Baigent and International Human Rights

Sara M Rowan

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ABBREVIATIONS

Bill of Rights: The New Zealand Bill of Rights Act 1990.

CERD:	International Convention on the Elimination of All Forms of Racial Discrimination.
CYPFA:	Children, Young Persons, and Their Families Act 1989.
ECA:	Employment Contracts Act 1991.
ECHR:	European Convention for the Protection of Human Rights and Fundamental Freedoms.
ICCPR:	International Covenant on Civil and Political Rights.
ILO:	International Labour Organisation.

INTRODUCTION

> *The human rights scene in New Zealand seethes with activity. International instruments, including but not confined to those which the state has ratified, influence the interpretation and development of the domestic law.*[1]

The New Zealand Bill of Rights Act (Bill of Rights) enacted in 1990 to affirm, protect and promote human rights and affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR), was not entrenched by Parliament and contained no remedies section. Despite this status the courts have embraced the Bill of Rights, establishing in *Simpson v Attorney-General (Baigent)*[2] that the judiciary has a general remedial jurisdiction under the Bill of Rights. Prior to this decision, the courts had established the specific remedy of "exclusion of evidence" for the proven breach of the criminal procedural rights under the Bill of Rights. *Baigent* is significant in that it opens the way for civil actions to be brought under the Bill of Rights, with the Court of Appeal showing that it is willing to give remedies that are more appropriate to the civil law such as compensation.

Baigent is a controversial decision and has generated a heated academic debate. The main concern of those who oppose the decision is that in creating a new public law cause of action and establishing a general remedial jurisdiction under the Bill of Rights, the Court of Appeal breached section 4 of the Bill of Rights and assumed too much power. The aim of this paper is to add to the debate surrounding *Baigent*. In my examination and analysis of this decision the focus is on the international human rights reasoning behind the decision.

The Court of Appeal referred to the ICCPR in *Baigent* first, in deciding that it had a remedial jurisdiction under the Bill of Rights and second, in determining that the public law cause of action under the Bill of Rights lay directly against the Crown and was not an action in tort

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1 Sir R Cooke, "A Sketch from the Blue Train - Non-discrimination and freedom of expression: the New Zealand contribution" [1994] NZLJ 10 at 10.

2 [1994] 3 NZLR 667; 1 HRNZ 42, hereinafter *Baigent*.

where the Crown was vicariously liable. In determining the legitimacy of this reasoning, this paper first addresses the question of what is the current approach of the New Zealand courts towards international instruments? This question is answered by examining the response of the courts to the issue of whether the terms of international instruments should be mandatory considerations when administrative decisions are made and further, by examining the approach of the courts when they are asked to interpret statutes which mirror the provisions of international instruments and/or there is a reference to a human rights instrument in the statute. It is argued that the traditional approach of the courts towards international instruments, which asserts that international instruments must be incorporated by domestic legislation before they can be given domestic legal effect, is being challenged by an emerging legal culture supportive of the use of international human rights instruments in the development of the domestic law. Seen in the context of this emerging legal culture, the reference to the ICCPR, by the Court of Appeal in *Baigent* can be argued to be legitimate.

Having established that there is an emerging legal culture in New Zealand supporting the use of international human rights instruments in the development of the domestic law, my focus is widened to examine whether other common law jurisdictions namely Australia, England and Canada, are responding in a similar way to international human rights instruments. If it can be established that other common law jurisdictions are giving international instruments increased recognition in domestic law, this will endorse the emerging legal culture in New Zealand surrounding international instruments thereby reinforcing the Court of Appeal's use of the ICCPR in *Baigent*.

The final part of this paper discusses the influencing factors behind this emerging legal culture. It is argued that in understanding the influencing factors behind this legal culture, we are able to get a better understanding of the legal culture itself and of why the judiciary are deciding human rights decisions the way they are. The influences

discussed include the First Optional Protocol to the ICCPR and the Human Rights Committee, the Judicial Colloquia on international human rights issues, and the persistent arguments of certain enlightened New Zealand lawyers.

The argument of this paper is that *Baigent* cannot be fully understood without reference to the underlying legal culture which is challenging the courts to recognise and give effect to international human rights instruments in domestic law. Seen in the context of this legal culture, the Court of Appeal's reference to the ICCPR in *Baigent*, is be argued to be legitimate.

1. *Simpson v Attorney-General [Baigent's case].*

1.1 The Facts and Proceedings in the Courts

On 18 October 1991, at about 7.30 am, a party of New Zealand police officers under a search warrant with a mistaken address, entered the home of Mrs Baigent in Lower Hutt and made a search. Mrs Baigent was not home at the time however the police continued their search despite being told by her son, a neighbour and her daughter, a barrister who talked to the police by phone, that they had the wrong address. In the plaintiff's statement of claim four causes of action were pleaded which can be summarised as - negligence in procuring the search warrant; trespass by entering or remaining on the plaintiff's land without lawful justification; abuse of process/misfeasance in a public office in executing the warrant; and violation of section 21 New Zealand Bill of Rights Act 1990, by conducting an unreasonable search. A fifth cause of action of, trespass to goods, was added without opposition, to the statement of claim during the appeal hearing before the Court of Appeal.

The Attorney-General, who was sued in respect of the police conduct, moved for an order striking out the whole of the plaintiff's statement of claim (Mrs Baigent died after the issue of proceedings but her estate sought to continue the claim). He argued that the provisions of sections 38 and 39 Police Act 1958, sections 26 and 27 Crimes Act 1961 and section 6(5) Crown Proceedings Act 1950 constituted a complete bar to all the plaintiff's causes of action. Master Williams QC accepted this argument and ordered the plaintiff's claims to be struck out.[3] A review of this decision was struck out by Grieg J in the High Court[4], however he did grant leave to appeal to the Court of Appeal. In the Court of Appeal it was argued for the appellants that all causes of action should not have been struck out. The actions in tort were pleaded as tenable despite the statutory immunity provisions in the Police Act, the Crimes Act and the Crown Proceedings Act. It was also argued that the Bill of

[3] *Baigent v Attorney General* [1990-92] 3 NZBORR 400.
[4] *Baigent v Attorney General* unreported, High Court, Wellington, 15 July 1993, CP850/91, Grieg J.

Rights created its own cause of action in public law, independent of the other tortious actions and so a cause of action for the breach of section 21 of the Bill of Rights arose in this case.

1.2 The Court of Appeal's Decision

A five-member Court of Appeal (Cooke P, Casey, Hardie Boys, McKay JJ and Gault J dissenting) allowed the appeal, reinstating not only the causes of action alleging trespass and abuse of process/misfeasance in public office but also the cause of action based on the alleged breach of section 21 of the Bill of Rights. In allowing the cause of action under section 21 of the Bill of Rights, the majority of the court held that it was not a private law action in tort where the Crown was vicariously liable but a public law action directly against the Crown.[5] The effect of this decision was two-fold. First, the decision widened the court's remedial jurisdiction under the Bill of Rights to include compensation for a proven breach of an affirmed right. Second, by establishing the cause of action as one in public law not an action in tort, the immunity provided by section 6(5) of the Crown Proceedings Act 1950 did not apply to the action.

1.3 The Reasoning of the Court of Appeal

In deciding that there was a cause of action under the Bill of Rights for an alleged breach of an affirmed right, the Court of Appeal first had to establish that even though there was no remedies section in the Bill of Rights, the Court still had a remedial jurisdiction under the Bill of Rights. The Court of Appeal in establishing its remedial jurisdiction placed significant emphasis on what it interpreted to be the purpose of the Bill of Rights as set out in the Long Title. The Long Title to the Bill of Rights provides that it 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.

The Court of Appeal reasoned that to find that there was no remedy

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[5] *Baigent* (supra n 2) at 675;56(Cooke P), 690;72(Casey J), 697;80(Hardie Boys J), 716;102(McKay J).

against the Crown for the breach of a right would be incompatible with both but particularly the second purpose of the Long Title, which affirms New Zealand's commitment to the ICCPR.[6] Article 2(3) of the ICCPR provides that:

> 3.Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto 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;

The Court of Appeal reasoned that as article 2(3) of the ICCPR provides that each State Party is obliged to provide an effective remedy for a breach of a Covenant right, Parliament intended, by enacting the Bill of Rights which affirms the ICCPR (including article 2(3)), that remedies would also be provided in the domestic law for a breach of the Bill of Rights. Casey J gives the most succinct reasoning on this point. He states:[7]

> I do not regard the absence of a remedies provision in the Act as an impediment to the Court's ability to 'develop the possibilities of judicial remedy' as envisaged in art 3(b). The rights and freedoms affirmed are fundamental to a civilised society and justify a liberal purposive interpretation of the Act, even though it has not been constitutionally entrenched and has the same status as ordinary legislation. Its purpose being the affirmation of New Zealand's commitment to the Covenant (including art 3 (b)), it would be wrong to conclude that Parliament did not intend there to be any remedy for those whose rights have been infringed ... I do not accept that Parliament intended it to be what most would regard as no more than legislative window-dressing, of no practical consequence, in the absence of appropriate remedies for those whose rights and freedoms have been violated.

The Court of Appeal in arguing that it had a remedial jurisdiction under the Bill of Rights also placed reliance on the fact that New Zealand signed the First Optional Protocol to the ICCPR on 26 May 1989, which allows individuals to obtain a remedy from the United Nations Human Rights Committee for a breach of their Covenant rights. It was reasoned that as the Bill of Rights affirms the ICCPR and reflects Covenant rights, New Zealand citizens ought not have to resort

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6 *ibid.*, at 676;57(Cooke P), 691;73(Casey J), 699;82(Hardie Boys J),718;104(McKay J)
7 *ibid.*, at 691;73-4.

to the Human Rights Committee or any other international tribunal to obtain an adequate remedy for the breach of those rights, they should be able to obtain relief from their own courts.[8]

A further reason why the Court of Appeal held that it had a remedial jurisdiction under the Bill of Rights, followed from their purposive approach to the interpretation of the Bill of Rights. Cooke P emphasised the importance of a straightforward and generous approach to the provisions of the Bill of Rights which ultimately required the courts to grant remedies for the infringement of rights.[9] This argument was reinforced by Cooke P's interpretation of section 3 of the Act. He stated that as section 3 makes it clear that the Bill of Rights applies to the actions of the judiciary, it follows from this that the Bill of Rights is binding on the courts and therefore the courts would fail in their duty if they refused to give effective remedies to individuals whose rights had been infringed.[10] Cooke P also issued a warning against Parliament and the Courts only giving lip-service to human rights.[11] Hardie Boys J also stressed the rights-centered approach of the courts towards the Bill of Rights and how this required the courts to provided an appropriate remedy to a person whose rights had been infringed whether that be a remedy of exclusion of evidence or compensation. The essence of his reasoning on this ground is contained in the following statement:[12]

> The New Zealand Bill of Rights Act, if it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of Government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed.

The fact that other international jurisdictions have shown that they are willing to give remedies for the breach of fundamental human rights provided a further reason why the Court of Appeal held that it had a

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8 *ibid.*, at 691;73-4(Casey J), 700;83(Hardie Boys J).
9 *ibid.*, at 676;57.
10 *ibid.*, at 676;57.
11 *ibid.*, at 676;58.
12 *ibid.*, at 702;86.

remedial jurisdiction under the Bill of Rights.[13] Hardie Boys J focused on this ground of reasoning, citing authority from England, India, Ireland and the United States in support. The jurisprudence of Ireland was given special emphasis as the written constitution guaranteeing fundamental human rights in Ireland, like the Bill of Rights, does not contain a remedies provision. The absence of a remedies clause has not stopped the Irish courts from developing remedies for infringements. Hardie Boys J used the similarity between the Irish Constitution and the Bill of Rights to bolster the argument why it is legitimate for the New Zealand courts to provide remedies for a breach of the Bill of Rights, even though there is no remedies provision in the Bill of Rights.[14]

The Court of Appeal having concluded that it had a remedial jurisdiction under the Bill of Rights, went on to classify the remedy as one in public law not tort. The Court gave two reasons for this conclusion. The main reason was that other international jurisdictions had classified similar causes of action for breaches of fundamental human rights as public law actions, where the state was primarily liable. The leading case cited on this point was the Privy Council decision *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*[15], with authority from India and Ireland also being cited.[16] The second reason given by the Court of Appeal was more subtle. Casey and McKay JJ both reasoned that a public law remedy seemed more appropriate considering the focus in the Bill of Rights on public responsibility and also because the Bill of Rights affirmed New Zealand's commitment to the ICCPR, where under article 3(2) it is the State itself which undertakes to ensure that any person whose rights or freedoms are violated has an effective remedy.[17]

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13 *ibid.*, at 677;58-9(Cooke P), 692;74-5(Casey J), 700-02;83-86(Hardie Boys J).
14 *ibid.*, at 701;85.
15 [1979] AC 385.
16 *Baigent* (supra n 2) at 677;58-9(Cooke P), 692;74-5(Casey J), 700-2;83-86(Hardie Boys J), 718;104(McKay J).
17 *ibid.*, at 691;73-4(Casey J), 718;104(McKay J).

