4

Application of International Human Rights Law in New Zealand

*Hon Justice Sir Kenneth Keith, KBE**

New Zealand, along with the other members of the Commonwealth, is bound by a very wide range of international human rights obligations.

This paper considers in turn:

- the subject matter and characteristics of human rights treaties;
- the general constitutional status of treaties in New Zealand law;
- the legislative implementation of human rights treaties; and
- judicial approaches to the interpretation of legislation in the light of human rights instruments.

It concludes by mentioning matters of information and education, and some constitutional questions.

The paper emphasizes that part of international human rights law which is incorporated into binding treaties. It is however important to bear in mind the other sources of international law, especially customary international law. Non-binding or non-treaty instruments may also be significant; for instance, the Privacy Act 1993 is, according to its title, an Act to promote and protect individual privacy in general accordance with the Recommendation of the OECD concerning guidelines governing the protection of privacy and transborder flows of personal data.[1]

Subject matter and characteristics of human rights treaties

Discussions of human rights treaties tend to emphasize developments in the United Nations since it was founded, including its Charter which itself, notably in its Preamble and Articles 1(3), 55 and 56, includes very important guarantees of human rights and fundamental

* I am grateful for comments on a draft of this paper by James Allan, Terence Arnold, Margaret Bedggood, Lord Cooke of Thorndon, Jerome Elkind, Philip Joseph, Sir Geoffrey Palmer, William Sewell, Antony Shaw and Anne Twomey.

1 *See also* the obligation of private prisons to comply with the UN Standard Minimum Rules for the Treatment of Prisoners, Penal Institutions Act 1954 (as amended) Sections 4B and 36H. The UN General Assembly Declaration on Friendly Relations of 1970 and the First Additional Protocol of 1977 to the Geneva Conventions scheduled to the Geneva Conventions Act 1958 (as amended) could operate within the New Zealand legal system in relation to the rights of people captured in armed conflict who claim to be entitled to a fair trial as prisoners of war.

freedoms. Building on those general propositions and the Universal Declaration of Human Rights are the great general treaties, the International Covenant on Civil and Political Rights (ICCPR) (and its first Optional Protocol) and the International Covenant on Economic, Social and Cultural Rights. Next are the United Nations treaties concerned with more particular matters, of discrimination in respect of race and against women (building on the earlier conventions relating to the political rights and nationality of married women, and marriage), the Convention on the Rights of the Child, the Torture Convention, and Conventions concerned with refugees and citizenship. With important exceptions, these conventions affirm rights of the individual against the state.

A wider view is important. Going back in time are a number of significant conventions relating to the criminal liability of individuals. At first they do not appear to fall easily within the present topic since they are concerned with the ***obligations*** of individuals (rather than their rights) owed to the state or even to the world community. But the obligations are of course imposed to protect the human rights of others. Historically we can begin with war crimes and piracy, traditionally governed by customary international law but also the subject of treaty last century and this. Associated with the former body of law is the Genocide Convention, and with the latter recent conventions designed to protect transport by sea and by air. Slavery conventions were first signed in the course of the 19th century and have been updated this century; there are associated International Labour Organization (ILO) conventions relating to forced labour as well as the League of Nations conventions concerned with white slavery. Also in the criminal area are conventions relating to hostages, internationally protected persons, obscene publications and the counterfeiting of currency, the last now complemented by OECD guidelines relating to money laundering.

Some of the obligations in the conventions already mentioned are obligations not of the individual to the state, or the state to the individual, but are essentially obligations owed by one individual to another. The discrimination conventions and the ILO conventions dating back over 70 years provide notable instances. Also among the treaties operating in the private law area between individuals are the conventions of the Hague Conference concerned with the abduction of children and inter-country adoption, and of the United Nations relating to the enforcement of maintenance obligations.

To summarize: first, the subject matter of human rights treaties is enormously various. Secondly, the treaties may affirm or create (1) rights held by the individual against the state, or (2) duties owed by the individual against the state in favour of other individuals, or (3) rights and corresponding duties between individuals. (In all those situations the States Parties to the treaties are of course obliged to ensure that those rights and duties are recognized in national law.) A third variable in the treaties is in the specificity or, to use a term of art, the self-executing character of the obligations.

The significance of the last point can be highlighted by comparing two cases decided in North America soon after the Charter of the United Nations was adopted. They both

concerned challenges based on the human rights provisions of the Charter, *Re Drummond Wren*[2] and *Sei Fujii v State of California.*[3] The question for the courts in Ontario and California was whether racially discriminatory covenants and alien land laws should be struck down because, among other reasons, they were contrary to prohibitions on racial discrimination declared in the Charter of the United Nations. The anticipated result might have been that because of the Charter breach the American court would strike down the discriminatory provisions while the Canadian court would not. After all, under the United States Constitution, a treaty made "under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby",[4] while just a few years earlier, in a Canadian case, the Privy Council had reaffirmed that, if the performance of treaty obligations involved alteration of the existing domestic law, legislative action was required.[5] The outcomes were exactly the reverse of that possible prediction. The Ontario court said that the restrictive covenant was to be struck down as being contrary to public policy as manifested among other things in the Charter provisions about racial discrimination. The Californian court on the other hand drew on long-established American constitutional doctrine to say that those Charter provisions were "non-self-executing". The obligations were directed at the political arms of government, at Congress or the executive. They did not give rise to immediately enforceable rights which could be implemented by the judicial arm. (The law did fall, but for breach of the equality guarantee in the 14th Amendment to the United States Constitution.)

