DEVELOPING HUMAN RIGHTS BEFORE THE UNITED NATIONS HUMAN RIGHTS COMMITTEE AND IN NEW ZEALAND COURTS: A PRACTITIONER’S PERSPECTIVE

Submitted by

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A thesis submitted in total fulfilment of the requirements for the degree

of Doctor of Juridical Science

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May 2014
## Selected Abbreviations

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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CAT</td>
<td>(United Nations) Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>Covenant or ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>CRPD</td>
<td>United Nations Convention on the Rights of Persons with Disabilities</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>GC</td>
<td>General Comment of a UN Committee</td>
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<td>HRC or The Committee</td>
<td>(United Nations) Human Rights Committee</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>NGO</td>
<td>Non-Government Organisation</td>
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<td>NZBORA</td>
<td>New Zealand Bill of Rights Act 1990</td>
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<td>NZ</td>
<td>New Zealand</td>
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<tr>
<td>UNCAT</td>
<td>United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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EB  
*EB v New Zealand, CCPR/C/89/D/1368/2005 (2007).*

Jessop  
*Jessop v New Zealand, CCPR/C/101/D/1758/2008 (2011).*

Manuel  

Rameka  

J.S.  
*J.S. v New Zealand, CCPR/C/104/D/1752/2008 (2012).*

Sestan HC  

Sestan CA  
*Sestan v Director of Area Mental Health Services, Waitemata District Health Board [2007] 1 NZLR 767(CA).*

Sestan SC  
*Sestan v The Director of Area Mental Health Services, Waitemata District Health Board SC [2007] NZSC 5.*

Taito PC  
*Taito v The Queen [2003] 3 NZLR 577 (UKPC).*

Taito HRC  
*Taito v New Zealand, 1909/2009 (awaiting views of the HRC).*

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Statement of Authorship

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis submitted for the award of any other degree or diploma.

No other person’s work has been used without due acknowledgement in the main text of the thesis.

This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

15 October 2013
Summary

This thesis argues that New Zealand ("NZ") law provides inadequate mechanisms for the discharge of its duties under the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"). Following an analysis of the New Zealand Bill of Rights Act 1990 ("NZBORA"), the thesis provides a series of case studies which demonstrate the vulnerability of New Zealanders’ human rights and the inadequacy of existing mechanisms for their protection. It provides examples of cases where communications with the United Nations Human Rights Committee have been successful in achieving recognition of breaches of the Convention, but concludes that a more effective strategy may be the making of ‘shadow reports’ to the Committee in relation to the state of human rights in New Zealand.
ACKNOWLEDGMENTS

This thesis would was made possible only with assistance from others. First, without my clients in the various domestic and international cases I could not have picked up my pen.

At the professional level, my principal supervisor Professor Roger Douglas was delightfully non-intrusive, but if and when I needed guidance he was ready and willing with appropriate and timely comment; his advice, particularly on structure and presentation, was important. Associate Professor Savitri Taylor’s detailed practical comments were particularly appreciated; and her advice of the grouping of topics was invaluable.

Numerous commentators and the facilities of many libraries, especially La Trobe, Victoria University of Wellington, and the Institute of Advanced Legal Studies, University of London, and increasingly the Internet, have been immensely valuable.

Whilst endless reading, writing, making entries in EndNote, and proof-reading consumed many January’s, Thursday’s or Friday’s, extended weekends and holidays, the patience of my wife Jean is appreciated.

To those who proof-read my draft thesis, my thanks.
Chapter 1—Introduction and outline of the thesis

All human rights instruments, including the NZBORA\(^1\) and the ICCPR\(^2\) need to be approached as evolving instruments. Cooke P as he then was took note of this necessity in *Tavita v Minister of Immigration*\(^3\) when he remarked on how domestic law interpreting international human rights, and the applicable international law, were undergoing evolution.\(^4\) Allied with that concept is the notion that today’s dissent may be tomorrow’s law.\(^5\) Faith in such progression may explain why, despite failing in the first instance, human rights lawyers, like Robert the Bruce, try and try again\(^6\).

The development to date of some aspects of domestic and international human rights, particularly the NZBORA – which, in its long title, purports to ‘affirm, protect and promote human rights and affirm the ... ICCPR’ – underpins this thesis that human rights instruments are and will continue to be evolving. In NZ, neither the NZBORA nor the ICCPR have constitutional or entrenched status. Any other domestic statute can displace the NZBORA.\(^7\) Further, two matters converge to prevent meaningful ICCPR implementation in NZ by legislative, judicial, or administrative means, such that the ICCPR remains without formal status in NZ law. That lack of formal status arguably reveals a lack of good faith by NZ authorities in light of the Vienna Convention on the Law of Treaties (‘VCLT’).\(^8\)