1.4 The Debate Surrounding *Baigent*

The wisdom of the Court of Appeal's decision in *Baigent* has been the subject of a very heated academic debate. Four strands of argument are apparent in this debate, two of which challenge the decision with the other two offering support. The first strand of argument which challenges the decision is advocated by Dr J Allan.[18] He argues that the Court of Appeal by creating a separate and distinct cause of action for the breach of an affirmed right under the Bill of Rights, used the Bill of Rights to avoid the limitation on the vicarious liability of the Crown in tort contained in section 6 of the Crown Proceedings Act 1950, thereby overriding section 4 of the Bill of Rights. He stresses the non-entrenched status of the Bill of Rights, essentially seeing the issue at stake in *Baigent* in terms of the allocation of power between parliament and the judiciary. It is his argument that the Bill of Rights does not give the judiciary a remedial power and certainly does not allow them to override other statutes such as the Crown Proceedings Act to assume that remedial power.[19]

The second strand of argument which challenges the Court of Appeal's decision is advocated by Professor J A Smillie.[20] He attacks the decision by arguing that the legislative history of the Bill of Rights does not support the view that Parliament intended to confer new enforcement powers on the courts under the Bill of Rights. Like Dr J Allan he stresses the ordinary status of the Bill of Rights, arguing that the ultimate sanction for the violation of the Bill of Rights should be political rather than legal.[21] Underlying Professor Smillie's criticism of *Baigent* is a concern for the fate of tortious liability in light of this new cause of action under the Bill of Rights. If the new cause of action under the Bill of Rights is seen as a complete substitute for the tortious liability of the Crown and its individual officers, then Professor Smillie

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18 J Allan, "Speaking with the Tongues of Angels: The Bill of Rights, *Simpson* and the Court of Appeal" (1994) 1 BORB 2.

19 *ibid.*, at 6.

20 J A Smillie, "The Allure of 'Rights Talk': *Baigent's case* in the Court of Appeal" (1994) 8(2) OLR 188.

21 *ibid.*, at 196.

fears the unique and unfettered jurisdiction of the Courts in respect of such an action, it being subject to none of the common law and statutory limitations that confine the power of the court in respect of both the incidence of tort liability and the heads of actionable damage.[22]

In seeking to defend the decision and dismiss the arguments of its critics, Dr R Harrison raises a third strand of argument in this debate.[23] In seeing the central issue in *Baigent* as the extent and nature of the Court's remedial jurisdiction under the Bill of Rights, Dr Harrison dismisses Dr Allan's argument which suggests that the Court of Appeal's central concern in its decision was how to avoid the statutory immunities of the Crown Proceedings Act 1950. Dr Harrison argues that the immunity from suit under the Crown Proceedings Act was not an issue for the Court once they had accepted the argument that the basis of liability in terms of the Crown Proceedings Act was section 3(2)(c) which is not concerned with tortious liability.[24] Dr Harrison also took issue with Dr AlIan's assertion, that the effect of the Court of Appeal's decision in *Baigent* was to entrench the Bill of Rights. Dr Harrison argues that in line with conventional Diceyan theory, Parliament can overturn or modify the result in *Baigent* at any time thus Dr Allan's argument was "seriously flawed".[25] Responding to the argument that the legislative history of the Bill of Rights denied the courts a remedial jurisdiction, Dr Harrison endorsed the approach of the Court of Appeal which preferred to put this uncertain legislative historical material aside, focusing instead on the actual wording of the Bill of Rights, particularly section 3 and the Long Title.[26]

The fourth strand of argument which can be interpreted to be supportive of the decision, concerns the decision's international human rights element.[27] J Dawson argues that as well as vindicating breaches of the Bill of Rights, the *Baigent* remedy has the purpose of

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22 *ibid.*, at 200.

23 R Harrison, "He That Is Without Sophistry, Let Him Cast the First Epithet" (1995) 2 BORB 18.

24 *ibid.*, at 21.

25 *ibid.*, at 20.

26 R Harrison, "A Brief Rejoinder to a Reply to Dr James Allan" (1995) 3 BORB 43 at 45

27 J Dawson, "*Simpson* Liability" (1994) 1 BORB 8.

affirming and promoting New Zealand's adherence to international human rights law, particularly the ICCPR. He poses the question of how can New Zealand sensibly purport to accede to the Optional Protocol and the jurisdiction of the Human Rights Committee but nevertheless resist the application of international human rights principles which require effective domestic remedies to be available? He goes on to suggest that perhaps the Court of Appeal through the *Baigent* decision is forcing us to recognise the full significance of our own desire to comply with international human rights norms and the consequent need for imaginative thinking about the sources of our law.[28]

This debate concerning the wisdom of the Court of Appeal's decision in *Baigent* shows that the decision has by no means been accepted by all members of the legal profession. The unreconcilable views of Dr J Allan and Dr R Harrison are based on totally different conceptions of what the role of the judiciary is with respect to the interpretation of the Bill of Rights. Dr Allan advocates that the Bill of Rights gives the judiciary no new powers, with Dr Harrison supporting a rights-centered approach to interpretation of the Bill of Rights, under which the judiciary have a duty to provide remedies for breaches of the Bill of Rights. The strand of argument which has not received any significant attention is that of J Dawson. International human rights considerations were a major part of the reasoning behind the decision therefore in any analysis of the wisdom of the decision these considerations must be addressed.

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[28] *ibid.*, at 9.

2. An Analysis of *Baigent* - The International Element.

2.1 The Approach of the Courts Towards International Treaties

International treaties which set down rules and norms of international law imposing binding obligations on those States which ratify them, are one source of international law.[29] The extent to which international treaties are also a source of domestic law is 'substantially conditioned' on whether the legal system of a State is monist or dualist.[30] A monist legal system adheres to the view that there is only one system of law, with international law being an element within it, alongside the domestic law of the State. International treaties in a monist legal system are self-executing and so directly enforceable in the domestic courts. A dualist legal system views international and domestic law as separate, with international law being inferior to domestic law. The common law legal system is dualist and as such the traditional approach of the common law courts towards international treaties and covenants is that they must be incorporated by domestic legislation before they can be given domestic legal effect by the courts.[31] Despite this traditional approach of the common law courts towards international treaties, a principle of construction exists whereby a statute which is ambiguous will be interpreted in accordance with international treaties, there being a presumption that the legislature does not intend to legislate in breach of international law or a specific treaty obligation.[32] The courts have also held international treaties to be aids to statutory interpretation where a statute itself implements a

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29 For general commentary on the status of international treaties in domestic law see P A Joseph, *Constitutional and Administrative Law in New Zealand* (1993); S A de Smith & R Brazier, *Constitutional & Administrative Law* (6th ed 1989); P H Lane, *A Manuel of Australian Constitutional Law* (5th ed 1991); K W Ryan (ed), *International Law in Australia,* (2nd ed 1984); H M Kindred (ed), *International Law Chiefly as Interpreted &Applied in Canada* (5th ed 1993).

30 R Higgins, *Problems & Process - International Law and How We Use It,* (1994) 205.

31 see *The Parlement Belge* (1879) 4 P.D. 129; *Walker v Baird* [1892] AC 491; *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] AC 326; *Blackburn v Attorney-General* [1971] 2 All ER 1380; *Bradley v The Commonwealth* (1973) 128 CLR 557; *Ashby v Minister of Immigration* [1981] 1 NZLR 222.

32 *Salomon v Commissioner of Customs & Excise* [1967] 2 QB 116; *R v Secretary of State for the Home Department, ex p Bhajan Singh* [1976] QB 198; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751; *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188 at 217.

treaty[33] or where the treaty represents a legislative policy apparent in the statute.[34]

It has been argued that the way that the courts approach the question of the relationship between international treaties and domestic law is also conditioned by 'legal culture'.[35] Legal culture describes the attitudes and responses of both judges and lawyers towards international law and its relationship to domestic law. In a legal culture where both judges and lawyers are familiar with international law, it will be referred to on a routine basis and its introduction into litigation will attract no special comment or interest. However another legal culture exists where a judge and lawyer have not studied and are therefore unfamiliar with international law. In this legal culture, international law will be treated as some exotic branch of the law to be avoided if at all possible. Although it is to be expected that a dualist legal system will encourage the latter legal culture, this is not necessarily so.

2.2 *Baigent* and the ICCPR

In *Baigent* the Court of Appeal refer to the ICCPR for two reasons. First, to reinforce their argument that they have a remedial jurisdiction under the Bill of Rights, and second to reason that the cause of action under the Bill of Rights was a public law action directly against the State, not one in tort. The Court of Appeal therefore used the ICCPR not simply as an aid to interpreting the Bill of Rights but effectively imported article 3(2), the remedies provision of the ICCPR, into the Bill of Rights. In a common law legal system which adheres to the dualist view of the law, this use of the ICCPR is questionable and so the wisdom of the Court of Appeal's decision in *Baigent* is placed in doubt. However, as it can be argued that the legal culture also determines how the legal profession will respond to the relationship between international law and the domestic law, an investigation of this factor may show that the Court of Appeal's use of the Convention is

33 *King-Ansell v Police* [1979] 2 NZLR 531; *Fothergill v Monarch Airlines* [1981] AC 251.
34 *Van-Gorkom v Attorney-General* [1977] 1 NZLR 535.
35 R Higgins, *Problems &Process - International Law and How We Use It* (1994) 206.

legitimate, in that it reflects the current legal culture surrounding international instruments and the domestic law.

2.3 The New Zealand Courts and International Instruments

The most common issue which has arisen in New Zealand and other common law courts in relation to the effect of international instruments on domestic law, is whether their terms should be mandatory considerations when administrative decisions are made. The response of the courts to this issue will help determine the status of international instruments in domestic law and be a useful indicator of the legal culture which surrounds them. In *Ashby v Minister of Immigration*[36] the New Zealand Court of Appeal firmly endorsed the traditional approach of the courts towards international instruments. However the 1993 decision of Court of Appeal, *Tavita v Minister of Immigration*[37], has been argued to have "severely eroded" the *Ashby* principle and thus the traditional approach towards international treaties.[38] In order to appreciate the change of approach that *Tavita* represents and to analyse what this in turn says about the legal culture, *Ashby* must first be examined.

Ashby v Minister of Immigration

Ashby arose because of opposition to the decision of the Minister of Immigration under section 14 of the Immigration Act 1964, to issue temporary entry permits to the Springbok Rugby Team so that they could tour New Zealand in 1981. The appellants raised two arguments to this decision. First, they argued that because of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (CERD) the Minister had no power or jurisdiction to grant the entry permits to the team. Second, they argued that as the existence and terms of the CERD were relevant to the exercise of the Minister's discretion he was bound to take them into consideration.

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36 [1981] 1 NZLR 222, hereinafter *Ashby*.

37 [1994] 2 NZLR 257, hereinafter *Tavita*.

38 J B Elkind, "*Ashby v Minister of Immigration: Overruled?* " [1994] NZLJ 95 at 120.

With regard to the first argument, the Court of Appeal adhered to the traditional approach of the courts towards the effect of international instruments on domestic law, holding that the CERD was not part of New Zealand law and consequently it could not override the Immigration Act by depriving the Minister of authority to grant entry permits to the Springbok.[39] Richardson J while acknowledging the dicta of Scarman LJ in *Ahmad v Inner London Education Authority*[40], that courts should pay very serious regard to international obligations and interpret legislation and common law principles consistently with them, added the caveat that where domestic legislation is clear and unambiguous its terms must be given effect even if this means that New Zealand's international obligations will be ignored. In concluding that the language of s 14(1) of the Immigration Act was "clear and unambiguous" Richardson J refused to hold that the Minister's discretion was fettered by the CERD.[41]

Responding to the appellants second argument, that the Minister was bound in law to give specific consideration to the existence and terms of the CERD in exercising his statutory discretion, the Court of Appeal applied the principle established in *CREEDNZ Inc v Governor General*[42] that:[43]

> it is only when a statute expressly or by implication identifies a consideration as one to which regard must be had that the Courts can interfere for failure to take it into account. The mere fact that the consideration is one that could properly or reasonably be taken into account is not enough.

In concluding that immigration policy is linked to foreign policy and can be a "sensitive and often controversial political issue" the Court of Appeal decided that the CERD was not a mandatory relevant consideration to the Minister's discretionary decision.[44] Despite reached this decision Cooke and Somers JJ were willing to accept that:[45]

> even in statutes concerned with immigration and policy in that regard ... a certain factor might be of such overwhelming or manifest importance that the

39 *Ashby* (supra n 36) at 224 (Cooke J).
40 [1978] QB 36 at 48.
41 *Ashby* (supra n 36) at 229.
42 [1981] 1 NZLR 172.
43 *Ashby* (supra n 36) at 225.
44 *ibid.*, at 226(Cooke P).
45 *ibid.*, at 226(Cooke P), 233(Somers J).

> Courts might hold that Parliament could not possibly have meant to allow it to be ignored. Such a situation would shade into the area where no reasonable Minister could overlook a certain consideration or reach a certain result.

This obiter comment of Cooke J, affirmed by Somers J, qualifies their statements that international instruments are not "binding" in domestic law unless they have been incorporated by legislation. This is because in some circumstances it could be argued that an international instrument is a factor of such "manifest importance" that no reasonable Minister could ignore it in making a decision. It has been suggested that a reason why the CERD was not such a factor was because it did not refer to sporting contacts.[46]

Despite these comments of Cooke and Somers JJ, *Ashby* is the leading New Zealand authority reinforcing the traditional approach of the courts that international instruments are only part of the law of New Zealand if they have been incorporated by an Act of Parliament. *Ashby* has been followed in a number of cases, with the most recent case being *Vaematahau v Minister of Immigration*.[47] In this case, which involved judicial review proceedings in the High Court, Jaine J, in citing *Ashby* and the English authority *R v Secretary of State for the Home Department, ex p Brind*[48], held that the Minister of Immigration is not required to take international treaties into account when determining appeals under the Immigration Act as international treaty obligations are not binding in domestic law until they have been incorporated in that way. *Ashby* was also upheld by McGechan J in *Federated Farmers v NZ Post*.[49] The appellants in this case argued that the defendant Ministers as the major shareholders of New Zealand Post, had a duty to make sure that New Zealand Post acts in such a way as not to breach New Zealand's international obligations under the Universal Postal Convention. McGechan J refused to hold that the Ministers had such a duty, as this would amount to an indirect enforcement of an international convention which is not part of the domestic law.

