

"THE IMPACT OF INTERNATIONAL CONVENTIONS ON DOMESTIC LAW"

**An Address to the Conference of International Association
of Refugee Law Judges
By The Rt. Hon. Dame Sian Elias, GNZM, Chief Justice of New Zealand
Held at the Auckland Club, Auckland
Friday 10 March 2000**

My assigned topic is "*The Impact of International Conventions on Domestic Law*". My initial reaction is "oh no, not again".

I do not repeat what has been said by commentators more qualified than me¹ Since *Tavita v. Minister of Immigration*² it might have been thought that the role of international instruments in domestic law is now relatively settled and that it is the responsibility of the Courts, at least where international instruments deal with human rights, to realise in domestic law the obligations and principles undertaken.

Certainly the international judicial community seems to have no doubts about its role. At the Commonwealth Judicial Colloquium in 1998 at Bangalore, the principles of the Colloquium of 1988 were re-formulated to include the following statements:

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

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

5. Both civil and political rights and economic, social and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights. The implementation of economic, social and cultural rights is a primary duty for the legislative and executive branches of government. However, even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for Judges as they interpret their constitutions and ordinary legislation and develop the common law. Likewise, even where human rights treaties

¹ See, for example Cartwright "*Application of International Human Rights Laws in New Zealand*", a paper delivered to the judicial colloquium on The Domestic Application of International Human Rights Norms, Bangalore, India, December 1998; Brennan, "*The Role and Rule of Domestic Law in International Relations*" (1999) 10 Public Law PLR 185; Harrison "*Domestic Enforcement of Human Rights In Courts of Law: Some Recent Developments*" (1995) NZLJ 256.

² [1994] 2 NZLR 257 (CA)

have not been ratified or incorporated into domestic law, they provide important guidance to law-makers, public officials and the courts.

These principles in their 1992 and 1993 formulation were referred to by the Court of Appeal in *Tavita*. At the 1998 Colloquium, Lord Lester of Herne Hill QC, noted that the relevance of the Bangalore Principles had been widely accepted by the Courts. He concluded that:

During the years ahead, the role of national courts in implementing the internationally guaranteed civil and political rights will be more and more significant, encouraging the legislative and executive branches of government to play their crucial role, making closer links with courts in other countries, and working as partners with the international and regional human rights courts and commissions³

Yet, despite the certainty evinced in these statements, doubts remain as to the extent of the incorporation and the basis upon which it is made. Some caution appears to have set in after the initial flush of judicial enthusiasm at least in New Zealand⁴.

In the area with which this conference is concerned, no difficulties about the relevance of the Convention Relating to the Status of Refugees arises in New Zealand since the Immigration Amendment Act 1999. The Act expressly invokes the Convention and indeed the Convention and the 1967 Protocol appear in a schedule to it. Section 129D requires Refugee Status Officers and the Refugee Status Appeal Authority “to act in a manner that is consistent with New Zealand’s obligations under the Refugee Convention. Similarly under s129X a claimant for refugee status, as well as someone who has been recognised as a refugee in New Zealand, may not be removed or deported from New Zealand unless such removal is permitted by Articles 32.1 and 33.2 of the Refugee Convention. And in carrying out their functions under the Act, Immigration Officers must have regard to the Convention.

Although the international obligations undertaken by New Zealand under the Convention are adopted by this legislation, the important questions of the extent to which international law will be looked to by New Zealand Courts in application of the legislation, are likely to turn upon other international covenants. That is because the Refugee Convention itself provides little guidance on the processes and standards in making determinations about refugee status. A refugee who is present in New Zealand without a permit under s4 of the Immigration Act 1987 is in New Zealand unlawfully. Once refugee status is granted, the Convention provides minimum standards, but before such status is confirmed, the Convention while it assumes there will be a process a process to “regularise” refugee status⁵ does not itself provide procedural or substantive guidance. Where such matters come to the Courts by way of judicial review therefore, the context of human rights in issue may lead to the invocation of more general international instruments.