The New Zealand Law Commission in a recent report, *A New Zealand Guide to International Law and Its Sources,*[6] has discussed the distinction between self-executing and non-self-executing treaties in a way that may be helpful. It began by quoting from a judgment of the Supreme Court of Cyprus:

> "'Only such provisions of a Convention are self-executing which may be applied by the organs of the state and which can be enforced by the courts and which create rights for the individuals; they govern or affect directly relations of the internal life between the individual, and the individuals and the state or the public authorities. Provisions which do not create by themselves rights or obligations of persons or interests and which cannot be justiciable or do not refer to acts or omissions of state organs are not self-executing ...' (*Malachtou v Armefti,* (1987) 88 ILR 199, 212-213)."

The Commission commented:

> "If a treaty provision falls within the second, 'non-self-executing' category, extensive national practice emphasizes that further action must be taken by national, and especially legislative, authorities before the treaty provisions can be given effect to by national courts. Characteristics of the treaties indicating the need for that action include the following:
>
> • The treaty might ***empower*** the state to take action. Consider for instance

2 [1945] 4 DLR 674.

3 242 P 2d 617 (1952).

4 Constitution of the United States, Article VI(2).

5 *Attorney-General for Canada v Attorney-General for Ontario,* [1937] AC 326, at 347.

6 (1996) NZLC R34, pp 16-17.

those parts of the law of the sea relating to the continental shelf and the exclusive economic zone (and probably the territorial sea as well): international law does not require states to make the claims that they are entitled to make. National action additional to the acceptance of the treaty is called for; in some cases that action will be executive but usually it is legislative. The Tokyo Convention on Crimes on Board Aircraft and the High Seas Intervention Convention similarly authorize national action which in some cases will require a legislative basis.

• The treaty itself might create a ***duty*** to take national legislative action. For instance, article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires states parties to declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, and incitement to racial discrimination, all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including their financing.

• The treaty might not only create a duty to take that distinct state legislative action, but it might also give that obligation a ***programmatic character***. For instance, the undertaking of each states party under article 2(1) of the International Covenant on Economic, Social and Cultural Rights is to 'take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

• The wording of the undertaking might be ***so broad as not to provide judicially manageable standards***. Pious declarations are non-self-executing. Some of the condemnatory language in the Racial Discrimination Convention has such a character.

• The obligations may be of a ***procedural*** rather than a substantive character. Many treaties, for instance in the trade and environment areas, require states to notify affected states and consult about certain matters. These provisions operate essentially only between the states parties. Chief Justice Marshall made an important statement in the first major United States decision on this matter:

> '... when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.' (*Foster v Neilson* (1828) 27 US 253, 314; (1830) 8 US 108, 121)"

That discussion by the New Zealand Law Commission occurs in the context of the choice to be made by the legislature of the form of words best designed to incorporate the treaty text. That is to say, in what circumstances is the better course simply to set out the treaty text and provide that it is to "have the force of law"? Or, on the other hand, when is it necessary to weave the obligations into the existing law? The discussion does help as well to point up the difficulty which courts may have when they are faced with arguments based simply on the general language of some international treaty texts. I come back to that matter later in the paper.

The general constitutional status of treaties in New Zealand law

In New Zealand, as in many other parts of the Commonwealth, the traditional British position is adopted: that is, that treaties do not become part of the law of the land in the sense of changing rights and duties under the law simply as a consequence of the executive action of the state becoming party. While the state is bound by virtue of the various executive actions of signature, ratification or other acceptance, if a change in rights and duties under the law is required, then there must be appropriate legislative action.

It by no means follows, however, that courts cannot have regard to treaties which have not been incorporated into the law. The Law Commission report mentioned earlier notes at least five ways in which that might happen:

1. as a foundation of the Constitution;
2. as relevant to the determination of the common law;
3. as a declaratory statement of customary international law which is itself part of the law of the land;
4. as evidence of public policy; and
5. as relevant to the interpretation of a statute.[7,8]

I discuss the last of those in some detail in a later part of the paper. The first is illustrated by cases decided in the 1920s and 1930s in New Zealand, Australia and South Africa about the power of those countries to legislate for mandated territories. Courts sought the source of that power in, among other places, the Treaty of Versailles which established the mandate system and the mandate documents themselves. The issue has not expired with the mandates. Consider the Treaty of Union between England and Scotland[9] or the Treaty of Waitangi in New Zealand.

Of the latter, Lord Cooke noted at the Sixth Judicial Colloquium at Bloemfontein that:

> "There are those who contend that the Treaty must be seen as the foundation document of New Zealand, not only in fact as it undoubtedly

7 *Supra*, n 6, pp 23-5.

8 So far as I am aware no New Zealand court has yet faced directly the proposition accepted by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*, (1995) 128 ALR 353; but see the reference to it in the judgment of Thomas J in *New Zealand Maori Council v Attorney-General*, [1996] 3 NZLR 140, at 186.