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46 J Elkind and A Shaw, "The Municipal Enforcement of the Prohibition Against Racial Discrimination: a Case Study on New Zealand and the 1981 Springbox Tour" In *The British Year Book of International Law 1984* (1985) 189 at 227.

47 [1993] NZAR 88.

48 [1991] 1 All ER 720, hereinafter *Brind*.

49 [1990-92] 3 NZBORR 339.

By endorsing the traditional approach of the courts towards international instruments, *Ashby* and the decisions which have followed it, promote a legal culture which does not view international instruments favourably. However there are signs in these decisions that the legal culture is open to change. First, the fact that counsel are raising arguments in judicial review proceedings concerning international instruments shows that there is a growing consciousness amongst lawyers of the importance of international instruments to the development of the domestic law. Second, the comments of Cooke and Somers JJ in *Ashby*, which envisage that there may be some factors which are of such "manifest importance" that no reasonable Minister could ignore them, are encouraging and perhaps indicate that the judiciary do recognise that international treaties may be significant in some circumstances.

Tavita v Minister of Immigration

The appellant in this case, Mr Tavita, was a Western Samoan citizen and an 'over stayer' in New Zealand. He had been issued with a removal warrant under the Immigration Act 1961 and had appealed to the Minister of Immigration on humanitarian grounds seeking a cancellation of the warrant or a reduction of the five year prohibition on returning to New Zealand. The appeal was unsuccessful and so judicial review proceedings were brought in the High Court on Mr Tavita's behalf, seeking an interim order quashing the removal order and directing a rehearing of the applicant's appeals to the Minister. McGechan J refused the application for review[50] and so Tavita appealed to the Court of Appeal.

In the Court of Appeal the appellant placed considerable reliance on New Zealand's international obligations under the ICCPR, its first Optional Protocol and the United Nations Convention on the Rights of the Child 1989. It was argued that the Minister in deciding the appeal should have had regard to the rights of the family and the child laid down in these instruments. In response, the Crown's main argument

50 *Tavita v Minister of Immigration* unreported, High Court, Wellington, 3 November 1993, CP No 422/93, McGechan J.

was that the Minister of Immigration was entitled to ignore these international instruments. The Court of Appeal responded by calling this:[51]

> an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing.

The Court of Appeal went on to cast doubt on the decision of the House of Lords, *Brind,* which also adheres to the traditional approach with respect to international instruments, referring to it "as in some respects a controversial decision".[52] Reference was also made to the fact that New Zealand has signed the Optional Protocol to the ICCPR which allows individuals to petition the United Nations Human Rights Committee. It was argued that this was a factor why the court should be hesitant before accepting the Crown's argument, that the Minister was entitled to ignore international obligations.[53] Despite these dramatic statements and a recognition by Cooke P that "the law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution"[54], the Court of Appeal declined to override *Ashby*. Instead the Court of Appeal adjourned the appeal and directed the Minister to reconsider the appellant's application in light of his changed family circumstances and the relevant international instruments.

Tavita represents a significant change of approach of the judiciary towards international instruments. With the judiciary becoming more aware of the importance of international human rights instruments and the relevance that they have to arguments involving human rights, *Tavita* is indicative of a legal culture which is more supportive of international instruments and their use in domestic law. The positive responses of various legal commentators to *Tavita* are important in reinforcing this change of approach towards international instruments. J B Elkind notes that, *Tavita* "seriously erodes" the *Ashby* principle even though it does not specifically overrule it. In his view *Tavita* signals that international law is going to become much more

51 *Tavita* (supra n 37) at 266.
52 *idem.*
53 *idem.*
54 *idem.*

important in New Zealand's domestic law and that the legal profession should be aware of this.[55] B O'Callahan views *Tavita* as significant in that it gives a very strong indication that if the Court of Appeal were asked to directly decide in the future the main issue in *Tavita* they would be likely to hold that, in the absence of any express direction to the contrary, the Executive must take into account relevant international obligations in the exercise of discretionary power.[56] B O'Callahan further argues that *Tavita* confirms that powers vested by statute do not exist in a vacuum, implying that where statutes overlap in subject matter with international obligations these obligations will be important to the interpretation of the statute.[57] P Hunt and Professor M Bedggood also interpret *Tavita* as casting considerable doubt on *Ashby* and state that:[58]

> As never before the executive is under pressure at least to consider, if not to give effect to its international human rights obligations whenever exercising a discretionary power.

By being supportive of *Tavita* these legal commentators can be seen to be part of the legal culture which is giving increased recognition to international instruments in domestic law. To see if the the judiciary has also been supportive of *Tavita* and the change of approach towards international instruments that it represents, it is necessary to examine in detail the reaction of the lower courts and tribunals to the decision.

Family Court

Tavita has received a favourable response from the Family Court. The decision is seen as particularly relevant to the area of family law in that it discusses the rights of a child and as Ian Hassall, a former Commissioner for Children has noted, "recognises the legitimacy of reference in New Zealand Courts to the U.N. Convention on the Rights of the Child".[59] In *Re the S Children (No3)*[60] Judge B D Inglis QC in the Napier Family Court had to decide whether to confirm the

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55 J B Elkind, "*Ashby v Minister of Immigration:* Overruled" [1994] NZLJ 95 at 120

56 Case Notes: B O'Callahan (1994) 7(3) AULR 762 at 765.

57 *ibid.*, at 765.

58 P Hunt and M Bedggood, " The International Law Dimension of Human Rights in New Zealand" in G Huscroft & P Rishworth (eds) *Rights and Freedoms* (1995) 56.

59 I Hassall, " N.Z. and the UN Convention - *Tavita*" (1994) 12 Children 6 at 7.

60 (1994-5) 12 FRNZ 430.

custody of two girls who were in the custody of the Director-General of Social Welfare because of their vulnerability in their own family situation towards sexual abuse. In deciding this issue, Judge Inglis had to balance the integrity of the family against the welfare and interests of the child as required under sections 5, 6, and 13 of the Children, Young Persons, and Their Families Act 1989 (CYPFA). The court held that the interests and welfare of the child, in a case such as the present, must be the deciding factors and so the custody of the Director-General of Social Welfare was confirmed. In reaching this conclusion the court relied on the United Nations Convention on the Rights of the Child 1989. Following *Tavita*, the court held that any difficulty in the balancing exercise under the CYPFA is resolved by reference to the Convention. This was because the relevant provisions of the CYPFA were seen as essentially a reflection of what was in the Convention.[61] The decision of Judge P von Dadelszen in the Palmerson North Family Court, *Re the W Children*[62], again illustrates the encouragement that *Tavita* has given the Family Court to use the Convention on the Rights of the Child in its decision-making. This case concerned the custody of three young children and the issue of whether they should be returned to their mother. In trying to resolve the interaction between the principles in sections 4, 5, 6 and 13 of the CYPFA, the court held that a "useful touchstone" could be found in the Convention. More importantly however, the court went on to hold that in following the approach of the Court of Appeal in *Tavita*:[63]

> ...when the Family Court is required to exercise its discretion ... it is legitimate, even essential, to fall back on that Convention when the Court is required to ensure that the fundamental rights of the child as proclaimed in its articles are recognised and protected.

The Convention on the Rights of the Child is clearly important in the Family Court decisions of *Re the W Children* and *Re the S Children (No3)*. The Convention is considered relevant to these cases first, because the provisions of the CYPFA are a reflection of the Convention's provisions and second, because the Court of Appeal in *Tavita* made it very clear that in cases concerning the rights of children

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61 *ibid.*, at 442.
62 (1994-5) 12 FRNZ 548.
63 *ibid.*, at 558.

decision-makers should not ignore the relevant provisions of the Convention.

Although *Tavita* has been followed by the Family Court, legal commentator Graeme Austin is not so convinced about the enhancing effect on family law that the decision will have.[64] He argues that existing processes and approach of the New Zealand Family Court, as they bear on the welfare of the individual children who come before the Court, already provide a large measure of rights protection, implying that the Convention will add little that is new.[65] He goes on to argue that where in family law statutes, such as the Matrimonial Property Act 1976 and the Child Support Act 1991, there is strict legislative guidance as to the exercise of discretionary power or the scope of a child's rights, it will be very difficult to persuade a court that the Convention should affect the exercise of the discretions or the child's rights.[66] Austin, although he accepts the significance of *Tavita* for New Zealand's domestic jurisprudence, believes that international human rights norms should be viewed in family law as a supplement to, rather than a substitute for, the careful and individualised analysis of the facts of individual lives, for which the Family Court is deservedly renowned.

Immigration cases

Tavita and the United Nations Convention on the Rights of the Child 1989 have also been referred to by tribunals and courts in subsequent Immigration cases. The Deportation Review Tribunal has viewed *Tavita* favourably, with McGechan J in the High Court being more cautious in his response. In *Etuati v Minister of Immigration*[67], the Deportation Review Tribunal followed *Tavita* holding that the absence of reference to the Convention of the Rights of the Child 1989 and the ICCPR in the Immigration Act 1987, did not relieve the Minister of

64 G Austin, "The UN Convention on the Rights of the Child - and domestic law" (1994) 1 BFLJ 63.

65 *ibid.*, at 88.

66 see *Andrews v Andrews* [1994] NZFLR 39 where Hammond J considered that though the express objects of the Child Support Act 1991 include the child's right to support, the extent of the right only goes so far as the detailed provisions of the Act provide.

67 [1994] NZAR 378.

Immigration or the Tribunal itself from the need to apply their principles. The Tribunal therefore determined the appeal, which concerned a deportation order, on what it considered to be the principles of these international Conventions.

McGechan J in the High Court has responded less favourably towards *Tavita. Nikoo v Removal Review Authority*[68] was an appeal against the decision of the Removal Review Authority (RRA), which had dismissed the appeals against the removal orders of two Iranian brothers. One of the grounds of the appeal was that the RRA had erred in law when finding that the separation of one of the appellants from his child was not an exceptional circumstance pursuant to section 63 B(2)(a) of the Immigration Act 1987. McGechan J, although he acknowledged *Tavita* and the powerful indications that the State should not ignore their international obligations, went on to construe the meaning of the word "exceptional" in section 63 B(2)(a) of the Immigration Act 1987 without attempting to give it a broad interpretation that would have been consistent with article 23(1) of the ICCPR which states:

> 1 The Family is the natural and fundamental group unit of society and is entitled to protection by Society and State.

This conservative approach of McGechan J towards international instruments is briefly seen again in the non-immigration related case *Taiaroa & Others v Minister of Justice*[69], where in citing *Tavita* he states:[70]

> International law does not create directly enforceable rights, unless incorporated in domestic legislation. The new recognition promoted by *Tavita v Minister of Immigration* (1994) 2 NZLR 257, encouraging Ministers to have regard to New Zealand's international obligations in the course of administrative decisions, allows appropriate account to be taken. It does not, however, convert international law into municipal law.

This is a rather conservative approach towards *Tavita* considering the scope it gives judges to develop the law in the area of international obligations. It seems that in the area of immigration law the Deportation Review Tribunal is prepared to take a more robust

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[68] [1994] NZAR 509.

[69] unreported, High Court, Wellington, 4 October 1994, CP 99/94, McGechan J.

[70] *ibid.*, at 20.

approach towards international instruments in the wake of *Tavita* than the High Court. This conservatism in the High Court may be due, with all respect, to the personal attitude of McGechan J towards international instruments. It was his decision in the High Court that the Court of Appeal overturned in *Tavita*[71] and his subsequent elaboration of the *Tavita* dicta does more to reinforce the traditional attitude of the courts towards international instruments than it does to develop the law in this area.[72]

As well as the personal attitude of some members of the judiciary towards international conventions, judicial acceptance of *Tavita* has also been affected by the type of right under consideration. Where the courts have had to consider social and economic rights as opposed to the rights of a child, they have not been as willing to consider the relevant international obligations, as the decision of Thorp J in *Ankers v Attorney-General*[73] illustrates. This case involved a challenge to the Minister of Social Welfare's directions concerning the grant of special benefits under section 61G of the Social Security Act 1964, as well as the application of those directions by the Social Welfare Department. One of the grounds pleaded in the attack on the Minister of Social Welfare's directions was that the Minister had failed to take into account a relevant factor, namely New Zealand's obligations under the International Covenant on Economic, Social and Cultural Rights. Thorp J, while accepting that *Tavita* emphasised the significance of international covenants to the interpretation and proper exercise of statutory powers to which those international covenants relate, distinguished this case on factual grounds. He held that unlike in *Tavita* where it was accepted that at no stage had the Minister concerned or his department taken international obligations into account, on the facts of this case there was no evidence for the contention that the Covenant obligations were not considered by the Minister.[74] The implication of this decision is that *Tavita* will be

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71 (supra n 50).

72 note also that it was McGechan J who decided *Federated Farmers v NZ Post* where *Ashby* was followed.

73 [1995] NZFLR 193.