³ Lord Lester, at 20-21

⁴ See *Puli’uvea v Removal Authority* [1996] 3 NZLR 54; *Rajan v Minister of Immigration* [1996] 3 NZLR 543.

⁵ Article 31 (2)

New Zealand was a founding member of the United Nations and has acceded to the major international conventions, including the Universal Declaration of Human Rights 1948, the International Covenant on Economic, Social, and Cultural Rights 1966, the International Covenant on Civil and Political Rights 1966 and its First Optional Protocol 1966 (the "International Bill of Rights"). Other instruments ratified include the Second Optional Protocol 1989, the Convention on Elimination of All Forms of Discrimination against Women 1979⁶, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Convention on the Elimination of All Forms of Racial Discrimination 1965 and the Convention on the Rights of the Child 1989.

Summaries of the sources of New Zealand's International Human Rights Law may be found in:

- Cartwright J, Bangalore 1998, pp.2-4.
- Law Commission, Report 34, *A New Zealand Guide to International Law and its Sources* (1996), Part 1.
- Palmer, at 8-16.
- Hoon, (1998 dissertation) at 5-7.
- Justice Bernard, 'Domestic Application of International Human Rights Norms as it Affects Women', 9th *Commonwealth Law Conference 1990*, 399 at 400.
- Legal Division, Commonwealth Secretariat, 'The Application of International Human Rights Standards in Domestic Law' (1992) 22 *VUWLR* 1 at 3-4.
- Hunt & Bedggood, in *Rights and Freedoms*, at pp.38-50.

Under the Westminster form of government, the Crown, or the Executive Branch of government, has the exclusive power to enter into treaties and thereby bind the State. Only the legislature can enact new laws.⁷ The provisions of an international treaty to which the State is a party do not form part of domestic law unless those provisions have been validly incorporated by statute.⁸ The result is that no private rights or obligations can be founded upon the terms of an un-incorporated treaty.⁹ Further, under domestic law,

⁶ The Optional Protocol to CEDAW was recently adopted by the UN. This will allow a complaints mechanism for women of ratifying States.

⁷ See Justice Lallah, 'The Domestic Application of International Human Rights Norms' (1991) 17 *Commonwealth Law Bulletin* 665 at 673, referring to the difficulty this raises in terms of implementation of international obligations. A further difficulty he notes is that treaty provisions are general in character and require detailed domestic provisions to implement them which will be dependent on the particular circumstances and traditions of each country (673).

⁸ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J; *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696 at 747, 760; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500).

⁹ *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 347 (PC).

statute prevails over treaty where there is any inconsistency between the two¹⁰.

Although there has been some debate on the issue,¹¹ I proceed on the basis that New Zealand, England and Australia, like most common law countries, have a dualist legal system. Although it has been said that the line between domestic and international law is becoming blurred in New Zealand,¹² it cannot be yet maintained that international law is “self-executing”: founding a direct cause of action in the courts.

The strict theory of dualism is however not supportable if it suggests that the Courts will not give practical effect to international covenants, particularly when they touch upon human rights, unless they are incorporated in domestic legislation.

In the English legal system, customary international law forms part of the domestic law, unless it is in conflict with an Act of Parliament¹³. “doctrine of incorporation” accommodates changes in the rules of international law in the domestic system. The principle is nothing new: Blackstone considered that customary international law is binding on all members of the international community, and that the “law of nations” in its broadest sense forms part of the common law.¹⁴ Although there is no direct authority, Hunt and Bedgood are of the opinion that the doctrine of incorporation applies in New Zealand and that a rule of customary international law forms part of New Zealand’s domestic law, even if the rule has not been adopted by Act of Parliament.¹⁵ Since the common law is derived from custom and is not limited to the custom of England¹⁶, that is no great step.

The New Zealand Bill of Rights Act, passed by Parliament ten years ago, is in part a restatement of principles recognised by the common law. It was enacted “to affirm, protect and promote human rights and fundamental freedoms in New Zealand” and “to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”. The Covenant on Civil and Political Rights was one of the covenants which grew out of the Universal

¹⁰ see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 229 per Richardson J

¹¹ Sir Geoffrey Palmer has argued that the dualist theory is incompatible with the obligations that New Zealand has undertaken and the principle of good faith which accompanies them, under Article 26, Vienna Convention on the Law of Treaties (Palmer, at 6, approving the heterodox analysis of Elkind and Shaw (summarised at pp.56-57 of Huscroft and Rishworth, *Rights and Freedoms*)).

