needs to be worked out, but the influence of the BORA, and especially section 14 of the BORA, is highly visible on the decision finding.

**D Incorrect and insufficient application of the BORA in regard to freedom of expression**

The following cases are examples of incorrect and insufficient application of the BORA by the courts. Detail will be given to this section to illustrate where the courts failed and because the cases concerned are not as prominent as most of those discussed previously.

1 Auckland City Council v Finau

(a) Facts of the case

In *Auckland City Council v Finau*,\footnote{107} the defendant Finau puts up signs on his residential property to protest against the commercialisation of Auckland’s water supply. Signage in residential property is not expressly allowed by Auckland bylaws, but the installation of one sign advertising products and services is still permitted. The Council can allow exceptions if the compliance affected any person or business without a

\footnote{104}| Jane Norton | Hosking v Runting and the Role of Freedom of Expression | AuckULR 2004 (Vol.10) 245, 247. |
\footnote{105}| Burrows and Cheer, above n 13, 646. |
\footnote{106}| Evans, above n 99, 182. |
\footnote{107}| Auckland City Council v Finau | [2002] DCR 839. |
corresponding public effect. The defendant refused to take down the signs and argued that the bylaw would violate his right to freedom of expression. The District Court decided in favour of the Council.

Part 27 of the Auckland City Consolidated Bylaw 1998 (bylaw) sets out rules for signage and Clause 27.5.1 of it states:\textsuperscript{108}

Subject to [provisions about signs on or outside dairies] signage in residential zones shall be limited to a single externally facing sign for each road frontage, advertising a lawful use of the site, located on the site to which the use occurs and advertising only products or services available on the site.

Signs are defined in Part 27 of the bylaw as follows:\textsuperscript{109}

Sign means visual message or notice conveyed to the public and visible from a public place displayed to advertise, identify a product, business, or service, inform or warn the public, together with any frame, supporting device and any associated ancillary equipment whose principal function is to support the message or notice. It includes but is not limited to any mural, message or notice painted on, affixed to or otherwise incorporated with a building, structure, or site; and any banner, flag, poster, sandwich board, wind sock, blimp or projection of light to create an advertising image. A bunting that has symbols or messages on it shall also be considered a sign for the purposes of this Part of the Bylaw. It does not include a billboard sign subject to Part 27B of this Bylaw.

(b) The decision

The first question which arose was whether the bylaw is an enactment under the BORA. Since the BORA does not define what an enactment is, the judges referred to the Interpretation Act 1999 (Interpretation Act). Section 29 of the Interpretation Act states that an enactment means the whole or a portion of an Act or Regulation. According to this section, regulations mean regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown. Furthermore, regulations are an order in Council, proclamation, notice, warrant, or instrument made under an enactment that varies or extends to the scope or provisions of an enactment.

Consequently, only bylaws of the kind specified in this section seem to be enactments under the Interpretation Act. Since the bylaw was not made under an Act of

\textsuperscript{108} Auckland City Consolidated Bylaw 1998 <www.aucklandcity.govt.nz> (last accessed 21 August 2005).
\textsuperscript{109} Auckland City Consolidated Bylaw, above n 106, Part 27.
the Governor-General in Council or by the Minister of the Crown, it is not an enactment under the plain wording of the Interpretation Act. Therefore, the application of the BORA would actually be blocked because section 3 of the BORA requires an enactment.

The Judge did not construe the Interpretation Act literally, but in a broader way by asking for the purpose of the Act and the aim of the legislator. By referring to section 5 of the BORA, the courts explained that the definition of “regulations” in section 29 of the Interpretation Act aimed to capture all delegated legislation. In would be illogical if some subordinate legislation such as the local government bylaws escaped the consideration of the BORA. Furthermore, the fact that the bylaw is an enactment could be affirmed by subsuming the bylaw under the term “instrument, made under an enactment that varies or extends to the scope or provisions of an enactment.” In addressing this, the Court acknowledges its bond to apply the BORA.

The Judge admits that freedom of expression under section 14 of the BORA is affected by this bylaw, but contrasts with the fact that there are still alternative ways for the defendant to express his opinion. He also holds that residential areas are recognised as having high amenity values that distinguishes them from other districts. In the case of Finau, the signage makes his place look more like a multiple advertising hoarding than a dwelling-place and demonstrates the potential for chaos in the absence of control. The maintenance of a residential district would have been the focus of the Council when it passed the bylaw. A restriction of freedom of expression would not have been the purpose.