74 *ibid.*, at 208-9.

followed depending on what type of right is under consideration. Although there is a strong link between the Social Security Act 1964 and the Covenant which would point to the conclusion that the Covenant should be used to interpret the Act, it can be argued that as the scope of the rights in the Act depend on social policy decisions which in turn raise issues of government expenditure, the courts are less willing to enforce social and economic international obligations. Dr R Harrison has suggested that the *Ankers* decision and its weak response to the International Covenant on Social, Economic and Cultural Rights, reflects the preoccupation of the judiciary with civil and political rights. A possible explanation for this preoccupation with civil and political rights being that these rights are expressly recognised in the Bill of Rights Act and Human Rights Act and that New Zealand as a developed country has at least a measure of social welfare support for the needy, making the social and economic rights as set out in the International Covenant less significant.[75]

A similar response to *Tavita* can be seen in the Planning Tribunal's decision *St Columba's Environmental House Group v Hawkes Bay Region*[76], which concerned environmental international obligations as opposed to human rights obligations. The appellants in this case sought to have a number of provisions reinstated in the Hawkes Bay Regional Policy Statement, including an insertion of an acknowledgment of the principles derived from the Rio Declaration. On the question of whether the principles derived from the Rio Declaration should be included in the Regional Policy statement the Planning Tribunal cited *Ashby* and the House of Lords decision *Brind,* holding that the judiciary could not import an international convention into domestic law. The decision of *Tavita* was distinguished on the ground that the Rio Declaration concerned "amorphous environmental issues" rather than human rights issues.[77] This decision again illustrates that the decision to follow *Tavita* depends on the type of rights under consideration.

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75 R Harrison, "Domestic Enforcement of International Human Rights in the Courts: Some Recent Developments" [1995] NZLJ 256 at 264.
76 [1994] NZRMA 560.
77 *ibid.*, at 575.

Therefore, the response of the courts, particularly the Family Court, to *Tavita* show that some members of the judiciary support the change of approach towards international instruments and therefore support the legal culture giving international instruments greater status in domestic law. This change of approach only applies to international *human rights* instruments and of these instruments only those which contain civil and political human rights as opposed to social and economic human rights.

2.4 Interpretation of Statutes

This growing willingness of the courts to recognise international human rights instruments in domestic law can also be seen by examining the response of the courts when asked to interpret statutes which have a strong connection to an international instrument. By a strong connection it is meant that the statute mirrors the principles or rights of an international instrument and/or there is a reference to the international instrument in the statute.

The New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 stands out as the most obvious example of a statute that has strong connections to international human rights instruments. Not only does the Bill of Rights mirror the provisions of major international human rights instruments, it also affirms in its Long Title, New Zealand's commitment to the ICCPR. In the leading Bill of Rights case of *Ministry of Transport v Noort*[78], in which the Court of Appeal ruled evidence inadmissible, where obtained after violations of the Bill of Rights provisions, Cooke P stated:[79]

> In approaching the Bill of Rights if must be of cardinal importance to bear in mind the antecedents. The International Convention on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is very general recognition that some human rights are fundamental and anterior to any municipal law, although

[78] [1992] 3 NZLR 260; (1992) 8 CRNZ 114, hereinafter *Noort*.
[79] *ibid.*, at 270.

municipal law may fall short of giving effect to them.

Despite this dicta of Cooke P in *Noort*, the initial response of the judiciary towards the ICCPR in interpreting the Bill of Rights was not very encouraging, as can be seen from the decisions on the meaning of "arbitrary" in section 22 of the Bill of Rights. Section 22 of the Bill of Rights was modelled on article 9(1) of the ICCPR, however in their early decisions[80] the courts failed to recognise this fact, ignoring the special meaning of "arbitrary" that the Human Rights Committee had determined in *van Alphen v the Netherlands*.[81] It was not until the decision of Cooke P in *R v Goodwin*[82], that reference was made to article 9(1) of the ICCPR in the interpretation of section 22. However, even in this decision not all the members of the Court of Appeal acknowledged the meaning that the Human Rights Committee had given to "arbitrary", which embraced the dual aspects of illegality and injustice, as Richardson J held that "arbitrary" does not turn on its illegality but on the nature and extent of any departure from the substantive and procedural standards involved. In *R v Goodwin (No2)*[83] the Court of Appeal finally acknowledged article 9(1) of the ICCPR and the decision of the Human Rights Committee in *van Alphen v the Netherlands* in the interpretation of section 22, as the principle was laid down that in general unlawful detention will be arbitrary detention for the purposes of section 22 of the Bill of Rights.

The more recent decisions of the courts show a willingness to observe international human rights instruments and accompanying jurisprudence in the interpretation of the Bill of Rights. In *Police v Smith*[84] Richardson J, in deciding the meaning of the word "detained" in section 23(1) of the Bill of Rights, referred to art 9(1) of the ICCPR which sets down the right to liberty and security of person. He examined contemporary international material on the explanation of art 9(1), including "The Body of Principles for the Protection of All

[80] see *R v Edwards* [1990-92] 1 NZBORR 37; *Re M* [1990-92] 1 NZBORR 217; *Re S* [1990-92] 1 NZBORR 237.
[81] Comm No 305/1988, GOAR, 45th Sess, Supp No 40 (A/45/40).
[82] (1992) 9 CRNZ 1.
[83] [1993] 2 NZLR 390.
[84] [1994] 2 NZLR 306.

Persons under Any Form of Detention or Imprisonment" adopted by the General Assembly of the United Nations (1988, 43/173) and the "Report of the Working Group on Arbitrary Detention" (UN Doc E/CN/1992/ 20), coming to the conclusion that s 23(1) of the Bill of Rights was aimed at significant deprivations of liberty only.[85]

International human rights instruments have also been referred to by the courts in three other very recent Bill of Rights decisions. In *R v L*[86], a case which concerned the scope of the right to a fair trial and the right to cross-examine witnesses, the Court of Appeal referred to the terms of the European Convention on Human Rights (ECHR) and the decisions upon it. The Court of Appeal held that it was justified in referring to the relevant provisions of the ECHR on the ground that they were parallel to the provisions in the Bill of Rights. The High Court also relied on international human rights jurisprudence, in determining the scope of the right to a fair trial in the later case *R v B.*[87] In holding that the principle of "equality of arms" between the prosecution and defence was a well recognised and inherent aspect of the right to a fair trial, the Court was persuaded by the defence counsel's submissions which cited decisions and general comments of the Human Rights Committee that supported the "equality of arms" principle. In *Martin v The District Court at Tauranga*[88] international human rights instruments were again referred to in the determination of a Bill of Rights issue. The issue before court was whether a delay of 17 months, between a criminal charge and the proposed trial date, breached the accused's right to be tried without undue delay under section 25(b) of the Bill of Rights. Even though the decision was ultimately decided by reference to Canadian authority, the High Court and the Court of Appeal both referred to the ICCPR and the ECHR in understanding the meaning of "undue delay" in the Bill of Rights.

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85 *ibid.*, at 316.
86 [1994] 1 HRNZ 310; [1994] 2 NZLR 55.
87 [1994] 1 HRNZ 1.
88 [1994] 1 HRNZ 186.

The Employment Contracts Act 1991

Freedom of association is of central importance to the Employment Contracts Act 1991 (ECA), with the objects clause of the ECA stating that one of the subsidiary objects of the ECA is to "provide for freedom of association". Freedom of association has also been regarded as a fundamental human right in international human rights instruments including the ICCPR (article 22), the International Covenant on Economic, Social and Cultural Rights (article 8) and in the International Conventions 87 and 88 promulgated by the International Labour Organisation (ILO). This connection between the ECA and the various international instruments has encouraged the courts to refer to these international instruments when interpreting the ECA.[89]

In *Eketone v Alliance Textiles (NZ) Ltd*[90], Gault J used international instruments including the unratified ILO standards in interpreting the scope of freedom of association in the ECA. After affirming the principle in *Noort*, that it is appropriate to have reference to the terms of, and decisions upon, international instruments dealing with fundamental rights, when interpreting the scope of the rights under the Bill of Rights Act and other relevant legislation, Gault J stated that:[91]

> Freedom of association is, of course, much broader than the rights to join or not to join a trade union. However, in the present context that is what is in issue. Part 1 of the Employment Contracts Act is directed to these rights and is to be seen as legislative compliance with New Zealand's international commitments. It is not open to the Courts to depart from the plain meaning of the words of the statute but where it can be done... the statute is to be given meaning consistent with freedom of association as internationally recognised.

These sentiments were endorsed by the Full Employment Court in *NZ Medical Laboratory Workers Union Inc v Capital Coast Health Ltd*[92] where it stated that it was "inclined to be receptive in principle" to a submission that, as there is nothing in the ECA that is contrary to the principle of freedom of association, as set out in the main international

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89 For a general discussion of the use of international conventions in Employment Law see Gordon, A and Thompson, M eds *Mazengarb's Employment Law*, (1995) Vol 1 at A/201 -A,212.

90 [1993] 2 ERNZ 783, hereinafter *Eketone*.

91 *Eketone* (supra n 90) at 795.

92 [1994] 2 ERNZ 93.

instruments, then this shows that it was Parliament's intention to recognise these international instruments and standards and to invite the Courts to have regard to them.[93]

Despite these positive endorsements of the use of international conventions in the interpretation of the ECA, Goddard CJ in *Ivamy v New Zealand Fire Service Commission*[94] was of the opinion that he was not justified in having regard to unratified ILO Conventions 87 and 98, for the purpose of interpreting the legislative intention of the ECA.[95] He disagreed with Gault J's comments in *Eketone* that on the passing of the ECA the reasons for withholding ratification of the ILO Conventions 87 and 98 had evaporated, implying that they could now be used in the interpretation of the ECA. The effect of this decision is that it places in doubt the legitimacy of the use of the unratified ILO Conventions in the interpretation of the ECA. It does not however detract from the principle that international instruments that have been ratified can be used in the interpretation of the ECA.

Therefore, where a statute has a strong connection to international human rights instruments the courts have shown that they are willing to refer to these instruments in the interpretation of the statute. The judicial use of international human rights instruments in the interpretation of the Bill of Rights and the ECA illustrates this point. This willingness to refer to international human rights instruments is indicative of the changing legal culture surrounding these instruments. If the courts took a strict traditionalist approach towards the interpretation of these statutes, they would not refer to international instruments. The fact that international human rights instruments hold persuasive force in these judicial decisions shows the enhanced status these instruments now hold in domestic law.

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[93] *ibid.*, at 118.

[94] unreported, Employment Court, Wellington, 14 July 1995,WEC 44/95, Goddard CJ.

[95] *ibid.*, at 52-3.

2.5 The Changing Legal Culture and *Baigent*

The traditional approach of the courts towards international instruments is no longer being followed with such vigour in relation to international human rights instruments which set out civil and political rights. This change in approach is evidenced by the Court of Appeal's decision in *Tavita* and by the willingness of the courts to refer to international human rights instruments when interpreting statutes which either mirror provisions of the international instruments and/or affirm an international instrument. This approach is indicative of an emerging legal culture surrounding international human rights which is recognising these instruments in domestic law. In *Baigent* the Court of Appeal goes further than just using the ICCPR to help interpret the scope of a right under the Bill of Rights, as in establishing a general remedial jurisdiction under the Bill of Rights, article 2(3) of the ICCPR was effectively imported into the Bill of Rights. This action is justified in that it can be seen to be consistent with the present legal culture surrounding international human rights instruments. Those who question the legitimacy of the decision on the ground that it conflicts with the traditional approach of the courts towards international instruments, must now consider *Baigent* within the context of this emerging legal culture. In *Tavita*, the Court of Appeal issued a warning to the Executive that they should consider New Zealand's international obligations when they are exercising their statutory discretions. *Baigent* can also be interpreted as a judicial warning but this time to Parliament. If Parliament is going to enact human rights legislation which affirms international instruments then the present legal culture demands that the courts take this as a sign that Parliament does not intend to disregard its international obligations. Therefore if the ICCPR states that remedies must be given for breaches of fundamental human rights then the courts, in accordance with the legal culture, should interpret this as allowing them to give remedies in domestic law for the breach of the Bill of Rights.

3. Other Common Law Courts and International Instruments

3.1 Introduction

The present legal culture in New Zealand which is giving international human rights instruments an increased status in domestic law cannot be viewed in isolation from the judicial decisions of other commonwealth countries. If it can be concluded that the legal culture surrounding international instruments in Australia, England and Canada is moving in the same way, then this will reinforce New Zealand's legal culture, making it more difficult to denounce. This in turn will make it harder to question the legitimacy of *Baigent*, which should be viewed in the context of the changing legal culture surrounding international human rights instruments.

3.2 The Approach of the Australian Courts

The decision of the High Court of Australia decided in April 1995, *Minister for Immigration and Ethnic Affairs v Teoh*[96] is the most recent decision to pronounce on the status of international human rights instruments in Australian domestic law. This decision shows a changing legal culture in Australia with respect to international human rights instruments.

The facts in *Teoh* were very similar to those in *Tavita*, as the case involved immigration law and a deportation order. Mr Teoh, a Malaysian citizen, entered Australia in May 1988 on a temporary entry permit and then proceeded to marry an Australian citizen and father her four children. Three further children were born of the marriage. He applied for a grant of resident status however before the application was decided he was convicted for drug offences and sentenced to six years imprisonment. As a result of his conviction his application for resident status was denied by a delegate of the Minister for Immigration, Local Government and Ethnic Affairs, and in February 1992 after an unsuccessful appeal to the Immigration Review Panel, an

[96] (1995) 128 ALR 353, hereinafter *Teoh*.

order was made by another delegate of the Minister, that Teoh be deported. Teoh applied to the Federal Court for an order of review of the delegates' decisions. The application was dismissed by the trial judge however on appeal to the Full Court of the Federal Court[97] the appeal was allowed due to two factors. First, the Court held that the delegates had failed to give proper consideration to the effect that the deportation would have on Teoh's family. Second, Teoh's children had a legitimate expectation that their father's resident status would be treated in accordance with the terms of the United Nations Convention on the Rights of the Child, which Australia had ratified on 17 December 1990. The Minister appealed the decision to the High Court of Australia.