9 Cf *Gibson v Lord Advocate*, 1975 SC 136, at 144.

> was, but in law also: a kind of *grundnorm*, a political compact as fundamental for our South Pacific country as was Magna Carta for England. The Courts have not yet had to face squarely the profound jurisprudential questions raised by such contentions; and long may that remain the position.[10,11]

The second role of treaties is illustrated by the litigation in the United Kingdom, mentioned by Lord Woolf at the same Colloquium,[12] about the right of local government bodies to sue in defamation. The Court of Appeal in particular gave considerable weight in the determination of the common law to the guarantee of freedom of expression in the European Convention on Human Rights.[13]

The third role of treaties was seen in recent litigation in New Zealand in which the Court of Appeal held that the Governor of Pitcairn had immunity from the jurisdiction of the local courts in respect of an employment dispute.[14]

So far as the fourth role is concerned, I have already mentioned the Ontario decision of 1945. A comparable case is the decision of the New Zealand Supreme Court in *Van Gorkom v Attorney-General*,[15] where Cooke J, when invalidating discriminatory conditions laid down by a minister under subordinate legislation, made use of international documents including the Universal Declaration of Human Rights, the Declaration on the Elimination of Discrimination Against Women, and an ILO Convention to which New Zealand was not party. That case might also be seen as one involving the interpretation of the empowering statute by reference to international texts.

The basic proposition remains, however, that treaties in the absence of implementing legislation do not impose duties or confer rights under the law of New Zealand. This paper now accordingly considers in turn legislation designed to give effect in domestic law to human rights provisions and the judicial interpretation of legislation by reference to such provisions.

Legislative implementation of human rights treaties

Following the earlier discussion of the types of obligations stated in the treaties, I begin with some examples from criminal law. In New Zealand since 1893 the criminal law has been statutory. There are no common law crimes. That approach helps give effect to the prohibition on retrospective criminal law, reaffirmed in Article 15 of the International Covenant on Civil and Political Rights.

Some legislation creating the relevant crimes shows its international origins on its face: the statutes relating to aviation crimes, war crimes (the grave breaches under the Geneva

---

10 *Developing Human Rights Jurisprudence, Vol 6: Sixth Judicial Colloquium on The Domestic Application of International Human Rights Norms*, (1995), p 192.

11 I do not take up this very important area of human rights law in the present paper. *See*, for example, Lord Cooke in the paper cited in n 10, pp 191-4 and "The Challenge of Treaty of Waitangi Jurisprudence", (1994) 2 Waikato LR 1; S. Elias "The Treaty of Waitangi and Separation of Powers in New Zealand" in B.D. Gray and R.B. McClintock (eds), *Courts and Policy: Checking the Balance - Papers presented at a conference held by the Legal Research Foundation, Auckland, August 1993* (Wellington: Brooker's, 1995), p 206, and the special sesquicentennial 1990 issue of the New Zealand Universities Law Review (Vol 14, No 1).

12 *Supra*, n 10, pp 101, 104-21.

13 *Derbyshire County Council v Times Newspapers Ltd*, [1992] 1 QB 770, [1993] AC 534.

14 *Governor of Pitcairn v Sutton*, [1995] 1 NZLR 426; *see also* its judgments in the wine box cases, *Controller and Auditor-General v Davison*, [1996] 2 NZLR 278, at 306-7.

15 [1977] 1 NZLR 535, at 542-3.

Conventions of 1949 and the 1977 Protocol), torture, internationally protected persons and hostages, for instance. But in other cases that origin may not be so obvious. The Crimes Act 1961, for example, includes provisions about slavery and piracy which do not indicate any treaty origin, although the definition of piracy - somewhat quaintly, given that it was most recently re-enacted in 1961 - does define the crime by reference to "the law of nations". That provision of the Crimes Act also assumes that piracy can be committed in relation to aircraft, although, given the requirements of the definition of piracy as now found in the 1958 and 1982 Conventions on the Law of the Sea, that appears to be highly unlikely in fact. Rather, hijacking is dealt with under the Aviation Crimes Act 1972 which indicates its origins in the air law conventions of the 1960s and the 1970s.

Legislation giving explicit effect to treaty obligations might or might not use its exact terms. The earlier passage from the report of the Law Commission about self-executing and non-self-executing treaties is directed at that choice. Recent New Zealand legislation concerning the Hague Convention on the abduction of children points to the problems that can arise when the legislator decides to depart from the precise terms of the treaty texts. In a case in the Court of Appeal in 1994 where the Court did manage to reconcile the different wording of the implementing statute and of the Hague Convention (in that respect reversing the decisions in the lower courts) one of the judges said, "It is unfortunate that for reasons which are not readily discernible the Act has departed from the wording of the Convention, instead of simply adopting it as has apparently been done in other countries. Some of the differences appear to be significant."[16]

The most notable New Zealand statute implementing a human rights instrument is the New Zealand Bill of Rights Act 1990.[17] Its text is set out at the end of this paper.