In conclusion, the impact on personal freedom would be negligible when the many remaining avenues for expression are brought to mind, and that the amenities sought to be protected are valuable ones. On this basis, the Court upholds the bylaw and finds it consistent with the BORA.

(c) Analysis

There were two issues in the decision that concerned the BORA. The first issue regarded the Interpretation Act, as to whether the bylaw fulfills the criteria of an enactment. Therefore, section 29 of the Interpretation Act was well construed under section 6 of the BORA. The Judge correctly recognised the function of the BORA to protect citizens against all kinds of action by authorities. The second issue was whether the bylaw and its enforcement violates section 14 of the BORA unreasonably.

110 Auckland City, above n 107, 848, Roderick Joyce QC.
111 Auckland City, above n 107 851, Roderick Joyce QC.
(i) Application of the bylaw

Initially, one might argue that both the Council and the District Court already erred regarding the applicability of the bylaw as legal basis, for disallowing non-commercial signs on private property. It seems that although the definition of signs in part 27 of the bylaw is very broad and also covers Finau’s signs, only advertising signs fall under the limitation of clause 27.5.1 of the bylaw. According to this view, clause 27.5.1 of the bylaw would only cover advertising signs and all other signs would be excluded from the limitation of the clause.

At closer inspection, it becomes clear that this interpretation is contrary to the wording of the bylaw. Clause 27.5.1 of the bylaw states that of all the different kinds of signs, which are defined in part 27 of the bylaw, only one special kind of sign is allowed on each property. The single sign which is allowed on the property is distinguished from the other kinds of signs by the fact that it has to advertise a lawful use on the site. Otherwise, those signs which advertise products and services that are not available on the site would also be excluded from the limitation of clause 27.5.1 of the bylaw. As the result, the bylaw is applicable for the purpose of the Council.

(ii) The judgment

The Court recognised the main points for the balancing under section 6 of the BORA, but overlooked one crucial issue also. The character of the residential district is important and the issue of public safety also requires a regulation of signage by the authorities. The arrangement of signs and posters at the site of Finau is a good example of how districts, which are originally dedicated for dwellings, could look like industrial or business districts, if there was no restriction at all.

However, the law allows one sign per house if it advertises products or services available on the site. Finau does not want to sell anything, instead he only wants to express his opinion. Therefore, he does not have the right to put even one sign in front of his house. Consequently, signs for commercial purposes and those without such intention are treated unequally.

If the principle argument is to prevent residential districts from changing their appearance into business- or industrial districts, the argument that signs with a commercial content are allowed and those with a non-commercial content are not is difficult to follow. As long as the content of a non-commercial sign does not violate the law, it should at least fall under the same restrictions as a commercial sign. This would not only serve the purpose of freedom of expression, but would also that of the bylaw,
since Finau would have to fulfil the same conditions regarding the size and make-up of the sign as commercial advertisers. A further extension of the defendant’s right could indeed be denied by the fact that he can still express his opinion in various other ways.

The judgment does not satisfy the test of reasonableness under the BORA, whether it is the Moonen approach or an alternative approach. The duty to remove all the signs from his property, while allowing single signs with a commercial content is a limitation of his right of freedom of expression, which can not be justified in a free and democratic society. The meaning of the bylaw is clear however and it is not capable of being construed consistently with the BORA through the analysis of section 6.

(iii) Ultra vires

The next issue to be addressed is whether the bylaw is ultra vires and therefore invalid. Subordinate legislation, such as the bylaw is ultra vires if it is outside the scope of the power conferred by the Act. In a similar case in Canada for example, the local bylaw prohibited posting on municipal was found unconstitutional and declared invalid as it contravened the right of freedom of expression.

In the present case, it is the Local Government Act 2002 (Local Government Act) which empowers the Auckland City Council to pass bylaws. The discretionary power, which is exercised by enacting delegated legislation, must also be exercised in accordance with the BORA. Any statute which devolves legislative powers to an authority other than Parliament must also be construed in the light of the BORA. The court must consider whether the rule making power authorises the bylaw. A regulation or bylaw is invalid if it is not authorised by the empowering provision read in accordance with section 6 of the BORA. Unless the empowering provisions in an Act are express and unequivocal, they cannot be interpreted as empowering subordinate legislation that is contrary to fundamental rights.