The High Court of Australia dismissed the appeal (Mason CJ, Deane, Toohey and Gaudron JJ, McHugh J dissenting). The majority held (Mason CJ, Deane and Toohey JJ) that although the provisions of an international treaty to which Australia is a party do not form part of Australian law unless they have been incorporated into domestic law by statute, the ratification of the Convention does give rise to a legitimate expectation that administrative decision-makers would act in conformity with the Convention and treat the best interests of the child as a primary consideration. Mason CJ and Deane J stated in their joint judgment:[98]

> Ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

The court further held that the existence of a legitimate expectation, that a delegate would act in conformity with the Convention, did not compel the delegate to act in that way as this was the difference between

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[97] (1994) 121 ALR 436.

[98] *Teoh* (supra n 96) at 365.

a legitimate expectation and a binding rule of law. But if the delegate proposed to make a decision which did not accord with the principle that the best interests of the children were the primary consideration, procedural fairness required the delegate to give the children notice and an opportunity to respond.[99]

McHugh J wrote a powerful dissent to the majority decision arguing that no legitimate expectation arose in this case. His first argument was based on the principle of law upheld by the High Court of Australia in *Attorney-General (NSW) v Quin*[100], that the concept of legitimate expectation is concerned with procedural fairness and imposes no obligation on a decision-maker to give substantive protection to any right, benefit, privilege or matter that is this subject of a legitimate expectation. He argued that as the legitimate expectation upheld by the majority would oblige the decision-maker to comply with the Convention, this amounted to an expectation for substantive not procedural protection therefore no legitimate expectation existed.[101] Clearly on this point the majority judges and McHugh J disagree. The judges in the majority claimed that they were giving procedural not substantive protection to the expectation, in that the decision-maker was not compelled to apply the Convention. Whether or not the legitimate expectation in this case demands substantive as opposed to procedural protection, the principle of law that McHugh J sets out as the basis of this argument is not settled.

In the High Court of Australia there appears to be two lines of argument concerning the concept of legitimate expectation. Brennan J stresses that the judiciary can only give procedural protection to a legitimate expectation and rejects the theory of judicial review which would give substantive protection to an individual's expectation.[102] Brennan J emphasised this view in *Quin*[103] reiterating it in *Annetts v*

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[99] *ibid.*, at 365.
[100] (1990) 170 CLR 1, hereinafter *Quin*.
[101] *Teoh* (supra n 96) at 382.
[102] see Forsyth "The Provenance and Protection of Legitimate Expectations" (1988) 47 Cambridge Law Journal 238.
[103] *Quin* (supra n 100) at 34-40.

McCann[104]. Mason CJ, in contrast to Brennan J, states in *Quin* that in some circumstances where no harm will be done to the public interest, the court may extend substantive protection to a legitimate expectation.[105] This view is endorsed in *Annetts v McCann,* where Mason CJ held that as the appellants had been granted representations at a coronial inquiry this created a legitimate expectation that the Coroner would not make any finding adverse to their interests without first giving them the opportunity to be heard.[106] This use of the concept of legitimate expectations was rejected by Brennan J, as he interpreted it as giving an individual's expectation substantive protection as opposed to mere procedural protection.[107] Although the High Court of Australia are having difficulty with the concept of legitimate expectation, the lower courts in Australia seem to support Brennan J's interpretation of the scope of protection afforded by the concept. In *Tasmanian Conservation Trust Inc v Minister for Resources*[108], Sackville J in the Federal Court of Australia agreed with Brennan J comments in *Quin.* It was held that a legitimate expectation, arising from a representation of the decision-maker, that an adverse decision will not be made without first giving a person who has the expectation an opportunity to be heard, cannot prevent the decision-maker from exercising a statutory power or discretion in the public interest.[109] This finding implies that the courts will only protect expectations of a procedural nature not those which will give substantive protection to a person's expectation.[110]

The New Zealand courts are also having difficulty determining the scope of protection that they can give to a person's legitimate expectation. In *Northern Roller Milling Co Ltd v Commerce Commission*[111] Gallen J stated that the concept of fairness need not be

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104 (1990) 97ALR 177.
105 *Quin* (supra n 100) at 23.
106 *Annetts v McCann* (supra n 104) at 179.
107 *ibid.*, at 183-185.
108 (1995) 127 ALR 580.
109 *ibid.*, at 610-611.
110 see also *Waters v Acting Administrator* (1995) 119 ALR 557 at 574-575; *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* (1992) 26 ALD 406 at 407-408;*Durant v Greiner* (1990) 21 NSWLR at 130.
111 [1994] 2 NZLR 747.

confined to merely procedural matters. He refers to Mason CJ's comments in *Quin*, that the court may in some circumstances give substantive protection to a legitimate expectation and further states:[112]

> It is not extending the reasoning of Mason CJ in the *Quin* case very far to suggest that where the circumstances are such that in a dispute between individuals, the behaviour of one would lead to a particular outcome, the same approach should lead to a similar result in an administrative situation unless the nature of the decision is such that its maker should not be fettered in this way.

In two more recent High Court decisions, the reasoning of Brennan J in *Quin* was supported, the concept of legitimate expectation being limited to procedural protection. *Ngai Tahu Maori Trust Board v Director-General of Conservation*[113] concerned an application for judicial review of the proposed exercise of the statutory power, of the Director-General of Conservation, to grant permits for commercial whale-watching. One of the pleaded grounds of review was that the applicants as existing permit holders had a legitimate expectation that no further permits for whale watching would be granted until the third and fourth applicants had had sufficient time to repay the capital development costs involved in the establishment of their whale-watching enterprises. Neazor J rejected this submission upholding Brennan J statement in *Quin*, that the concept of legitimate expectation relates to the process to be followed in the making of a decision not to a substantive outcome. He held that the applicants claim could not succeed on this ground in so far as it was directed to the substantive determination to be made on permit applications.[114] In *Taiaroa v Minister of Justice*, McGechan J in addressing an issue relating to the applicants' legitimate expectations also cited *Quin* and held that the term legitimate expectation is "an expectation as to process, borne out of governmental statement or well established governmental practice, from which a departure without notice would be unfair."[115]

This obvious disparity in the High Court concerning the scope of protection that a legitimate expectation demands will need to be settled by the Court of Appeal in a future case. The 1994 decision of the Court

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112 *ibid.*, at 754.

113 unreported, High Court, Wellington, 23 December 1994, CP841/92, Neazor J.

114 *ibid.*, at 35-36.

115 *Taiaroa* (supra n 69) at 36.

of Appeal *Thames Valley EPB v NZFP Pulp & Paper Ltd*[116], signals the approach that the Court of Appeal may take on such an issue. In this case "substantive fairness" was upheld as a legitimate ground of judicial review, which shows that the Court of Appeal is expanding the scope of judicial review to cover the quality of administrative decisions as well as the procedure.[117] With the Court of Appeal being responsive to this ground of review, this may mean that they will be more open to the argument that the concept of legitimate expectation should give substantive protection to a person's interests not limiting the protection to procedural fairness.

Considering the uncertainty surrounding the concept of legitimate expectation both in the Australian and New Zealand courts, the first argument of McHugh J in *Teoh* is questionable. There is a definite line of argument which has been given some support in the courts, that the concept of legitimate expectation can in some circumstances give substantive protection to a person's legitimate interests of a favourable decision. This line of argument supports the majority decision in *Teoh* and weakens McHugh J's first argument.

Another argument that McHugh J put forward of why no legitimate expectation arose in this case was that the ratification of the Convention on the Rights of the Child does not give rise to any legitimate expectation.[118] In support of this argument he asserted that, Conventions were agreements between States and by ratification the Executive Government does not give undertakings to its citizens. He goes on to make the practical point that if by ratifying a convention a legitimate expectation arises this would have the effect of altering the duties of all State government officials, as all ratified conventions would apply to every decision made by a federal official unless the official stated that he or she would not comply with the convention. The consequences for administrative decision-making were held to be enormous considering that Australia is party to over 900 treaties.[119]

116 [1994] 2 NZLR 641.
117 *ibid.*, at 652.
118 *Teoh* (supra n 96) at 385.
119 *ibid.*, at 385.

This argument fails to draw any distinction between the different types of rights contained in treaties. When Mason CJ and Deane J held that ratification of a convention gives rise to a legitimate expectation, they were not referring to all conventions but only ones which declare universal fundamental human rights.[120] The legitimacy of this distinction can be upheld by emphasising two features of international human rights treaties which distinguish them from the more classical international conventional law. Classical international conventional law is concerned with stabilising and facilitating interstate relations, whereas international human rights conventions are strikingly different in that they stipulate that obligations are owed directly to individuals. International human rights conventions can also be distinguished from the more classical international law conventions in that human rights are universal, as they are held by virtue of being a human person, it being irrelevant what state that person lives in.[121] The subject matter of most international conventions do not have this universal quality and so can be distinguished from international human rights conventions. McHugh J in failing to recognise this distinction exaggerates the consequences of the majority decision in *Teoh* and so his argument on this point is also weakened.

The majority decision of the High Court of Australia in *Teoh* is truly significant. The effect of holding that people have a legitimate expectation that a decision-maker will act in accordance with the Convention on the Rights of the Child, is that decision-makers will have to consider this Convention in making decisions concerning children. Although the High Court of Australia stresses that international instruments are not to have effect in domestic law until implemented by statute, its decision taken to its logical conclusion amounts to a judicial importation into domestic law of international instruments. This decision then is a major cause for concern for those like McHugh J, who support the notion of national sovereignty and the

120 *ibid.*, at 362.

121 There is an argument that human rights are not universal considering the diverse cultures and political systems of the world. See, R. Higgins *Problems & Process - International law and how We Use It* (1994), 96-97, where she argues that human rights are universal; D Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards' (1991) 27 Stanford Law Journal 345.

supremacy of Parliament, with international instruments having no effect on the domestic law whatsoever. One may ask McHugh J and others who oppose the decision, why does the Executive bothers to ratify international instruments if they are to have no effect in domestic law?

A political backlash to the majority decision in *Teoh*, which supports the dissenting arguments of McHugh J, looks likely to quash any enduring effect that the decision may have. On the 10 May 1995 in a joint-statement released by the Foreign Affairs Minister Senator Gareth Evans and the Attorney General Michael Lavarch it was made very clear that the Federal Parliament did not support the majority decision in *Teoh*. They stated:[122]

> It is not legitimate, for the purposes of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers.

Legislation is to be introduced into the Federal Parliament to reinforce this statement, with the effect of putting beyond any doubt the status of unincorporated international obligations.

Despite this political backlash to the *Teoh* decision, it is still significant in that it shows the current revolutionary attitude of the High Court of Australia towards international human rights instruments and human rights law generally. The majority judges show that they are anxious to protect human rights and are forcing the Australian Federal Parliament to face up to its international human rights obligations, which it refuses to legislate for domestically. What the political backlash signals to the High Court of Australia is that they will have to resort to less controversial ways of giving effect to international human rights in domestic law. Gaudron J hinted at one such way in *Teoh* by suggesting an argument that would see the common law developed so that human rights, as expressed in ratified conventions, are given recognition. She argued in *Teoh* that citizenship carries with it a common law right, on the part of children and their parents, to have a child's best interests taken into account, at least as a primary

[122] Michael Dwyer, "Australia: Govt Clips the Role of Unlegislated Treaties", Australian Financial Review, 11 May 1995.

consideration, in all discretionary administrative decisions which directly affect children. The significance of the Convention on the Rights of the Child to this argument, was that it gave expression to a fundamental human rights taken for granted in Australian society.[123] These obiter comments are reinforced by Brennan J in *Mabo v Queensland (No 2)*[124] who argues that international human rights instruments can be used to develop the common law. He states:[125]

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards that it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights.

This approach although not endorsed by the other members of the High Court of Australia in *Mabo*, was accepted by the High Court of Australia in *Teoh*[126]. The High Court of Australia did warn though that a cautious approach must be taken by the courts in developing the common law in this way, as the development must not be seen as a "backdoor means of importing an unincorporated convention into Australian law".[127]

Therefore, the current approach of the High Court of Australia towards international human rights instruments is indicative of a legal culture which is giving increased recognition to these instruments. The decision goes further than *Tavita* as it effectively states, through the reference to the concept of legitimate expectations, that international convention are mandatory relevant considerations in decisions affecting a person's human rights. The political backlash to this decision will effect this revolutionary attitude towards international human rights instruments, though it will not alter the fact that the current legal culture surrounding international human rights instruments in Australia is changing.

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123 *Teoh* (supra n 96) at 375-6.
124 (1992)175 CLR 1, hereinafter *Mabo*.
125 *ibid.*, at 42.
126 *Teoh* (supra n 96) at 384(McHugh J), 362(Mason CJ, Deane J).
127 *ibid.*, at 362.

3.3 The Approach of the English Courts

The international human rights instrument which the English courts have given most of their attention to to date, is a regionally based Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which England ratified in 1953. Even though England, like Australia and New Zealand, has ratified the ICCPR, the ECHR has a higher profile because since 1966 England has recognised the right of an individual to send a petition to the European Commission of Human Rights claiming a breach of the Convention and if the Commission finds such a breach and it cannot be settled in a friendly manner, have the case determined by the European Court of Human Rights. Having this form of individual redress for its citizens has meant that England has not been pressed to ratify the First Optional Protocol to the ICCPR, which allows individuals to send communications to the United Nation's Human Rights Committee.[128]

The effect on the English domestic law of article 10, the freedom of expression provision in the ECHR, was considered by the House of Lords in *R v Secretary of State for the Home Department, Ex parte Brind and Others*.[129] The issue before the court was whether the Secretary of State was obliged to consider the ECHR when issuing directives under s 29(3) of the Broadcasting Act 1981. The appellants submitted that when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the ECHR, it may be presumed that the legislative intention was that the discretion should be exercised within the limitations that the ECHR imposes. The House of Lords rejected this submission, holding that while the ECHR may be resorted to in order to resolve ambiguity or uncertainty in the wording of s 29(3) of the Broadcasting Act 1981, there was no uncertainty in the

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[128] For a general commentary on the ECHR and Human Rights issues in Europe see R Beddard, *Human Rights and Europe* (3rd ed 1993).