¹² Hunt & Bedgood, in *Rights and Freedoms*, p.37, with international law have an increasingly pervasive influence at many levels.

¹³ *Trendex Trading Corporation v Central Bank of Nigeria* (1977) 1 QB 529 at 553-554 (CA) per Lord Denning; *JH Rayner* (HL), *supra*; *Mortensen v Peters* (1906) 8 F (JC) 93 (Scotland: HC of Justiciary); Brownlie, *Principles of International Law* (4th ed, 1990) at p.47; Oppenheim, *International Law* (1992) at pp.56-57.

¹⁴ William Blackstone, *Commentaries*, Vol 4, p.67. See also *Barbuit’s case* (1737) Forr 280; 25 ER 777 per Lord Talbot LC.

¹⁵ *Rights and Freedoms*, p.57.

¹⁶ As *Mabo* and *Te Ika Whenua* have reminded us, in application of a principle of law applied by the Privy Council last century.

Declaration of Human Rights, the fiftieth anniversary of which we celebrated two years ago.

It is worth recalling that these international statements were born of dreadful experiences. Nor can we be complacent about the performance of the common law in the domestic protection of human rights. Those of us old enough to have practised in the early 1970s can recall the deference paid by the courts to authority of all types. In England, to which we looked largely for our common law at the time, the distinguished public lawyer, Sir William Wade, described the “deep gloom” that settled on English administrative law in the middle of the twentieth century.¹⁷ That mood changed from the 1960s as the courts realised “how much had been lost and what damage had been done to the only defences against abuse of power which still remained”.¹⁸ The domestic and international antecedents of the New Zealand Bill of Rights Act, therefore, did not inspire complacency about the protection of fundamental rights and freedoms.

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

Behind the Act stand the international covenants, and further back still the great Eighteenth Century declarations of the rights of man which they echo. Arising from the constitutions adopted upon the philosophies expressed, and out of the international obligations undertaken through the United Nations and by regional groupings of nations, a substantial body of case law has developed. Not surprisingly, this case law has influenced the New Zealand courts in their approach to the New Zealand legislation. Human rights law is international.

Indeed by New Zealand's adherence to the Optional Protocol on Civil and Political rights, international scrutiny of our domestic observance of human rights is available. By the Optional Protocol, New Zealand's citizens who have exhausted their domestic legal remedies, may complain of breaches by the Government of its obligations under the Covenant. Cooke P in *Tavita v Minister of Immigration*¹⁹ suggested that since New Zealand's accession to the Optional Protocol “the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it.” This is something of an overstatement. Certainly for the purposes of legal aid, the Human Rights Committee is not part of the judicial structure of New Zealand.²⁰ But it is valid to remind us that the decisions of our courts are now taken upon an international stage.

¹⁷ HWR Wade and CF Forsyth, *Administrative Law*, Oxford, 1994, p 17.

¹⁸ *Ibid*, at 19.

¹⁹ [1994] 2 NZR 257 at 266.

²⁰ *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 at 22 (PC)

The assistance derived from international case-law is likely to receive fresh impetus from the English Human Rights Act 1998. Like the New Zealand statute, it is an ordinary Act of the United Kingdom Parliament. It is enacted to incorporate into the domestic law of the United Kingdom the rights and liberties guaranteed by the European Convention on Human Rights. I do not believe that the fact that the English legislation looks to the European Convention will affect the persuasiveness of decisions of the English courts taken under it. Traditionally, we have been more comfortable with English precedents than decisions of other common law jurisdictions operating under written constitutions. Indeed, I expect that the decisions of the European Court of Human Rights (already cited in a number of New Zealand decisions) are likely to become more influential in New Zealand through the decisions of the English courts.