The Local Government Act contains several requirements that local authorities must fulfil to pass a bylaw. Section 155 (2) (b) of the Local Government Act 2002 states

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112 Statute Law, above n 40, 11.
113 Toronto City v Quickfail (1994) 111 DLR (4th) 687 (Ont CA).
115 Drew v Attorney General [2002] 1 NZLR 58, 73 Blanchard J.
116 Drew, above n 115, 68 Blanchard J.
that the local authorities have to observe the BORA in order to pass a bylaw. This is in addition to section 3 of the BORA. Furthermore, section 155 (3) of the Local Government Act states that no bylaw may be made which is inconsistent with the BORA, notwithstanding section 4 of the BORA.

The bylaw allows a limitation on the right of freedom of expression protected by section 14 of the BORA, which cannot be justified in a democratic society, for the reasons given above. The local authority did not take into consideration the provision of the BORA when passing the bylaw. Consequently, the bylaw is ultra vires and therefore invalid. The District Court did not consider whether the rule making power authorises the bylaw and as a result the court did not declare the bylaw invalid.

Thus, the decision of the District Court is a dissatisfying result from the perspective of freedom of expression and it is inconsistent with the BORA. It is true that early in the judgment, the court debates in depth that “normal” bylaws are enactments within the section 3 of the BORA and they also pay sufficient attention to the BORA, and especially to section 14 regarding the substantive law. Nevertheless, the assessment of the value of freedom of expression regarding the unequal treatment in comparison with commercial signs is flawed. It is a result of the non-observance of freedom of expression in this respect that Blanchard J does not conclude that the bylaw is ultra vires.

This case demonstrates how courts still fail to balance freedom of expression against contradictory rights and how judges seem to overlook deficiencies in legislation. This case could have been viewed as a model for the reach of the BORA. It illustrates the impact the BORA should have on decisions by judges, and those of law making authorities.

2 Re Baise moi

(a) Classification Office and the first Board of Review decision

The Film and Literature Classification Office (Classification Office) classified the French movie “Baise Moi” as R18 to persons who are students of film studies or for the purposes of screening at a films festival. The film can be described as an extreme version of the movie “Thelma and Louise”. The appellant, the Society for Promotion of Community Standards Inc (SPCS) applied for a review by the Film and Literature

117 R18 means that the availability is restricted to persons who are eighteen or older.
Board of Review (Board of Review) and sought for a complete ban on the basis that the film was objectionable.

The Board of Review instead removed all restriction by the Classification Office, except for the R18 restriction and recommended that the film be advertised and screened with the warning that it contains frequent disturbing depictions of violence and repeated explicit sexual content. The SPCS appealed against the decision of the Board of Review to the High Court under section 58 of the Films Act.

(b) The first High Court decision

The first appeal by the SPCS to the High Court resulted in enormous publicity for the film. High Court Judge Hammond J allowed the appeal and remitted the issue back to the Board of Review. Justice Hammond found that the Board of Review did not properly consider the impact of the classification on mediums other than films. This finding was supported by section 26 of the Films Act, which states that if a film is classified in a certain way, videos for public consumption attract the same classification.

However, Hammond J does not look further at section 26 of the Films Act, but implies that a classification finding might have to be more restrictive, if the publication of the film on mediums such as videos and DVDs is taken into account. Hammond J refused to review the Board of Review’s decision on the grounds of the BORA as it would be neither necessary nor appropriate. He did not want to anticipate what view the Board of Review would take or the extent to which the classification by the Board of Review must be BORA consistent.

(c) The second Board of Review decision

The Board of Review reconsidered their decision in the light of the preceding High Court decision. The Board of Review issued that the film is objectionable if it is available on video or DVD, with the exception for theatrical exhibitions or film and media studies courses. The Board of Review only allowed the showing in cinemas restricted R18. The Board of Review considered the publication of the film as video or DVD as more likely to injure the public good because private and/or in-home viewing

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118 Re Baise Moi (23 July 2002) HC WN AP76/02.
119 New Zealand Media Law Update - Recent Developments, above n 62, 316.
120 Re Baise Moi, above n 118, para 68 Hammond J.
121 Re Baise Moi, above n 118, para 88 Hammond J.
is uncontrolled. Viewers could copy the publication to easily give the video or DVD to a third party, while the likelihood of harm to the public good would not exist in a public theatre or a controlled theatrical environment. SPCS was also not satisfied by the second decision of the Review Board and appealed against this decision again to the High Court.

(d) The second High Court decision

A ground for the second appeal was that the Board of Review had failed in the proper application of the BORA. According to the appellant, the BORA would have impact only on one level, namely the determination of whether a publication has to be classified regardless of the medium on which it is publicised. The appellant argued that the BORA cannot legitimately make a different classification for the same publication regarding the format of the publication in the light of freedom of expression.