[129] (supra n 48).

wording of the section and no presumption that the Secretary of State's discretion had to be exercised in accordance with the ECHR. To hold that the Secretary was obliged to consider the ECHR before issuing the directives would, in the House of Lord's opinion, amount to incorporation of the ECHR into English law by the back-door, amounting to a judicial usurpation of the legislative function.[130]

Brind reinforces the traditional approach of the English courts towards international instruments and their effect on the domestic law. The more recent decision of the English Court of Appeal, *Derbyshire County Council v Times Newspapers Ltd*[131] shows however that not all English judges have such a traditionalist attitude towards international instruments. The facts in the *Derbyshire* are quite simple. In September 1988 two articles in the Sunday Times criticised share deals involving the Derbyshire County Council's superannuation fund. The Council and its leader brought actions against the paper for defamation. These actions were stayed pending an appeal to the Court of Appeal on the question of whether a local authority can sue for libel. In attempting to resolve this issue the Court of Appeal found that there was no clear authority in the English law for it to follow. The Court therefore turned to the article 10 of the ECHR to resolve the issue, holding that where the common law is ambiguous or unclear the court must have regard to the principles stated in the Convention.[132] The Court of Appeal went on to decide that the Council could not sue in libel, the reason being that article 10 of the ECHR upheld "everyones right to freedom of expression".[133]

The Council appealed to the House of Lords[134] and although the decision of the Court of Appeal was upheld, Lord Keith engaged different reasoning, avoiding the issue of whether Courts can refer to the ECHR when the common law is unclear. In referring to the

130 *ibid.*, at 478(Lord Bridge).

131 [1992] 3 WLR 28, hereinafter *Derbyshire*.

132 Butler-Sloss LJ and Ralph Gibson LJ both hold that the courts "must" take into consideration the ECHR, with Balcombe LJ holding that it is "permissible" for the courts to do so.

133 *Derbyshire* (supra n 131) at 45(Balcombe LJ), 63(Butler-Sloss LJ).

134 *Derbyshire County Council v Times Newspapers* [1993] 2 WLR 449.

reasoning of the Court of Appeal, Lord Keith does not expressly dismiss it. Instead he rules out the need to refer to the ECHR in this case as, following the decision of Lord Goff in *Attorney General v Guardian Newspapers Ltd. (No.2)*[135], the English common law is no different in principle from article 10 of the ECHR.

By relying on the ECHR to clarify an area of the common law, the Court of Appeal extended the rule considerably as to the circumstances in which the ECHR may be used in the domestic courts. The House of Lords, by refusing to address the issue of whether the ECHR can be used by the Courts to resolve ambiguities in the common law, has confused rather than clarified the Court of Appeal's decision. Did the House of Lords impliedly reject the Court of Appeal's reasoning by refusing to comment on it? Or did the House of Lord's silence mean that the Court of Appeal's approach would be acceptable in other cases where the common law is obviously unclear? Further, did the House of Lords simply leave the issue open, neither accepting or rejecting the Court of Appeal's approach rather preferring to decide the issue in a future case? This last interpretation seems to be the most logical considering that the House of Lords saw the ECHR as irrelevant to the issue. Therefore, even though the law is somewhat confused on whether the ECHR can be used to develop the common law, *Derbyshire* shows that the English courts are finally beginning to take notice of the principles of the ECHR and to give them effect in domestic law. R Higgins identifies the English Court of Appeal's decision in *Derbyshire,* as indicative of a changing legal culture in which international human rights law is felt to be part of English public life. This legal culture encouraged the Court of Appeal to use this law in the development of the common law, notwithstanding the fact that it has not been incorporated by legislation into the domestic law.[136]

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135 [1990] 1 AC 109 at 283-284.

136 R Higgins, *"Problems and Process- International Law and How We Use It"* (1994) 216.

3.4 The Approach of the Canadian Courts

The approach of the Canadian courts towards international treaties and conventions has been extremely cautious. Although they accept the presumption that Parliament and the Legislatures do not intend to legislate in violation of Canada's international obligations, they have refused to refer to these international obligations to interpret domestic statutes unless an ambiguity appears on the face of the statute. This point was made clear by Laskin J in *Capital Cities Communications Inc. v Canadian Radio-Television*[137], where he held that he would not consider the Inter-American Radio Communications Convention 1937 in interpreting the Broadcasting Act, which did not implement the Convention, because he could not find any ambiguity in the Act.

The Canadian Charter of Rights and Freedoms which was enacted in 1982, signalled to the courts that a change of approach to international human rights instruments was needed if the Charter was to be interpreted correctly. This was because even though the Charter did not expressly implement any of the international human rights instruments that Canada subscribes to, they were extremely influential in the drafting of the Charter, with many of the provisions in the Charter reflecting their language and ideology.[138] It was hoped because of this strong link between the municipal and international conventional law, that the Charter's application would lead to a "multi-national-transcultural-international approach to patterns of interpretation".[139] The approach of the Canadian courts is of particular interest to the New Zealand courts in the way that they interpret the Bill of Rights, considering that both pieces of legislation affirm fundamental human rights and both relied heavily on international human rights instruments in their drafting.

The enactment of the Charter has seen a dramatic change in the approach of the Canadian courts towards international instruments,

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137 (1978), 81 D.L.R. (3d) 609 (SCC).

138 M Cohen & A F Bayefsky, "Charter of Rights and Freedoms and Public International Law" (1983) 61 CBR 263 at 267.

139 *ibid .*, at 310.

causing an exponential growth in the number of cases which refer to these instruments.[140] Dickson CJC of the Supreme Court of Canada has been extremely influential in this change of approach. In his dissenting judgment in *Reference Re Public Service Employee Relations Act (Alta)*[141], a case which concerned the nature and scope of the right of freedom of association of workers, Dickson CJC examined international treaties and conventions stating:[142]

> The various sources of international human rights law- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms- must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.

As well as stressing the importance of referring to international human rights instruments to determine the nature and scope of Charter provisions, Dickson CJC also held in *Slaight Communications Inc. v Davidson*[143], that these instruments could be used in the interpretation of section 1 of the Charter, to determine what constitutes a pressing and substantial objective justifying restrictions upon Charter rights. He also made an obiter statement, that international law should be used to ensure that the Charter provides protection as great as that afforded by Canada's international legal obligations. In *R v Keegstra*[144] Dickson CJC again referred to international human rights instruments in Charter litigation, the issue raised was whether section 319 (2) of the Criminal Code, which made it an offence to wilfully promote hate propaganda against an identifiable group, violated the Charter guarantee of freedom of expression. Dickson CJC writing in the majority, referred to Canada's international obligations in order to determine the legislative objective behind this section of the Code. In looking at the CERD and the ICCPR he found that freedom of expression did not extend to cover hate propaganda and as such held that the objective of section 319(2) of the Code must also be to prohibit hate propaganda, justifying a limit on freedom of expression.[145]

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140 A F Bayefsky, *International Human Rights Law - Use in Canadian Charter of Rights and Freedoms Litigation* (1992) at 73.
141 [1987] 1 SCR 313.
142 *ibid.*, at 348.
143 [1989] 1 SCR 1038.
144 (1990), 1 C.R.(4th) 129, hereinafter *Keegstra*.
145 *ibid.*, at 42.

Despite these findings of Dickson CJC, which show a change in approach of the Canadian judiciary towards international instruments, his views do not have universal support. The dissent of McLachlin J in *Keegstra,* illustrates this point. Although recognising the usefulness of Canada's international obligations in placing Charter interpretation in a larger context, she rejects that these obligations should be determinative of or used to limit the scope of Charter guarantees. This is because she sees the provisions of the Charter as uniquely Canadian even though they draw on the political and social philosophy shared with other democratic societies.[146] The approach of Dickson CJC has also been criticised because of his failure to justify his use of international human rights instruments in Charter litigation.[147] This failure to justify has led to the absence of a principled use of international instruments by the Canadian courts in Charter litigation, causing international human rights law arguments to be ignored in cases where they had the potential to be very powerful and decisive.[148]

Considering this criticism of the use of international human rights instruments in the interpretation of the Charter, the question arises of whether this affects the legitimacy of the use of international human rights instruments by the New Zealand courts when interpreting the Bill of Rights. It can be argued that there are three distinguishing features between the Canadian Charter and the Bill of Rights, which support the New Zealand courts in adopting a different approach towards international instruments in the interpretation of the Bill of Rights. First, unlike the Charter, the Bill of Rights has an express reference to an international human rights instrument, the ICCPR, in its Long Title. The effect of this is that the New Zealand courts have a stronger justification for referring to the ICCPR than the Canadian courts. Second, Canada has a federal system of government which has traditionally made the judiciary more cautious with respect to

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146 *ibid.*, at 104.

147 A F Bayefsky,*International Human Rights Law, Use in Canadian Charter of Rights and Freedoms Litigation,*(1992) at 93.

148 see *Andrews v Law Society (B.C.)* [1989] 1 SCR 143; *Reference Re Workers Compensation Act , 1983 (Newfoundland), ss 32 & 34* [1989]1 SCR 922; *R v Turpin* [1988] 1 SCR 1296.

international instruments.[149] New Zealand is not a federal state so its judiciary does not have this tradition of caution towards international instruments. Third, it can also be argued that the Canadian courts have not been so pressed to refer to international instruments in their interpretation of the Charter because they have wide powers under the Charter which includes the ability to grant remedies for breaches of Charter rights. The Bill of Rights does not expressly state that the courts may give remedies and so the courts have been forced to refer to international instruments in determining whether Parliament, in enacting the Bill of Rights, intended that the courts have the power to give remedies for breaches of the affirmed rights. Therefore aware of these distinguishing features between Canadian and New Zealand law, the fact that all members of the Canadian judiciary have not universally supported the use of international instruments in the interpretation of the Charter, does not mean that the New Zealand courts should adopt a similar stance towards such instruments in interpreting the Bill of Rights.

3.5 Conclusion

From an examination of the approach of the judiciary of other common law legal systems towards international human rights instruments it can be concluded that the emerging legal culture in New Zealand surrounding international human rights instruments, is also emerging in Australia, England and to a more limited extent in Canada. With other common law judges part of and supportive of this emerging legal culture, the attitudes and approach of the New Zealand judiciary is reinforced. *Baigent* to the extent that it is part of this emerging legal culture, is also reinforced. It can be argued that given the High Court of Australia decision in *Teoh*, this court would be supportive of the Court of Appeal's use of the ICCPR in *Baigent* in granting themselves a remedial jurisdiction under the Bill of Rights. This support strengthens the legitimacy of the decision, as it is more difficult to denounce a decision if it has an international legal culture which supports it.

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[149] see *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326.

4. Factors Influencing this Change in Legal Culture

4.1 Introduction

Having established that there exists a legal culture which is supporting a change in the status of international human rights instruments in domestic law, the next question to be addressed is what are the factors influencing this change in legal culture? In exposing the factors which are influencing this legal culture we are able to understand why the courts are changing their approach towards international human rights instruments in domestic law.

4.2. The First Optional Protocol to the ICCPR

The First Optional Protocol to the ICCPR and the jurisdiction of the United Nations Human Rights Committee is one important factor which is influencing the change in legal culture surrounding international human rights instruments and their status in domestic law. Under the First Optional Protocol to the ICCPR, which New Zealand ratified on 26 May 1989, New Zealand citizens can send written communications to the United Nations Human Rights Committee in New York claiming that their human rights under the ICCPR have been violated by the State. The individual must have exhausted all domestic remedies before sending a communication to the Committee and the Committee having ruled the communication admissible can order that the State provide a remedy if they form the view that a violation of the individual's human rights has taken place.[150] This ability of individuals to take their human rights grievances to the Human Rights Committee for determination was an important factor in why the Court of Appeal asserted in *Baigent* that it had a remedial jurisdiction under the New Zealand Bill of Rights Act 1990. Hardie

[150] NZ citizens are exercising their rights under the Optional Protocol to the ICCPR. In December 1992, a communication was filed with the Human Rights Committee by Apirana Mahuika & Others against the NZ Government. This communication alleges that the authors' rights under the ICCPR were violated by the 1992 "Sealords" Fishing Settlement. The Committee has not made a decision on the matter yet.

Boys J stated in *Baigent* that:[151]

> citizens of New Zealand ought not to have to resort to international tribunals to obtain adequate remedies for the infringement of Covenant rights this country has affirmed by statute.