By s.3 of the New Zealand Bill of Rights Act, the 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”.

The scope of the English Act is similar. The language of the provision suggests that the Bill of Rights Act applies to actions taken by the judiciary. It may well be that section 3 requires the Judges to develop the common law in conformity with the New Zealand Bill of Rights Act. The point has not yet arisen directly for determination in New Zealand (although it was assumed by Hardie Boys J in *Baigent's case*²¹ and by me in *Lange v Atkinson*²²). If so, through a “cascading”²³ effect, the Act will come to influence private as well as public law. That is a conclusion reached extra-judicially by Lord Cooke of Thorndon.²⁴ Similarly, Lord Irvine of Lairg, the Lord Chancellor of England, has no doubts that the English Human Rights Act 1998 has the effect of requiring the Courts to develop the common law in conformity with the Act:

“Clause 6 makes it clear that “public authority” includes a court and a tribunal which exercises functions in relation to legal proceedings. That inclusion, as this audience will recognise, does more than asking the courts to interpret legislation compatibly with the [European Convention on Human Rights]. It imposes on them a duty to act compatibly with the Convention.

²¹ *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 at 702

²² [1998] 3 NZLR 424; and see the discussion by Rishworth “Bill of Rights, Human Rights” [1998] New Zealand Law Review 585 at 605-607; and in Leigh “Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth” (1999) 48 ICLQ 57 at 70-71.

²³ A concept used by Lord Justice Sedley in *Freedom, Law and Justice*, London 1999, at p 23, and which for the reasons he gives I consider is to be preferred to the “horizontal” effect described by other commentators.

²⁴ Cooke “A Sketch from the Blue Train” [1994] NZLJ 10 at 11.

We believe it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention. They will be under this duty not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals.”²⁵

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

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

If the limitation cannot be justified, there is an inconsistency with the Bill of Rights, but the statutory provision because of s.4 still stands and must be given effect.²⁶ Some commentators have seen in discussions within the cases decided by the Court of Appeal an indication that the Courts will not assess whether a limitation is justifiable under section 5, but instead will simply apply it under section 4.²⁷ In a recent Court of Appeal decision, the Court indicated preparedness to examine the justifiability of a limitation before applying it under s 4:

“Ultimately whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all of the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise”.²⁸

The New Zealand Court of Appeal has indicated that on an appropriate occasion it may be necessary for it to declare that a limitation cannot be demonstrably justified in a free and democratic society.²⁹ In this, the Court has assumed a power specifically conferred upon the English Courts as a significant remedy under the Human Rights Act 1998. Such a declaration was thought in *Moonen* to have value “should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum”.

I don’t speak here of the remedies the Courts in New Zealand have fashioned under the New Zealand Bill of Rights Act. But in developing them, the New Zealand Court of Appeal has invoked the decisions of the constitutional courts of other jurisdictions, as well as the growing body of

²⁵ Lord Irvine of Lairg, “The Impact of a Bill of Rights on English Law”, Address to the 3rd Clifford Chance Conference, 28 November 1997.

²⁶ *GA Moonen v Film and Literature Board of Review* (CA42/99, 17 December 1999).

²⁷ See, for example, Anna Adams “Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal” [1996] New Zealand Law Review 368.

²⁸ *Moonen*, at p 12.

²⁹ Cooke P had earlier expressed some doubts as to whether such a remedy was available in New Zealand: *Temese v Police* (1992) 9 CRNZ 425 at 427.

Caselaw generated by international bodies such as the European Court of Justice.

Section 19 of the New Zealand Bill of Rights Act confers rights against discrimination on all the grounds set out in the Human Rights Act 1993. That considerably expands the ambit of the Bill of Rights Act in matters of discrimination and because the Human Rights Act recognises and protects economic, social and cultural rights. In *Northern Regional Authority v Human Rights Commission*³⁰, Cartwright J held that s19 prohibited both direct and indirect discrimination. Indirect discrimination, a concept difficult to define at the margins, is action not apparently discriminatory, which is discriminatory in effect. In that case, North Health had denied approvals to doctors who had qualified at overseas medical schools. That was held to be indirect discrimination on the grounds of national origin, since the excluded category were over-whelmingly not of New Zealand birth.