In general, the balancing of freedom of expression against the vulnerability of members of the public should only be taken into account for the classification of the publication itself and not regarding the medium or format of the publication. The High Court Judge Goddard J recognised that this criticism was aimed towards the consideration of the Board of Review, which relied on section 14 of the BORA in order to permit the showing of the film in cinemas, but not on video or DVD.

The Court recognises the test of proportionality of the Board of Review in balancing the rights of the makers of the film in publishing it, the rights of the public to see the film and the right of the public to be protected against the danger that the availability of the film might create. With reference to the warning in Moonen not to “use a sledgehammer to crack a nut”, the Court held that the Board of Review looked for safeguards, which at least allow the publication under certain conditions and dismissed the appeal.

(e) Court of Appeal decision

The appellant appealed against the High Court decision to the Court of Appeal and was partly successful. The Court of Appeal quashed the decision of the High Court because
of the distinction between “Baise Moi” as a movie for the cinemas and as video/DVD. The Court of Appeal found that the two different classifications was contrary to section 26 of the Films Act, which states that a classification given to a publication must apply to every copy of that publication identical in content with it. The Court of Appeal substitutes the decision of the Board of Review with the decision that the film is objectionable, except if the availability of the film is restricted to persons of 18 years or older and the film is used for the purpose of theatrical exhibition or exhibition to participants in a tertiary media studies course or a tertiary film studies course.

(f) Analysis

The judgment of Hammond J in the first High Court demonstrates a refusal to comment on the application of the BORA. Indeed, the courts can only review decisions of the Board of Review on a question of law. On the other hand, he states that all different kinds of mediums of a publication have to be taken into account by the Board of Review. A statement that the BORA also has to be considered by the Board of Review would have been appropriate.

According to the wording of section 26 of the Films Act, the Court of Appeal is correct in stating that the Board of Review was wrong in making two separate classifications for different mediums of the same publication.

In the present case, the application of section 26 of the Films Act results in a limitation of freedom of expression, since all mediums of a publication are automatically encompassed by a classification.

In the second High Court decision, Goddard J did not observe section 26 of the Films Act and approved with the different classification for DVDs/videos and for cinema-movies by the Board of Review. Both the High Court and the Board of Review recognised the different impact of different mediums of a publication. In the context of the BORA, freedom of expression should be only limited where it can be demonstrably justified. If a limitation of section 14 of the BORA can be justified regarding the publication of a movie as DVD/video, this does not necessarily mean that such a justification concerning the same movie exists for the publication in cinemas or film festivals. This would be analogous to comparing apples and oranges. Cinemas or film festivals have safeguards to control the age of the audience at the point of admission.

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128 Re Baise Moi, above n 127, para 44, O’Regan J.
which makes it unlikely that children and young persons have access to cinemas or film festivals where R18 films are shown. Video shops provide similar restrictions on age, but once the video or DVD is in the home, where it may even be copied, the age restriction can no longer be controlled. Therefore, these different mediums have different impact on the vulnerability of members of the public.

However, the plain wording of section 26 of the Films Act is contrary to these findings and it is not open for a consistent interpretation under section 6 of the BORA, with the conclusion that section 26 of the Films Act is inconsistent with the BORA.

It is not entirely clear what intention the legislature had by including section 26 of the Films Act in the statute. It may have been intended to further freedom of expression instead of restricting it. This view can be supported by consideration of some of the other sections in the Films Act. Section 23 (3) of the Films Act states that in cases where a publication would be classified as objectionable, the Classification Office may classify the publication as a restricted publication, which is only available to particular persons or classes of persons for educational, professional, scientific, literary, artistic, or technical purposes. In this context, section 26 of the Films Act might serve the same purpose, which is to prevent overly harsh decisions against the publishers, the public to see the publication and at least against the freedom of expression, if there is the possibility to find a middle course, which means less limitation.

Consequently, section 26 of the Films Act could have been intended as a limitation on the power of the censorship bodies to restrict publications. In summarily, section 26 of the Films Act could have been intended to apply only for classifications, which are neither restricted nor objectionable. However, the interpretation of the wording of the section in context of the statute does not definitely result in such an intention by the legislator. Section 26 of Films Act is unambiguous that makes it impossible to construe section 26 of the Films Act to be consistent with the BORA.