According to its title, that Act is:

"An Act -

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

As appears clearly from the text of the Bill of Rights, its terms follow closely the content and the wording of provisions of the International Covenant on Civil and Political Rights. There are differences, generally in the direction of following the language of the Canadian Charter of Rights and Freedoms. Even with those differences, the courts from the outset have been assiduous in recognizing the international origins of the Bill of Rights. That plainly conforms with the Government's intent. Its White Paper, *A Bill of Rights for New Zealand* (1985), elaborated the point when setting out the reasons for a Bill of Rights. One of them was:

---

16 *Gross v Boda*, [1995] 1 NZLR 569, at 574.

17 Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1980 and the Human Rights Act 1983* (Wellington: Brooker's, 1995) provide a valuable account of the Bill of Rights including its drafting and early operation (Chapter 1 by Rishworth), its international context (Chapter 2 by Hunt and Bedggood), its constitutional significance (Chapter 3 by Rishworth), and freedom of expression (Chapter 5 by Huscroft). They refer to the New Zealand primary sources and to much of the commentary.

"The implementation of New Zealand's international obligations

4.21 New Zealand ratified the International Covenant on Civil and Political Rights in 1978. As the New Zealand Government's report and presentation to the United Nations Human Rights Committee indicates, the Government was of the opinion, with the exceptions marked by the formal reservations attached to the instrument of ratification, that New Zealand law and administrative practice conformed with the Covenants. At the same time that presentation recognized that there can be a legitimate difference of opinion about the adequacy of the protection afforded to the human rights set out in the Covenant in the absence of a basic or supreme law which guarantees those rights. In a formal legal sense there is no guarantee that the relevant law will not be changed and that Parliament will not invade the rights that New Zealand is internationally bound to observe. The representative then went on to refer to the argument mentioned earlier: that there are other informal restraints guaranteeing individual liberty.

4.22 The Bill would provide that greater guarantee of compliance with those important international obligations that comes from the superior status of the Bill. It would as well give a legal significance, a significance, that is, that can be asserted in court proceedings, to the informal restraints on which we place such very large reliance at the moment.

4.23 As will appear from the Commentary on the draft Bill, many of its provisions do in fact relate closely to those of the Covenant. There are some differences. Some provisions of the Covenant do not appear in the draft. The Bill would include rights not included in the Covenant. And the detail of the drafting differs."

The reference in paragraph 4.22 to "the superior status of the Bill" makes it necessary to note a significant difference between the 1985 proposal and the 1990 measure as actually enacted. The original proposal was for an entrenched Bill which could have been amended only following a referendum or by a 75 per cent vote of all the members of the House of Representatives. That status and the consequent judicial powers of the striking down of statutes were strongly opposed and the Bill was enacted as an ordinary statute, subject to repeal or override, impliedly as well as expressly, by other Acts of Parliament (see especially Section 4, which was added in the course of the Bill's passage through Parliament to emphasize the point). The Bill was to have interpretative rather than overriding effect. It is for others to say how significant that change in status has been.

The Human Rights Act 1993 (which replaced the Human Rights Commission Act 1977 and the Race Relations Act of 1971) is also designed, in a more general way than the Bill of Rights Act, to give effect to international human rights instruments. Its title says, among other things, that it is an Act "to provide better protection of human rights in New Zealand

in general accordance with United Nations covenants or conventions on human rights". One of the functions of the Human Rights Commission continued under the Act is to report to the Prime Minister on action needed to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights and on the desirability of New Zealand becoming bound by any such instrument. That Act also gives substantial effect to the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination Against Women. It forbids the various acts of discrimination proscribed by those conventions and sets up mechanisms through the Race Relations Office, the Human Rights Commission and a Tribunal for enforcing the prohibitions.

Many other statutes give effect to human rights obligations. That appears for instance from the list included in the Law Commission report, mentioned earlier, of statutes with possible implications for New Zealand treaty obligations.[18] That list includes about one-third of the public statutes of New Zealand.

It is not enough of course to enact the legislation. It must then be applied and interpreted. In what follows I limit myself to the judicial role.[19]

Judicial approaches to the interpretation of legislation presenting international human rights issues

In practice, three different situations involving interpretation by reference to treaty provisions can be distinguished:

1. the legislation in question aligns exactly or in substance with the relevant treaty provisions;

2. the legislation is intended in a general way to give effect to the treaty, but departs from its wording;

3. the legislation is not concerned in its main provisions and purposes with the treaty (which might indeed have been accepted by the Government after the legislation was enacted) but the treaty is nevertheless claimed to be relevant to its operation.

(A fourth situation is where the legislation contradicts the treaty. In that case, in general, the interpretative techniques are not available.)

The principal human rights cases falling within the first category relate to the application and interpretation of the Bill of Rights. In an early major case, both the present President of the Court of Appeal and his immediate predecessor emphasized the international

---

18 *Supra*, n 6, pp 116-19.