Where I think the Bill of Rights Act will make its greatest impact is in the standards by which the Court judges the lawfulness of official and private conduct.

Where official conduct is challenged by judicial review, the most difficult cases do not arise where the claimed illegality is manifest because the power purportedly exercised falls outside the four corners of the statute. That question may raise difficult points of statutory interpretation, but ultimately it is a question of the statutory meaning. The difficulties rather arise where the claimed unlawfulness is that the decision-maker has struck the wrong balance among competing interests or where the decision is one of degree (as in challenges based on standards such as reasonableness or proportionality). The Courts are largely adrift in such challenges. They have to seek answers in the statute, in the international context where applicable,³¹ and in enduring community values. Inevitably, the result has been deference to the decision-maker and a lack of clarity and persuasiveness in judicial reasoning where, as Professor Taggart has put it, judgments are too often "characterised by assertions of unreasonableness or unfairness, and little else". Taggart sees the Bill of Rights methodology as "a more focused, consistent and transparent methodology than that prevalent in administrative law adjudication, where 'rights' issues can be swept over in conclusionary findings that the exercise of the power was or was not *Wednesbury* unreasonable ... As Professor Jowell and Lord Lester demonstrated a decade ago,³² the concept of unreasonableness in administrative law has obscured the underlying role of protecting rights."³³

Sir Anthony Mason goes straight to the heart of the matter. He argues that a convention provision, like other legitimate material, whatever it may be, is

³⁰ [1998] 2 NZLR 218

³¹ See *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

³² Jowell and Lester, "Beyond *Wednesbury*": Substantive Principles of Administrative Law" [1987] Public Law 368.

³³ Michael Taggart, "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" [1998] Public Law 266.

something to be taken into account when formulating common law principles.³⁴ It seems blindingly obvious. And makes all this brow furrowing about the theory upon which such material is to be received seem beside the point.

The Bill of Rights Act therefore provides content to the standards by which the supervisory jurisdiction of the Courts is to be exercised and gives the Judges a framework for reasons for their judgments that executive action is or is not within the boundaries of proper administrative discretion. But it does more than that. Where human rights are engaged, they can be expected to prevail unless the statute under which the authority is exercised requires a result inconsistent with the human right or unless it is limited by another human right. This development is a logical extension of the principle that Parliament is not to be presumed to intend that discretionary powers created by it will be exercised inconsistently with its international obligations.³⁵ It conforms with the view expressed by Lord Justice Thorpe that, where fundamental human rights are engaged, the margin of appreciation permitted to the decision maker will be correspondingly reduced.³⁶ In the Bill of Rights Act Parliament has made explicit an approach the common law had already come to through experience. Sections 3 and 6 provide, as Taggart suggests, a constitutional “trump”.

The New Zealand Bill of Rights Act 1990 provides then a measure against which executive action can be readily tested. But the rights based approach it requires of the Courts has profound implications for all judicial decision-making, in private law as well as in public law. This is not a theme I want to develop here and I do not suggest that remedies will be granted against private litigants directly, but it would be naïve to think that this Act will not ultimately come to exercise a huge influence on the interpretation of all statutes and the development of the common law. As Cooke P remarked in *R v Goodwin*:

“The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance.”³⁷

I do not underestimate the challenges that the Bill of Rights Act will bring to the Courts when its application moves beyond the criminal law to which it has till now been mostly confined. Human rights adjustments may be complex. Where there are a range of valid outcomes, the case will not always be suitable for judicial determination. But where a case is properly brought before the Courts, they cannot evade decision simply because it is difficult or politically contentious. As will often be the case in immigration and refugee status determinations.

³⁴ At p 24.

³⁵ As to which, see *Tavita v Minister of Immigration; Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).

³⁶ *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 564-565 (CA).

³⁷ [1993] 2 NZLR 153 at 156.

The extent to which the New Zealand Bill of Rights Act applies to those seeking refugee status is not yet settled³⁸.