The Court of Appeal simply oversees the conflict of section 26 of the Films Act and section 14 of the BORA, while the High Court Judge Goddard J attempts to avoid a discussion by not observing section 26 of the Films Act. As the courts are forced to

129 Section 55 Films Act states that section 23 Films Act applies as well to classifications by the Board of Review.
apply a meaning that is inconsistent with the BORA, a declaration of inconsistency, as suggested in Moonen, would have been appropriate.

3 Summary

*Finau v Auckland City Council* and *Re Baise Moi* are two cases from very different areas of law, which were dealt by different authorities and courts. The first case concerned the Auckland City Council and the District Court, and it belongs to the legal area of administrative law. *Re Baise* is a case from the area of censorship law, which concerned various censorship bodies before the High Court and later, the Court of Appeal had to deal with it.

The two cases have in common the failure in the consideration of the freedom of expression, as it is guaranteed in section 14 of the BORA. Neither the District Court in *Finau*, nor the Court of Appeal in *Re Baise Moi*, recognised the impact of section 14 of the BORA has on their judgments. The District Court Judge considered freedom of expression insufficiently when he treated commercial and non-commercial signs unequally to the disadvantage of freedom of expression. The Court of Appeal in *Re Baise Moi* considered freedom of expression insufficient, when it did not distinguish between different formats of the publication to the disadvantage of freedom of expression. Consequently, both applications of the BORA are incorrect. Furthermore, these cases show that both, authorities as the Auckland City Council and lower, as well as higher courts, still fail in giving weight to freedom of expression, as it was intended by the legislation.

**VI CONCLUSION**

Freedom of expression was already long recognised in New Zealand. *In re Lolita* and *Broadcasting Corporation v Alex Harvey Industries* illustrate the positive impact the common law had on freedom of expression, years before the first steps for the enactment of the BORA were taken. However, freedom of expression was rarely used by the judiciary as an express ground for a decision. Freedom of expression and similar liberties occurred more as a conduct, which was not prohibited by law.

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130 *Moonen*, above n 9, 17, Tipping J.
In this regard, the BORA is of great value for the freedom of expression in New Zealand. However, the positive impact that the BORA has on freedom of expression depends on how and for which purpose the BORA is applied.

The construction of statutes under section 6 of the BORA is the most obvious example for a change through the BORA. The judgments in *Moonen*, *Hopkinson* and *Living Word* are clearly aligned with the BORA, and characterised by the application of the interpretive sections of the BORA. At least the result, which was achieved in *Hopkinson* seems unlikely to have been possible without the application of the BORA.

Furthermore, the impact of the BORA on the exercise of powers by the executive and on the making of orders by the courts was illustrated. In this area of the law, the BORA is also of importance, although the approach is different from an approach based on the wording of a particular statute. The application in *Police v Beggs* results in a comprehensive consideration of how and to which extent freedom of expression has to be taken into account, in regard to the performance of executive powers. Here, the BORA operates more as the basis or the starting point of the whole judgment, and not as a tool for the interpretation of the statute concerned.

A similar approach of the BORA, which demonstrates a new awareness of freedom of expression, is *Police v O'Connor*. In this case, the BORA supports the restrictive use of name suppression orders by the courts; a progress which started in the pre-BORA period, but the BORA adds additional weight in favour of freedom of expression. On the other hand, in *Television New Zealand Ltd v R*, the BORA assists the courts in finding certain restrictions on freedom of expression to be justified under section 5 of the BORA. The BORA also obligates the courts to adapt the common law to be consistent with the BORA. The *Lange* decisions and *Hosking v Runting* are not judgments which might have been decided with another result, but the consideration and the decision finding itself is marked by the BORA.

The approaches of the BORA and of section 14 of the BORA in the surveyed cases differ from each other, due to the different circumstances. Nevertheless, all these judgments share the fact that freedom of expression runs through them as a thread, and that they develop the law towards consistency. The fact that the approaches differ is not opposed to consistency, instead, it is rather the precondition for consistency of the jurisdiction.
Fundamental human rights and freedoms were recognised in New Zealand before the enactment of the BORA and therefore, the BORA did not dramatically change or revolutionise the New Zealand legal system towards human rights. But the BORA caused a change in the awareness of these rights, and especially of freedom of expression. It is not only the approach of the BORA by the judges which is different from each other, but also the extent in which the BORA influenced law. The suppression cases are examples where the BORA emphasises a rule, which was developed before the BORA. In cases concerning the construction of statutes, it is more likely that the BORA also has impact on the outcome of a case. However, the courts give the necessary weight and consideration to the single rights and freedoms, and achieve through this uniformity and consistency. In the end, legal certainty is achieved.