19 Steps have been taken to attempt to ensure that treaties are properly taken into account when legislation is prepared. The papers put to Cabinet proposing legislation must certify compliance with relevant international obligations (*Cabinet Office Manual* (1996) 57, 122, 124). That process will sometimes be related to that under Section 7 of the Bill of Rights - the power of the Attorney-General to vet proposed legislation against the Bill (and accordingly the International Covenant on Civil and Political Rights). *See*, for example, the discussion of amendments to the Transport Act 1962, giving additional powers to the police to screen drivers for drink-driving, in light of public safety considerations and the provisions of the Bill of Rights, in Keith, "Road Crashes and the Bill of Rights: A Response", [1994] NZ Recent Law Review 115. Prevention is often better than cure.

context in which the Bill is to be seen.[20] Cooke P quoted the statement "now evidently destined for judicial immortality" made by Lord Wilberforce in *Minister of Home Affairs v Fisher*:[21] the antecedents of the Bermuda Constitution in the European Convention on Human Rights and the Universal Declaration of Human Rights and the form of the Constitution itself "call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to". Cooke P then quoted passages from the Bill of Rights including its title, set out earlier in this paper, and continued:

> "In approaching the Bill of Rights Act it must be of cardinal importance to bear in mind the antecedents. The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see *Mabo v Queensland* (1988) 166 CLR 186, 217-218. The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognized right (for some references see [1992] 2 NZLR 257 at p. 265) and one of those affirmed in New Zealand. It has great 'strategic' value as a safeguard against violations of undoubtedly fundamental rights such as the right not to be arbitrarily arrested or detained (s 22 of the New Zealand Bill of Rights Act). Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights Act."[22]

Richardson J also set out the title to the Act and made three points:

> "First 'affirm', 'protect' and 'promote' are all words expressive of a positive commitment to human rights and fundamental freedoms. It is in that spirit that interpretation questions are to be resolved. Second, the deliberate reference to 'affirm' in the long title and in s 2 which provides 'The rights and freedoms contained in this Bill of Rights are affirmed' makes the very important point that the Act is declaratory of existing rights. It does not create new human rights. As basic human rights, the rights and freedoms referred to do not derive from the 1990 Act. In that respect it parallels the Bill of Rights Act 1689 which was declaratory of 'the true, ancient and indubitable rights and liberties of the people' (s 6). That philosophical underpinning has to be taken into account when construing and applying the Bill of Rights Act provisions. Third, para (b) of the long title affirms New Zealand's commitment to internationally acceptable human rights standards. As recognized in the preamble to the International Covenant on Civil and Political Rights, human rights 'derive from the inherent dignity of the human person' and States party to the Covenant are obliged to 'promote universal respect for, and observance of, human rights and freedoms'.

---

20 *Ministry of Transport v Noort*, [1992] 3 NZLR 260.

21 [1980] AC 319, at 328H.

22 *Supra*, n 20, at 270.

> Next, any reading of the 1990 Act brings out its special characteristics. Some have already been noticed. Two more should be mentioned. First the statement in Part II of civil and political rights is in broad and simple language. No doubt that is to emphasize the importance which Parliament attaches to their clear expression. It calls for a generous interpretation suitable to give the individuals full measure of the fundamental rights and freedoms referred to (*Minister of Home Affairs v Fisher*, [1980] AC 319, 328).
>
> The second is the recognition of limitations on the absoluteness and generality of the rights and freedoms affirmed in the Act. This reflects the fundamental consideration that individual freedoms are necessarily limited by membership of society and by duties to other individuals and to the community. That consideration is also reflected in the statement in the preamble to the International Covenant on Civil and Political Rights that an individual has 'duties to other individuals and to the community to which he [or she] belongs'."[23]

As appears from Section 3 of the Bill of Rights, it applies to the judiciary as well as to the other organs of the state. It may accordingly govern the way in which the courts perceive their powers, for instance in respect of the suppression of the publication of evidence. The parallel provisions of the International Covenant on Civil and Political Rights may be also used in that process, as appears from a recent judgment of the Court of Appeal lifting a suppression order on evidence which had not been admitted in a high profile murder case.[24,25] The first sentence of the judgment stated the issue in this way:

> "This application concerns, on the one hand, the principles of public and open justice and freedom of expression and, on the other, the right of privacy and the dignity of victims of offences."

By the time the application was heard the regular course of the criminal justice process was complete. Accordingly there was no real basis for contending that the suppression order was needed to protect the interests of justice in the particular sense of protecting the right of a person charged with the offence to "a fair and public hearing by an independent impartial court", Section 25(a) of the Bill of Rights.

That provision, along with the direction in the Criminal Justice Act 1985, provided the critical reminder that in the absence of compelling reasons to the contrary, criminal justice is to be public justice. That principle, said the Court, must be the starting point. The Court then quoted the parallel provisions of Article 14(1) of the International Covenant which indicates in addition possible compelling reasons, relevant as well to the limiting provision of Section 5 of the Bill of Rights, for making exceptions to the principle of public justice. Among the possible limiting principles is that stated in the Victims of Offences Act 1987: that judges should treat victims (here including the family of those murdered) with courtesy, compassion and respect for their personal dignity and privacy.

---

23 Ibid, at 277.

24 *Television New Zealand Ltd v R*, [1996] 3 NZLR 393; [1997] 1 LRC 392.