But the fundamental rights and freedoms affirmed by the United Nations Conventions to which New Zealand is a party, in part represent values which have been adopted by the common law. As such, many ante-date the Conventions which repeat them. In those circumstances, reluctance³⁹ to look to international law in the absence of legislative incorporation of international covenants seems unnecessarily cautious. Professor Rosalyn Higgins QC (now Judge of the International Court of Justice) has explained why:

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

... An un-incorporated treaty can *always* be looked at, so long as rights of individuals are not founded upon it alone and so long as it is not suggested that it takes away rights under common law (Higgins, 'The Relationship Between International and Regional Human Rights Norms and Domestic Law' (1992) 18 Commonwealth Law Bulletin 1268 at 1273-1274).

This view may be gaining ascendancy in the United Kingdom, at least. In *R v Secretary of State for the Home Department, ex p McQuillan*⁴⁰ Sedley J stated:

Once it is accepted that the standards articulated in the convention are standards which both march with those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them.

In addition, the English Court of Appeal has accepted in the judicial review of administrative action, in judging whether the decision-maker has exceeded his margin of appreciation, the human rights context is important:

... the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable⁴¹

In Australia in *Minister for Immigration and Ethnic Affairs v Teoh*⁴² the High Court of Australia treated ratification of the International Convention on the Rights of the Child as a statement giving rise to a legitimate expectation that

³⁸ *Callaghan v Superintendent of Mt Eden Prison* Auckland M648/91, per Temm J, judgment delivered 22 July 1991: *Poon v Commissioner of Police* [2000] NZAR 69
³⁹ JH Rayner (*Mincing Lance*) Ltd v Department of Trade and Industry [1990] 2 AC 418: *R v Home Secretary v Brind* [1991] 1 AC 696
⁴⁰ [1995] 4 All ER 400 at 422
⁴¹ (*R v Ministry of Defence, ex p Smith* [1996] QB 517 at 564-565 (CA) per Thorpe LJ).
⁴² (1995) 183 CLR 273 (HCA)

the Australian Government would act in accordance with that Convention. There are some conceptual difficulties with this development. Whether it is something of a dead end or whether it will be a springboard for further application of international instruments, remains to be seen. In New Zealand the Court of Appeal has the matter under consideration⁴³.

In New Zealand since the adoption of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, much of the perceived difficulties in application of international norms appear to have evaporated in the area of human rights.

It has been said that the New Zealand Bill of Rights Act 1990 has "internationalised" our right jurisprudence as well as investing it with greater moral content⁴⁴. In *R v Butcher*⁴⁵, Cooke P explained the adoption of a *prima facie* exclusion rule for evidence obtained in breach of the Act as lying not in "judicial discretion but [in] the increasing international recognition of basic human rights"⁴⁶.

But the experience in the United Kingdom and Australia suggests, the internationalisation of rights in our common law jurisdiction may well have occurred in any event. It is now standard practice for New Zealand Courts to inform their decisions by reference to the authorities of international bodies and the decisions of national courts interpreting constitutional documents relating to human rights. These include the European Court of Human Rights, the United Nations Human Rights Committee, as well as the decisions of constitutional courts such as the United States Supreme Court and the Canadian Supreme Court.

In the area of human rights we can expect the consideration of international and comparative material to increase. The international conventions are a source of domestic law too.

The extent to which the New Zealand Bill of Rights Act and the Human Rights Act and the international covenants upon which they draw will impact upon the application of the Immigration Act 1987 remains a question for the future. Both the conventions reference to a process for regularising the position of those claiming refugee status and s140(4), with its reference to right to counsel, suggest that a process which complies with s27 and with the International Covenant on Civil and Political Rights, is contemplated. As for the standards, the international register increasingly provides the framework for the interpretation of the legislation and development of the common law.

⁴³ On appeal from the decision of Fisher J in *E v Attorney-General* M1884-SW/99 Auckland Registry, judgment delivered 29 November 1999

⁴⁴ Joseph: The New Zealand Constitution p.170

⁴⁵ [1992] 2 NZLR 257

⁴⁶ At p.267