Besides the positive developments, there are also examples where the courts failed in applying the BORA. The erroneous decisions in the two surveyed cases are characterised by the fact that the judges do not give section 14 of the BORA the required emphasis in their decisions. In *Finau*, the District Court applied the BORA erroneously, which led to the wrong assumption that it is justified to favour commercial signs over non-commercial signs. In *Re Baise Moi*, the Court of Appeal would have recognised the conflict of section 26 of the Films Act with section 14 of the BORA, if it had taken the BORA sufficiently into account for their decision. These cases, which concerned different courts, authorities and bodies, also reflect the broadness of the influence the BORA has or should have. Hence, there is still room for improvement in the application of the BORA, throughout the courts and authorities.

However, the large majority of cases concerning freedom of expression is characterised by an application of the BORA, which gives the required weight to freedom of expression. Judges develop the law towards a consistent understanding of the right of freedom of expression, how it had not been possible without the BORA. In conclusion, the enactment of this fundamental right in statutory form has a positive impact on freedom of expression before the courts in New Zealand.
Bibliography

Legislation

Auckland City Consolidated Bylaw
Criminal Justice Act 1985
Film, Video, and Classification Act 1993
Flag, Emblem, and Names Protection Act 1981
Human Rights Act 1993
Indecent Publication Amendment Act 1954
Indecent Publications Act 1910
Interpretation Act
Local Electoral Act 2001
Local Government Act 2002
New Zealand Bill of Rights Act 1990
Transport Act 1962
Trespass Act 1980

Articles

Boyle, Alan “Freedom of Expression as a public interest in English law “Public Law 3, 574.
Katrina Evans, Katrina “Was Privacy the winner of the day?” NZLJ 2004 181.


Tobin, Rosemary “Privacy: one steps forward, two steps back!” NZLJ 2003, 256.

Textbooks

Burrows, John F
*Statute Law in New Zealand*
3ed Lexis Nexis, 2003

Burrows, John F, ed Josephs, Philip A
*Freedom of the Press under the New Zealand Bill of Rights Act 1990 in Essays on the constitution*
Brookers 1995

Burrows John F and Cheers Ursula
*Media Law in New Zealand*
5ed Oxford University Press 2005

Huscroft, Grant and Opitcan, Scott and Rishworth, Paul
*The Bill of Rights – getting the basic right*
New Zealand Law Society, November 2001

Joseph, Philip A
*Constitutional and Administrative Law in New Zealand*
2ed, Brookers 2001

McVeigh, Chris and Pike, John
*Criminal law and procedure after the Bill of Rights Act 1990*
New Zealand Law Society, 1995

Mill, James
*Essays on Government*
Effingham Wilson 1839

Mill, John Stuart
*On liberty*

Rishworth, Paul and Huscroft, Grant and Opitcan, Scott and Mahoney, Richard
*The New Zealand Bill of Rights*
Oxford University Press, 2003

Cases
New Zealand

Amery v Mafart [1988] 2 NZLR 754

Auckland City Council v Finau [2002] DCR 839

Brill v Television One [1976] 1 NZLR 683

Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd [1980] 1 NZLR 163

Broadcasting Corporation of New Zealand v Attorney General [1982] 1 NZLR 120

Department of Labour v Matches Construction Ltd [2001] DCR 587

Drew v Attorney General [2001] 1 NZLR 58

Hopkinson v Police [2004] 3 NZLR 704

Hosking v Runting [2005] 1 NZLR 1

In re Lolita [1961] NZLR 542

Lange v Atkinson [1998] 3 NZLR 424

Lange v Atkinson [2000] 3 NZLR 385

Lewis v Wilson & Horton Ltd [2000] NZLR 546

Living Word Ltd v Human Rights Group Inc (Wellington) [2000] 3 NZLR 570

Mafart v Television New Zealand Ltd (4 August 2005) CA 92/05

Ministry of Transport v Noort [1992] 3 NZLR 260 (CA)

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

Police v Beggs [1999] 3 NZLR 615

Police v O'Conner [1992] 1 NZLR 87

R v Mahanga [2001] 1 NZLR 641

Re Baise Moi (23 July 2002) HC WN AP76/02

Re Baise Moi (11 November 2003) HC WN CP300/02

Re Baise Moi (9 December 2004) CA 239/03

Simpson v Attorney-General [1994] 3 NZLR 667