25 For another recent judgment when the Covenant provisions were directly invoked *see Re J (An Infant): B and B v Director-General of Social Welfare*, [1996] 2 NZLR 134, at 145, affirming [1995] 3 NZLR 73; the court exercised its broad guardianship powers to override the parental refusal to allow a blood transfusion to a child for religious reasons. Lord Cooke also mentioned freedom of expression cases at the Bloemfontein Colloquium (*supra*, n 10, pp 186-9).

The Court next referred to a further principle supporting the lifting of the suppression order:

> "The principle of public or open justice does not stand alone in the present situation. It gains support from the right to freedom of expression, a right in this case of the proposed witness as well as of the applicant. That right is declared in s 14 of the Bill of Rights:
>
> > 'Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.'
>
> Again, the related covenant provision indicates, conformably with s 5 of the Bill of Rights, that there may be limits on that right. Article 19(3) states that the exercise of that right:
>
> > '... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> >
> > (a) For respect of the rights or reputations of others;
> > (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.'"

The Court recalled reasons and purposes underlying both the principle of public justice and the supporting right to freedom of expression:

> "In an earlier case in this Court, Woodhouse P put the reasons for public justice persuasively and succinctly:
>
> > 'The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes.' *Broadcasting Corporation of New Zealand v Attorney-General*, [1982] 1 NZLR 120, 122-123; see also Cooke J, 127-128, and Richardson J, 132"

In support of freedom of expression the Court quoted the metaphor of Justice Oliver Wendell Holmes, "the best test of truth is the power of the word to get itself accepted in the competition of the market".[26] It then assessed the facts in the light of the principles and concluded:

> "To summarize, the basic principles of open and public justice, and of freedom of expression, are subject to limits. But there is no right, interest or value, in particular in terms of the dignity or privacy of members of the Bain family, which at this time justifies, in terms of s 5 of the Bill of Rights, the limit on those principles contained in the order made last December."

In this case the provisions of the Bill of Rights, the Covenant and indeed basic common law principles (as seen for instance in *Scott v Scott*)[27] were all aligned. More difficult is the second situation identified above where the fit between the treaty text and statute is not a neat one.

A notable instance is *Baigent's Case*,[28] where the Court of Appeal held that a person whose rights set out in the Bill had been breached had a cause of action in public law, in appropriate cases in monetary compensation, against the Crown.[29] The plaintiffs alleged an unlawful execution of a search warrant by the police and sought damages for trespass and breach of the right stated in Section 21 of the Bill of Rights to be secure against unreasonable search or seizure.

One problem standing in the way of the proceeding was that the Bill of Rights contains no remedy provision. Further, the remedy provision which had been included in the draft Bill of Rights tabled in Parliament in 1985 (on the model of the Canadian Charter) was no longer in the Bill introduced in 1989 when, as well, the status of the proposed measure was reduced from an entrenched Bill to an interpretative one. In both respects the New Zealand Bill differs from the related constitutional documents of Canada and of Trinidad and Tobago, the latter being significant because of the central role in the *Baigent* judgments of the Privy Council decision on the Trinidad measure in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*.[30]

A related problem was presented by immunity provisions apparently protecting the police officers and the Crown, included in the Crown Proceedings Act 1950, the Crimes Act 1961 and the Police Act 1959. Those protections, said the Crown, blocked both the common law trespass actions and any action based on the Bill of Rights. This argument gained additional force from the fact that Parliament had made it clear that the Bill of Rights would not override any legislation including that already on the statute books, Section 4. Parliament did however also provide that if legislation "can" be given a meaning consistent with the Bill of Rights that meaning "shall" be preferred to any other, Section 6. (And that direction led the judge who dissented on the main holding to read the protections narrowly, in favour of the trespass cause of action.)

---

26 *Abrams v United States*, 250 US 616 (1919), at 630.

27 [1913] AC 417.

28 *Simpson v Attorney-General*, [1994] 3 NZLR 667; [1994] 3 LRC 202.

29 The decision has led to considerable comment and criticism; *see* especially the criticism by Professor John Smillie, "The Allure of 'Rights Talk': *Baigent's Case* in the Court of Appeal", (1994) 8 Otago LR 188; *see also* a note by the same author, "Fundamental Rights, Parliamentary Supremacy and the New Zealand Court of Appeal", (1995) 111 LQR 209, and the support of Rodney Harrison QC in Huscroft and Rishworth (*supra*, n 17, Chapter 10). The Law Commission is reporting to the Government on possible legislation on the matter; its draft report of 1 April 1996 supported the decision.

30 [1979] AC 385.

Among the reasons leading to the conclusion that a monetary remedy could be available for breach of the Bill were a "rights-centred" approach to the Bill, the principle that where there is a right there is a remedy and, most relevantly for the present paper, the affirmation in the title of the Bill of New Zealand's commitment to the International Covenant on Civil and Political Rights. Particular emphasis was placed on the obligation, stated in Article 2(3)(a) of the Covenant, of States Parties "to ensure that any person whose rights or freedoms as ... recognized [in the Covenant] are violated shall have an effective remedy". Supporting that obligation is the undertaking to ensure that the right to such a remedy be "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy", Article 2(3)(b). Reference was also made to the Human Rights Committee set up under the Covenant to consider, among other things, complaints by individuals of breaches of the Covenant. "The Act reflects Covenant rights, and it would be a strange thing if Parliament, which passed it one year [after New Zealand acceded to the Optional Protocol], must be taken as contemplating that New Zealand citizens could go to the ... Committee ... for appropriate redress, but could not obtain it from our own Courts".[31] Perhaps a lesson was learned from the difficulties which the United Kingdom had had with the European Human Rights Court and Commission.