Casey J agreed with this argument, recognising that it was better for New Zealand citizens to gain remedies in their own courts for breaches of human rights, rather than having to go to New York to the Human Rights Committee for relief.[152]

This argument is by no means exclusive to *Baigent*, as similar arguments have arisen in other cases involving international human rights instruments. In *Tavita*, Cooke P was influenced in his decision by the fact that New Zealand had acceded to the Optional Protocol to the ICCPR. He stated that now that individuals have direct recourse to the Human Rights Committee this means that the courts must give practical effect to international human rights instruments otherwise they will face legitimate criticism.[153] In response to the ratification by the Australian Federal Government of the Optional Protocol to the ICCPR, the Australian judiciary have expressed similar arguments. Brennan J in *Mabo*, in asserting that international human rights instruments could be used in the development of the common law, was influenced by the fact that individuals can now go to the Human Rights Committee and obtain remedies for the breach of their internationally recognised human rights.[154] In an extra-curial paper Kirby J, the President of the New South Wales Court of Appeal, concurs with Brennan J as he asserts that:[155]

> Using principles of human rights which have become part of international law to fill the gaps of the common law and to aid the interpretation of ambiguous legislation involves no heretical leap into the unknown. It is, in a sense, the inevitable consequence of submitting our legal system to the scrutiny of the agencies of the international community, such as the Human Rights Committee established under the Optional Protocol to the ICCPR.

The courts feel obliged to give effect to international human rights

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151 *Baigent* (supra n 2) at 699;83.
152 *ibid.*, at 691;73-4.
153 *Tavita* (supra n 37) at 266.
154 *Mabo* (supra n 124) at 42.
155 M Kirby, "Human Rights- Emerging International Minimum Standards" (1993) 19(3) CLB 1252 at 1270.

instruments in domestic law because of the Human Rights Committee's remedial powers under the Optional Protocol. It needs to be asked therefore, whether the Human Rights Committee is a valid influence on whether the courts should be giving increased recognition to international human rights instruments in domestic law? The primary question to be determined is whether the Committee really does provide individuals with a meaningful avenue of redress for the violation of their human rights? If it is found that it does not, then it would seem that the judiciary is worrying unnecessarily about the powers of the Committee, causing their argument that they must develop the law of international human rights because of the Human Rights Committee's power to order remedies, to collapse.

From its seventh session, in 1979, to its fifty-first session, in July 1994, the Human Rights Committee has adopted 193 views on communications received under article 5, paragraph 4 of the Optional Protocol, with the Committee finding violations of the ICCPR in 142 of the communications.[156] The Committee has demonstrated that on the finding of a violation of an individual's human rights it will not hesitate in expressing a view that the State party involved should provide an effective remedy to the individual concerned. Two examples of communications where the Committee has ruled that a State party is under an obligation to pay compensation to an individual as a remedy for the violation of their human rights are *Daniel Monguya Mbenge v Zaire*[157] and *Antonio Viana Acosta v Uruguay.*[158] In *Mbenge* the Committee formed the view that because Daniel Monguya Mbenge had been sentenced to death twice, contrary to the provisions of the ICCPR and had been charged, tried and convicted in circumstances in which he could not effectively enjoy the safeguards of due process enshrined in the provisions of the ICCPR, his rights had been violated and that the State of Zaire was under an obligation to pay compensation for the violations suffered. In *Acosta* the Committee

156 General Assembly Official Records 49th Session,No. 40 (A/49/40) at 84.
157 Selected Decisions of the Human Rights Committee, Vol 2 at 76, hereinafter *Mbenge*.
158 Selected Decision of the Human Rights Committee, Vol 2 at 148, hereinafter *Acosta*.

again formed the view that the State involved was under an obligation to pay compensation for violating one of its citizen's rights. In this communication the Committee found that the State of Uruguay had subjected the author of the communication to inhuman treatment while in detention, denied him counsel of his own choosing when he went before the Supreme Military Tribunal and was not tried without undue delay, all of which constituted State actions which violated certain provisions of the ICCPR.

These two examples show that the Human Rights Committee is not afraid to come to a view that State parties must pay compensation for the violation of the rights of individuals. These view are weakened though, by the fact that they are not considered to be legally binding on the State party involved. It can be concluded that these views are not legally binding because the Optional Protocol does not contain a provision which stipulates that the Committee's views are binding and also because the Committee itself is not a judicial body, its main role being that of a supervisor over the human rights records of State parties.[159] This non-binding nature of the Committee's views is further emphasised by comparing them to the decisions of the European Court of Human Rights and the European Commission set up under the ECHR. Article 53 of the ECHR stipulates that parties to the ECHR, who recognise the jurisdiction of the Court, "undertake to abide by the decision of the Court in any case to which they are parties". Likewise if a State party has violated the ECHR and the European Commission has proposed a friendly settlement to remedy the breach which is ignored, the matter will be referred to the Committee of Ministers who, under article 32 of the ECHR, have the power to affirm the violation and decide on an appropriate remedy for the breach. The decisions of the Committee, as provided in article 32(4) of the ECHR, are regarded by the State party as 'binding' on them.

Therefore as the Human Rights Committee's views are not binding in the same way as the decisions of the European Court of Human Rights and the Committee of Ministers are, the Committee has to apply non-

[159] see Part IV ICCPR.

legal pressure to ensure that its views are carried out by the State Party involved. The Committee at its thirty-ninth session (July 1990), set up a procedure which allows it to monitor the follow-up to its views and established the mandate of a Special Rapporteur to help in the follow-up of its views.[160] The primary task of the Special Rapporteur is to request follow-up information from States parties who have been found by the Committee to have violated the ICCPR and then report back to the Committee with this information. The first four years of using the follow-up procedures have not been found by the Committee to be fully satisfactory.[161] To combat this, the Committee has adopted the principle of publicity with respect to its follow-up procedures.[162] The Committee hopes that by making the results of its follow-up procedures publicly available this will enhance the authority of the Committee's views and encourage State parties to implement them. A further way in which the Committee is able to follow up on its views is through the State reporting system, set up under Part IV of the ICCPR. This system requires States to submit a report within a year of the Covenant entering into effect for them, and then to submit further reports on a five-year cycle.[163] The Committee has made it a standard practice as part of this reporting system to ask State parties to clarify, during the considerations of their reports, how they are implementing views on communications adopted by the Committee.[164]

This strengthening of the Committee's follow-up procedures must ensure that its views gain more prominence, making it harder for a State party who has violated the ICCPR to ignore them. A recent example of an Australian communication, further shows that the Human Rights Committee can have a real influence on ensuring that an individual can obtain a remedy for breaches of their human rights.

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160 This mandate is set out in annex XI of the Report of the Committee to the General Assembly at its Forty-seventh session (March/April 1993).

161 General Assembly Official records 49th Session No. 40 (A/49/40) at 85.

162 This principle of publicity was agreed upon at the Committee's Forty-seventh session (March/April 1993) and at its Fiftieth session (March 1994) the Committee adopted a new rule of procedure reinforcing this principle of publicity.

163 R Higgins (supra n 30) at 108.

164 R A Myullerson, " Monitoring Compliance with International Human Rights Standards Experience of the Human Rights Committee" Canadian Human Rights Yearbook 1991-1992, 105 at 108.

In December 1991 Michael Toonen submitted a communication to the Human Rights Committee alleging that the Tasmanian Criminal Code 1924 violated Australia's obligations under the ICCPR, namely article 17 (right to privacy) and article 26 (right to equality), as it criminalized homosexuality.[165] In November 1992 the communication was declared admissible and on 30 March 1994 the Committee made its decision.[166] The Committee was of the view that the Tasmanian Criminal Code violated Mr Toonen's privacy rights under article 17 of the ICCPR and as an effective remedy, sections 122(a), 122(c) and 123 of the Code should be repealed. The Committee refused to rule on article 26 of the ICCPR. The Tasmanian Government has to date refused to repeal the offending section of its Criminal Code. However the Federal Government has moved to implement the Committee's views by enacting the Human Rights (Sexual Conduct) Act 1994 (assented to 19 December 1994). Section 4(1) of the Act provides:

> **4.(1)** Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

This Act shows that the Parliament of Australia is aware of its obligations under the ICCPR and has been careful not to attract criticism from the Human Rights Committee and other State parties by ignoring the Committee's views on this communication.

Therefore, by showing that the Human Rights Committee views can compel States to provide remedies to individuals for the breach of their human rights through their follow-up procedures and as shown by the Toonen communication, the argument of the Court of Appeal in *Baigent* that the courts should have the power to order remedies for State violations of human rights prior to the Committee, is reinforced. Not only do communications to the Committee take an average of three years to process but the State exposes itself to international criticism if the Committee comes to the view that a violation of a citizen's human rights has occurred. The Court of Appeal by

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[165] For a discussion of this communication see W Morgan, "Identifying Evil For What It Is: Tasmanian Sexual Perversity & the UN" (1994) 19(3) MULR 740.
[166] CCPR/C/50/D/488/1992.

interpreting the ratification of the Optional Protocol as allowing it to give domestic remedies for the breach of affirmed human rights has a legitimate argument in so far as it accords with common sense. Not only will the Court of Appeal provide the individual with a shorter and less expensive route in the redress of their human rights but the State will also benefit by avoiding the international embarrassment, if the Human Rights Committee comes to the view that the State has violated a citizen's human rights.

In light of this analysis it can be concluded that the First Optional Protocol to the ICCPR and the Human Rights Committee are an important and legitimate factor influencing the change in legal culture surrounding international human rights instruments.

Judicial Colloquium at Balliol College, Oxford, on the Judiciary and Human Rights, September 1992.

Front row: Zullah CJ (Pakistan); Bello CJ (Nigeria); Lord Mackay of Clashfern (LC); Ryssdal P (European Court of Human Rights) and Dumbutshena CJ (former Chief Justice of Zimbabwe)

4.3. Judicial Colloquia on International Human Rights

A series of High Level Judicial Colloquia which have addressed the issue of the domestic application of international human rights norms are an important factor behind the change in judicial attitude towards international human rights instruments. The first Judicial Colloquium which discussed this issue was held in Bangalore, India in February 1988 and the participants included judges from both commonwealth and non-commonwealth nations.[167] A comprehensive exchange of views and full discussion of expert papers took place at this conference with a statement of principles emerging as a result. The "Bangalore Principles"[168], as they are referred to, acknowledged that fundamental human rights and freedoms are inherent in all humankind and find expression in constitutional and legal systems throughout the world and in the international human rights instruments.[169] Although it was also acknowledged, that international human rights conventions are not directly enforceable in national courts unless they have been incorporated by legislation into domestic law, the growing tendency for national courts to have regard to the international norms for the purpose of deciding cases where the domestic law is uncertain or incomplete, was welcomed. The reason why this development was welcomed was because it reflected "the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community".[170] The "Bangalore Principles" also stressed the need for education on the subject of international human rights at all levels of the legal establishment. Both judges and law students alike, it was stressed, need to be aware of this fast growing and important area of the law so that they can encourage universal respect for fundamental human rights and freedoms.[171]

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167 For a discussion of the Colloquium see M D Kirby, "Judicial Colloquium at Balliol College, Oxford, on the Judicial and Basic Rights, September 1992" (1993) 67 ALJ 63.
168 M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514 at 531.
169 *ibid.*, Principle 1.
170 *ibid.*, Principles 4 & 5.
171 *ibid.*, Principle 9.

These principles have gone on to be discussed, reaffirmed and developed in subsequent Judicial Colloquia held successively in Harare, Zimbabwe (1989); Banjul, The Gambia (1990); Abuja, Nigeria (1991); Balliol College, Oxford, England (1992); and Bloemfontein, South Africa (1993). The Bloemfontein Statement of 1993[172] expressly affirmed the importance both of international human rights instruments and international and comparative case law, as essential points of reference for the interpretation of national constitutions and legislation and in the development of the common law. Fundamental human rights and freedoms were held to be more than just paper aspirations and that judges had to ensure that they were given real effect in the domestic law.[173]

These Judicial Colloquia have had a definite effect on the thinking of commonwealth judges with respect to human rights. As well as educating some of the most influential judges in the commonwealth on the significance of fundamental human rights, they have also challenged these judges to develop the domestic law of their respective countries in a way which reflects the importance of human rights as contained in the various international human rights instruments. The Hon Justice M D Kirby, President of the New South Wales Court of Appeal, is an example of one commonwealth judge whose thinking, as reflected in his judicial decisions and extra-curial writings, has been greatly influenced by these Colloquia. Prior to attending the Judicial Colloquium in Bangalore, India, in February 1988, Kirby P admits that he was a faithful advocate of the common law principle that international law was not automatically incorporated into domestic law. On attending the Colloquium, he was exposed for the first time to the fast developing jurisprudence of international human rights norms. This led to what he describes as his "conversion", which was a realisation that fundamental human rights were inherent in human kind and that they provided important guidance in cases concerning

172 For selected papers from this Colloquium see "1993 High Level Judicial Colloquium Bloemfontein, South Africa" (1993) 19(4) CLB 1644.
173 *ibid.*, at 1646.

basis human rights and freedoms.[174]

Kirby P's "conversion" has clearly affected his judicial decisions post-Bangalore. This is shown by his willingness to refer to international human rights instruments when interpreting domestic statutes which affect a person's fundamental human rights. In *Daemar v Industrial Commission of New South Wales & Ors*[175], the issue before the New South Wales Court of Appeal was whether the Bankruptcy Act 1966 (Cth) provided that proceedings for the vindication of a public right were stayed during the bankruptcy of the petitioner. Kirby P in discussing this issue referred to the ICCPR which sets out the right of access to the courts. Although the other judges of the Court did not refer to the ICCPR, Kirby P took it as a touchstone for indicating the basic matters of approach which should be taken by the Court in tackling the construction of the statute.[176] In *Jago v District Court of New South Wales & Ors*[177], where the question was raised of whether under the common law a person accused of a criminal charge had a legally enforceable right to a speedy trial, Kirby P again made reference to the ICCPR. He stated that where the common law is unclear a relevant source of guidance may be the statements of human rights found in international instruments. International instruments he asserted, were a more reliable source of guidance than the 800 hundred years of legal history which counsel had referred to in arguing whether there was a right to a speedy trial. The case went on appeal to the High Court of Australia, where no reference was made to the international human rights instruments.[178] Kirby P in his dissenting judgment in *Cachia v Hanes & Anor*[179] was supported in his view, that a litigant could recover all costs and expenses incurred to represent himself in court, by article 14(1) of the ICCPR which provided that all persons

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174 M Kirby, " The Australian Use of International Human Rights Norms: From Bangalore to Balliol- A View From the Antipodes" (1993) 16(2) UNSWLJ 363 at 364.
175 (1988) 12 NSWLR 45; 79 ALR 591 (CA).
176 see also *S and M Motor Repairs Pty Limited & Ors v Caltex Oil (Australia) Pty Limited & Anor* (1988) 12 NSWLR 358 (CA), where Kirby P reiterates this view that the ICCPR provides the starting point in the statement of principles which placed in context, the dispute between the parties.
177 (1988) 12 NSWLR 558 (CA).
178 *Jago v District Court of New South Wales* (1989) 168 CLR 23.
179 (1991) 23 NSWLR 304.