That last matter is one reason for resisting the argument that the undertakings in Article 2 of the Covenant are directed at the legislative branch rather than the judicial, to return to the earlier discussion of self-executing and non-self-executing treaties. In this context it is interesting to note that, when the Human Rights Committee most recently considered New Zealand's periodic report on implementation of the Covenant, it proposed not only that the *Baigent* remedy should be available (it was informed of the decision), but that that should be made explicit in legislation. The question might be asked whether those who monitor compliance with those international obligations should be concerned about the particular means by which the state complies with its international obligations. Is it not the result which counts?[32]

The third category of case presenting interpretation issues arises where, by contrast to the other two, the legislation may have been enacted without any particular reference to the treaty, or even before the treaty was accepted. The statutory powers are often conferred in broad terms as well. The treaty provisions in issue may also be stated in general terms. In three recent immigration cases in the Court of Appeal all those matters came together: *Tavita v Minister of Immigration*,[33] *Puli'uvea v Removal Review Authority*,[34] and *Rajan v Minister of Immigration*.[35] The treaty provisions, from the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, concern the rights of the family and the child.

The relevant part of the latest of these three judgments has been paraphrased as follows:

> "The Court considered that there were at least four factors which militated in favour of reading the power conferred by s 20 as subject to the international obligations. The first is the presumption of statutory

31 *Supra*, n 28, at 691 (Casey J).

32 *See*, for example, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 1993) pp 53-4.

33 [1994] 2 NZLR 257; [1994] 1 LRC 421.

34 [1996] 3 NZLR 538.

35 [1996] 3 NZLR 543; [1996] 4 LRC 190.

> interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations. The second is the fact that s 20 confers a discretion. Third is the great importance of the right involved. It would hardly be surprising if humanitarian considerations were mandatorily relevant to the exercise of that power, particularly as time passes and the ties of those affected with New Zealand grow. Fourth, the very existence of an 'appeal' on humanitarian grounds might be seen as implying that the initial decision maker will have regard to them.
>
> On the other hand, there were factors telling against the imposition of the requirement. First, while it is true that the power includes a discretion, it does not follow that that discretion carries with it any mandatory factors. Second, by contrast to the silence of s 20 several other provisions make it explicit that those exercising important powers leading to the removal of persons resident in New Zealand are to have regard to humanitarian considerations. Third, the issues required to be considered by the international texts appear to fall clearly within the explicit duty of an independent tribunal. Under s 22 the Deportation Review Tribunal is to determine whether it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely. In assessing that matter, the Tribunal is to have regard among other things to the interests of the appellant's family. Fourth, while the Minister was obliged by 1977 amendments to the Immigration Act 1964 and carried forward in the 1987 Act expressly to have regard to humanitarian considerations, that is no longer the case. Following the 1991 amendments it is only the independent tribunals which are expressly required to have regard to those matters. Parliament, it might be said, has decided that only the tribunals and not the minister are now to make the humanitarian assessments.
>
> The result is that the issue noted in the *Tavita* and *Puli'uvea* cases - the significance of treaty obligations, including those stated in broad terms, which have not been given direct legislative effect, for the exercise of powers and discretions conferred in general terms - has yet to be decided by a New Zealand court."[36]

To move to broader ground, on the one side is the obligation under international law of New Zealand to comply with the treaties to which it is party; on the other the basic principle of the Constitution that the executive cannot in general alter the law of the land.[37]

Concluding comments

In the first of the three immigration cases just mentioned, Cooke P referred to two decisions of the European Court of Human Rights which "appear distinctly relevant. Neither was cited to us in argument, but that implies no criticism for the case had to be

---

36 Newsletter No 2 of the Institute of Public Law, Victoria University of Wellington.

37 For a valuable discussion of the issues, pitting *The Parlement Belge*, (1879) 4 PD 129 (reversed 5 PD 197 but not on the treaty issue) against the *Case of Proclamations*, 12 Co Rep 74, 77 ER 1352, see Elkind and Shaw, "The Municipal Enforcement of the Prohibition Against Racial Discrimination: A Case Study on New Zealand and the 1981 Springbok Tour", (1984) 55 BYIL 189, pp 233-41.

prepared under pressure and such decisions are not always easy to locate". Such comments, and the growing realization of the mounting importance of international law in the national legal system, led the Law Commission to prepare the *Guide* noted earlier.[38] *The Guide* emphasizes that importance, and provides information about major sources of international legal materials. It points to the importance of professional practice and culture.

The implications of globalization for education, not only in the law schools but both before and after that stage, in general education and continuing legal education are also fundamental. As long ago as the 1820s Chancellor Kent began his lectures to the law students at Columbia College with the law of nations. The law of the United States or of New York would not be properly appreciated without that background.[39] There must be a lesson in that for legal education 170 years later.

The growth in the internationalization of law-making also brings with it major constitutional issues. New Zealand's very early ratification, in February 1990, of the Second Optional Protocol to the ICCPR relating to the abolition of the death penalty helps make the point. That was purely an executive action - as it can be in our constitutional system - involving no parliamentary or public opportunity for comment, criticism or opposition. To be fair Parliament had, on 28 November 1989, enacted the Abolition of the Death Penalty Act repealing the remnants of that penalty for treason and treachery in the armed forces. That was however effected by a private members bill which preceded the adoption by the UN General Assembly (on 15 December 1989) of the Second Optional Protocol, and although the drafting of the Protocol was mentioned in the parliamentary debate there was no indication at all that the Government would move to sign and ratify it and to do that so rapidly.

There is a strong argument that there is no right to withdraw from that Protocol. That position under international law is to be contrasted with the domestic constitutional position. At the time it ratified the Protocol the Government had accepted that it could do no better domestically than to have an interpretative Bill of Rights, and yet it was very likely committing New Zealand, without any public process, to an irrevocable bar on capital punishment. (It is not even clear that the proposed entrenched Bill of Rights would have superseded the remaining instances of capital punishment.)[40] It is not surprising that some who have called for the reintroduction of capital punishment in New Zealand have been inclined to question the commitment in the Protocol. There is, however, no question. The commitment exists. But treaty-making processes should be such as to emphasize that commitment. They should be more public, participatory and democratic.

Australia is leading the way with the important Senate Committee report, *Trick or Treaty? Commonwealth Powers to Make and Implement Treaties* (November 1995) and the Government response given in early 1996. The Government will in general table in Parliament all treaties which it proposes to accept at least 15 sitting days before acting; a national interest analysis is also to be tabled. More, timely information is to be made available and the process of consultation is to be enhanced.[41]

---

38 *Supra*, n 6.

39 *Commentaries on American Law* (1826), Part I: Of the Law of Nations.

40 *See* paras 10.84 - 10.89 of the White Paper referred to at p 53, *supra*.

41 *See*, for example, the statements made on 2 May 1996 and the opening address of the Attorney-General, Daryl Williams QC, MP, to the Joint Meeting of the Australian and New Zealand Society of International Law and the Australian Branch of the International Law Association, 17 May 1996, and the *First Report* (August 1996) of the Joint Standing Committee on Treaties on the first 25 treaties tabled under the new rules.

It would be wrong for me to leave the impression that the New Zealand authorities are reluctant to make treaty processes more open and to provide greater information. There are some notable instances of consultation, for example, through the long Uruguay Round (although some controversy about that process remains),[42] and the Ministry of Foreign Affairs and Trade and other Ministries publish valuable information, for instance on New Zealand's periodic reporting on human rights treaties. And the Law Commission has prepared a paper as a basis for further discussion of the issues. The lack of appreciation of the growing significance of this international law-making activity is, I suspect, more to be found in the legal profession and the wider public than in the ministries. Meetings such as the present should help remove this ignorance.

42 Nottage, "The GATT Uruguay Round 1984-1994: 10 Years of Consultation and Co-operation", Address to the Senior Executive Service Conference, Wellington, 19 August 1994, *Ministry of Foreign Affairs and Trade Record*, August 1994.

Appendix

NEW ZEALAND BILL OF RIGHTS ACT 1990

An Act -

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

1. Short title and commencement -

(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.

(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART I

GENERAL PROVISIONS

2. Rights affirmed - The rights and freedoms contained in this Bill of Rights are affirmed.

3. Application - This Bill of Rights applies only to acts done -

(a) By the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

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.

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights - Where any Bill is introduced into the House of Representatives, the Attorney-General shall, -

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill, -

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

PART II

CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

8. Right not to be deprived of life - No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment - Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10. Right not to be subjected to medical or scientific experimentation - Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. Right to refuse to undergo medical treatment - Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

12. Electoral rights - Every New Zealand citizen who is of or over the age of 18 years -

(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and

(b) Is qualified for membership of the House of Representatives.

13. Freedom of thought, conscience, and religion - Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

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

15. Manifestation of religion and belief - Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. Freedom of peaceful assembly - Everyone has the right to freedom of peaceful assembly.

17. Freedom of association - Everyone has the right to freedom of association.

18. Freedom of movement -

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-Discrimination and Minority Rights

19. Freedom from discrimination -

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the

Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

20. Rights of minorities - A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Search, Arrest, and Detention

21. Unreasonable search and seizure - Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the person - Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained -

(1) Everyone who is arrested or who is detained under any enactment -

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is -

(a) Arrested; or

(b) Detained under any enactment -

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24. Rights of persons charged - Everyone who is charged with an offence -

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. Minimum standards of criminal procedure - Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

(b) The right to be tried without undue delay:

(c) The right to be presumed innocent until proved guilty according to law:

(d) The right not to be compelled to be a witness or to confess guilt:

(e) The right to be present at the trial and to present a defence:

(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. Retroactive penalties and double jeopardy -

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. Right to justice -

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III

MISCELLANEOUS PROVISIONS

28. Other rights and freedoms not affected - An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. Application to legal persons - Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.