"shall be equal before the courts and tribunals". From this fundamental principle he derived the principle that litigants should not suffer discrimination because they are not represented by lawyers.

Kirby P's attitude towards international human rights, as the above case examples illustrate, was clearly the result of his attendance and education at the Judicial Colloquium at Bangalore and at subsequent Colloquia. With the decisions of the High Court in *Mabo* and *Teoh* it can be concluded that Kirby P is no longer a lone advocate of the importance on international human rights to the interpretation and development of the domestic law.[180] Kirby P interpreted the *Mabo* decision, where Brennan J held that international law was a legitimate influence on the development of the common law, as:[181]

> ...an extremely bold step. Pointing the way to the future development of the Australian common law in harmony with developing principles of international law, just as the *Bangalore Principles* had suggested.

New Zealand's President of the Court of Appeal Sir Robin Cooke has attended a number of the Judicial Colloquia on international human rights, delivering a paper at the Judicial Colloquium at Balliol College, Oxford.[182] The extent to which his thinking has been influenced by the Judicial Colloquia is more difficult to measure as he has not been so forthright in his praise of the Colloquia as Kirby P. One example where he has referred to the Colloquia was in his judgment in *Tavita*. After stating that "the law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution", he referred to the Balliol Statement of 1992 which was reaffirmed in the Bloemfontein Statement of 1993, stating that the duty of the judiciary is to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights.[183] He was obviously influenced by the Colloquia, as his decision in *Tavita* represents a major change in the

[180] Kirby P continues to advocate the Bangalore Principles and with renewed vigour since *Mabo* , see *Regina v Greer* (1992) 62 A Crim R 442; *R v Astill* (1992) 63 A Crim R 148; *Director of Public Prosecutions for the Commonwealth v Saxon* (1992) 28 NSWLR 263.

[181] M Kirby (supra n 174) at 386.

[182] Sir R Cooke, " Empowerment and Accountability: The Quest for Administrative Justice" (1992) 18(2) CLB 1326.

[183] *Tavita* (supra n 37) at 266.

way that the judiciary are approaching international human rights instruments.

4.4 The Legal Profession

Lawyers who advocate arguments that promote the use of international human rights instruments in interpreting the domestic law have also played a key role in altering the traditional attitude of the courts towards international instruments. Anthony Shaw, barrister and Lecturer in Law at Victoria University of Wellington, through his persistent arguing in the Court of Appeal advocating the importance of international human rights instruments in the interpretation of the domestic law, has been an important figure in causing this change in attitude. He was one of the counsel for the appellants in *Ashby*, where it was argued that the Minister for Immigration should have regard to the CERD when exercising his discretion under the Immigration Act 1964. With the enactment of the Bill of Rights, he has been co-counsel in many Bill of Rights cases where it has been argued that the courts should refer to the ICCPR and the accompanying international jurisprudence in the interpretation of the Bill of Rights. He was co-counsel for the appellants in *R v Goodwin (No2)*, where the Court of Appeal accepted the argument that the jurisprudence of the Human Rights Committee is of considerable persuasive authority in the interpretation of section 22 of the Bill of Rights. He was also co-counsel for the appellants in the cases of *R v B*, *Martin v District Court of Tauranga* and *Baigent*, where the Court of Appeal accepted arguments advocating international human rights instruments in the interpretation of the Bill of Rights. By advancing arguments based on international human rights instruments, A Shaw has been an important influence not only in educating the judiciary of the importance of international human rights instruments and international jurisprudence on human rights but also in challenging the judiciary to apply these instruments and jurisprudence in domestic law.

Dr R Harrison is another New Zealand barrister who has continued to

argue in the courts the importance of international human rights instrument and international human rights jurisprudence to domestic law. He was co-counsel with A Shaw in *Ashby,* was leading counsel for the successful appellants in *Auckland Unemployed Worker's Rights Centre Inc v Attorney-General*[184] and was counsel for the plaintiffs in *Ankers v Attorney-General.*

As lawyers play an important part in this emerging legal culture they need to be educated on the subject of international human rights so that this legal culture can continue to develop. The New Zealand Law Society recognised this need for education as in June 1995 it held a Seminar on Human Rights. The aim of the Seminar was to educate interested members of the legal profession on the growing importance of human rights in New Zealand law and society today. Distinguished international and national speakers addressed the Seminar on issues relating to human rights. International, regional and national mechanisms for the enforcement of human rights were all discussed at length. Dr R Harrison gave part of a paper addressing the issue of the importation into domestic law of international human rights. In discussing the current developments in this area of the law, this paper is indicative of the emerging legal culture surrounding international human rights instruments.[185]

4.5 Conclusion

Therefore there are three principle factors which are influencing the change in legal culture surrounding international human rights instruments. The most obvious factor is the influence on the judiciary of the Optional Protocol to the ICCPR and the Human Rights Committee. The Courts fear that if they do not apply the principles of the international human rights instruments where they are relevant to issues raised in domestic law, they will face international criticism. The second important factor are the Judicial Colloquia which discuss

[184] [1994] 3 NZLR 720; (1994) 1 HRNZ 106. This case was argued conjointly with *Baigent.*

[185] This paper is reproduced at [1994] NZLJ 256.

international human rights issues. In educating members of the Commonwealth's judiciary on the importance of international human rights instruments to domestic law issues, these Colloquia challenge the judiciary to refer to these instruments in their decisions. The third important factor influencing this emerging legal culture is the persistent presentation to the courts, by certain New Zealand barristers, of reasoned arguments concerning the relevance of international human rights instruments to the domestic law. Judges have been educated on the importance of international human rights instruments through these arguments and this in turn has lead to a change in judicial attitude towards them, influencing an overall change in the legal culture surrounding these instruments.

CONCLUSION

> *...it is essential that we strive to develop a culture of respect for internationally stated human rights norms which results in those norms being applied in domestic law through the courts. Domestic courts must have regard to international human rights norms whether or not they have been incorporated into the domestic law and whether or not a country is party to a particular instrument. Fundamental human rights and freedoms are inherent in human kind.*[186]

Within New Zealand's legal profession there is an emerging 'culture of respect for internationally stated human rights norms' which is resulting in these international norms being incorporated into the domestic law. This emerging legal culture represents a radical departure from the traditional approach of the courts towards international conventional law, where the courts were very reluctant to import the terms of international conventions into the domestic law. The 1994 decision of the Court of Appeal, *Tavita*, marks a significant turning point in the judicial recognition of international human rights norms in domestic law. In this case Cooke P asserted that international instruments were more than mere 'window-dressing'[187], implying that courts would no longer tolerate statutory decision-makers ignoring international human rights norms, where they are relevant to their decisions.

The reaction of the lower courts to *Tavita*, emphasises that this emerging legal culture only applies to international human rights instruments and of these instruments only those which deal with civil and political rights as opposed to social and economic rights. Of the courts and tribunals in New Zealand, the Family Court has been the most embracing of the emerging legal culture spearheaded by *Tavita*. In two important cases *Re the S Children (No 2)* and Re *the W Children*, this Court has shown that it is willing to refer to the United Nations Convention on the Rights of the Child 1989 to interpret the CYPFA and

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186 Hon Mr Justice E Dumbutshena, Chief Justice of the Supreme Court of Zimbabwe, "Human Rights in the 21st Century" In *9th Commonwealth Law Conference : conference papers* (1990) 603 at 605.

187 *Tavita* (supra n 37) at 266.

when it is required to exercise its discretion under the CYPFA. An argument has been advanced that this use of the Convention by the Family Court will add little that is new to family law. This argument may be a reflection of the similarity in principles between the CYPFA and the Convention, however it cannot be ignored that the Family Court now recognises the legitimacy of reference to the Convention in developing the law in New Zealand.

This emerging legal culture can also be seen in the judicial approach to the interpretation of statutes, such as the Bill of Rights and the ECA, which recognise fundamental human rights. The judiciary has now shown that it is willing to refer to international human rights instruments and international jurisprudence when deciding human rights issues under these Acts.

This 'culture of respect' for international human rights norms and instruments can also be seen in Australia, England and to a more limited extent in Canada. The High Court of Australia in *Teoh* held that the ratification of the International Convention on the Rights of the Child gave rise to a "legitimate expectation" that decision-makers would act in conformity with the Convention. This is tantamount to holding that the Convention is a relevant consideration to a statutory decision and so illustrates the revolutionary attitude that the High Court of Australia has towards the effect of international instruments in domestic law. The High Court of Australia in *Mabo* and the English Court of Appeal in *Derbyshire,* have also tentatively accepted that international human rights instruments can be used to develop the common law. This again illustrates the enhanced role that these instruments are having on the development of the domestic law. The Canadian judiciary have not shown the same enthusiasm in using international human rights instruments in the development of Canadian domestic law. However some members of the Canadian judiciary lead by Dickson CJC, have held that international human rights law is a relevant and persuasive source in the interpretation of the Canadian Charter of Rights and Freedoms. The fact that this

'culture of respect' for international human rights norms and instruments is being reflected in other common-law jurisdictions, besides New Zealand, reinforces its legitimacy. With the support of many distinguished members of the Commonwealth's judiciary this legal culture will be more difficult to denounce by those who oppose it.

Three important factors discussed in this paper which are influencing this change in legal culture include, the Optional Protocol to the ICCPR which allows individuals to take their human rights complaints to the United Nation's Human Rights Committee, the series of High Level Judicial Colloquia which discuss international human rights issues and the arguments of enlightened lawyers who are challenging the judiciary to refer to international human rights law in their decisions. Underlying this legal culture and the factors which are influencing it, is a recognition of the universal nature of fundamental human rights which are inherent in human kind. People hold human rights by virtue of being human persons, there being no distinction depending on what State a person lives in. International human rights instruments are also strikingly different from the more classical international conventions, in that their concern is for individual citizens not for relations between States. One senior Australian judge has stated that to ignore international human rights principles in today's world is "akin to persisting with the horse and cart in the age of interplanetary flight, nuclear physics, and the microchip."[188] This statement reflects the very contempory nature of human rights law, which is challenging the judiciary to abandon their traditional approach towards international instruments.

Baigent is a significant decision in that the Court of Appeal in deciding that it had a general remedial jurisdiction under the Bill of Rights, effectively imported article 2(3) of the ICCPR into the Bill of Rights. This importation of article 2(3) into New Zealand's domestic law, takes the approach of the Court of Appeal towards international human rights instruments in *Tavita*, one step further. It can be argued that the Court of Appeal also went further than the Family Court, in its

[188] M Kirby, (supra n 155) at 1271.

decisions which have followed *Tavita.* In *Tavita,* the Court of Appeal hesitated in importing the provisions of the United Nations Convention on the Rights of the Child into the domestic law, by declining to finally decide whether the provisions of international human rights instruments were mandatory relevant considerations in statutory decisions which affect an individual's human rights. The Family Court has taken the comments of Cooke P in *Tavita* concerning the importance of international human rights instruments to the the development of the domestic law very seriously, using the Convention on the Rights of the Child in the interpretation of the CYPFA and in guiding its discretion under the CYPFA. The Family Court though, has not gone as far as to import provisions of the Convention into the domestic law. In *Baigent* the Court of Appeal took the step of importing a provision of an international human rights instrument into the domestic law. This is a major development in the domestic law with respect to international human rights instruments.

In order to understand and legitimize *Baigent* it must be examined in the context of this changing legal culture surrounding international human rights. This paper has endeavoured to show that there is a changing legal culture surrounding international human rights instruments. *Baigent* is part of this changing legal culture. It can be compared with the decision of the High Court of Australia, *Teoh,* and argued to be just as revolutionary. Whether there will be a political backlash to this decision as there was in Australia to *Teoh,* remains to be seen. It is my argument that this decision should be applauded, as long as it is realised that the importation of the provisions of international instruments into domestic law only applies to international human rights instruments. The Court of Appeal in *Baigent,* recognised the universal nature of human rights which are fundamental and anterior to domestic law. *Baigent* therefore forces us, as members of the legal profession to become more internationalist in our outlook. This is a new development in our legal system, which challenges orthodox views concerning the role of judges in developing the law and for this reason alone it will attract condemnation. The law

is constantly changing and the area of human rights law for it to be effective and to adequately safeguard individual's human rights, challenges lawyers and judges to disregard their traditional approach towards international instruments and embrace the use of international human rights instruments in the development of the domestic law. *Baigent* and its endorsement of the changing legal culture surrounding international human rights instruments represents the way of the future in the area of human rights law. The legitimacy of this decision will be cemented once the legal profession takes up the challenge in using international human rights instruments and the accompanying international jurisprudence to develop the domestic law.

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