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6. “If at first you don't succeed try, try and try again” Attributed to Robert the Bruce, King of Scotland, urging his troops into battle before the greatest Scottish victory against the English at Bannockburn in 1314.
7. See discussion on s 4 of the NZBORA in chapter 2. The NZBORA is reproduced in Appendix 1.
The first matter contributing to a lack of meaningful implementation of the ICCPR in NZ is an absence of political will necessary to rescue the treaty from its present unincorporated status, even some 30 years after its ratification. The NZ judiciary cannot strike down legislation for breach of either the Covenant or the NZBORA. The unicameral nature of NZ’s Parliament and the lack of a written constitution or entrenched Bill of Rights further hinder advancement of human rights in NZ. Whilst New Zealand is a parliamentary democracy and parliament is sovereign, the unicameral nature of New Zealand’s parliament provides only limited checks and balances within the NZ government. It means that it is easy for the majority will—or at least the will of the majority as perceived by Parliament—to be rapidly enacted regardless of rights considerations. This is contrary to human rights principles and disturbs the advancement of human rights in NZ. Baroness Hale, one of the nine Law Lords sitting in A v Secretary of

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9 See the NZ government’s position in the third, fourth and fifth periodic reports to the HRC as follows:
   New Zealand Government’s Third Periodic Report, CCPR/C/64/Add.10 (1994), and
   New Zealand Government’s Fourth Periodic Report, CCPR/C/NZL/2001/4, (2001), and
   These periodic reports are discussed further in Chapter 2.

10 Concluding Observations of the Human Rights Committee, UN Doc CCPR/C/79/ADD47: A/50/40 (1995), UN Doc CCPR/C/79/ADD47: A/50/40 (1995), paragraph 176 (The Committee noted is was possible to enact legislation contrary to the NZBORA, and regretted that such enactments had occurred on several occasions).

11 The Constitution Act 1986 an update of the Constitution Act 1852, continues the 3 branches of Government, but has no human rights provisions, other than protection of judges from removal from office or reduction in salary. As an ex Prime Minster and Attorney-General, and Professor of Law Sir Geoffrey Palmer says ‘The Constitution is odd because there is no upper house, no entrenched written constitution, and no judicial review of legislative action in the sense that statutes cannot be struck down by the Courts. Sir Geoffrey Palmer, ‘Constitutional reflections on Fifty Years of the Ombudsman in New Zealand’, New Zealand Universities Law Review, Vol 25, 2013 p 780. The Ministry of Justice comment on the New Zealand legal system says ‘New Zealand does not have a single written constitution. New Zealand’s constitutional arrangements can be found in a number of key documents. These, together with New Zealand’s constitutional conventions, form the nation’s constitution. Key written sources include the Constitution Act 1986, the New Zealand Bill Of Rights Act 1990, the Electoral Act 1993, the Treaty of Waitangi and the Standing Orders of the House of Representatives. Aspects of the constitution are also found in United Kingdom and other New Zealand legislation, judgments of the courts, and broad constitutional principles and conventions.’

State makes the point that democracy values everyone equally, and that the will of the majority cannot prevail if it is inconsistent with equal rights of minorities. She quotes Thomas Jefferson’s inaugural address in support of the notion that the minority possess equal rights to the majority, which equal law must protect, and that to violate those rights would be oppression.\(^{13}\)

However, in NZ, legislation sometimes passes without giving weight to the rights of the minority. For example, the National Government announced as part of its election manifesto for the November 2011 election that prisoners' compensation will no longer be paid to prisoners’ instead it will be used to fund services for victims of crimes, under a new law.\(^{14}\) Victims could currently make a claim on any money awarded by the courts for a breach of a prisoner's human rights. Before July 2013,\(^{15}\) offenders receiving monies for abuse in prison were subject to a claim for that money from their prior victims'. That legislation expired on 30 June 2013.\(^{16}\) A permanent new legislative scheme now applies.\(^{17}\) This is worse than the original scheme in that, for example, it suspends limitation periods to the disadvantage of the prisoner. Whether that is a direct attack on the basis of the UN Convention Against Torture remains to be seen. The select committee considering the Bill, were advised a challenge to the legislation before UNCAT, would be made this was repeated this when the Bill became law.\(^{18}\)

The second factor hindering implementation of the Covenant in NZ is a matter of judicial politics. In the period following the enactment of the NZBORA, a liberal Court of Appeal presided over by Sir Robin Cooke moved human rights forward. Since Lord Cooke’s 1996 elevation to the House of Lords, the Court of Appeal has become increasingly more conservative.\(^{19}\) The Chief Justice recently

\(^{13}\) Ibid, paragraph 237.


\(^{15}\) Or such other date arising from final passage of the Bill into law.

\(^{16}\) Prisoners' and Victims' Claims Act 2005, which was extended for three years in 2008, and then again until 30 June 2013.

\(^{17}\) The Prisoners' and Victims' Claims (Continuation and Reform) Amendment Act 2013.


commented\textsuperscript{20} that there were risks in constitutional reform. Whether a “soft” (i.e. unbinding) form of judicial review for human rights values introduced with the NZBORA (by which the courts under s 4 must apply legislation which is inconsistent with the Act), has left us with the worst of all worlds, is a troubling question. This may have led to three further consequences: erosion of the former conventions of parliamentary observance of human rights, and perhaps respect for the decisions of the courts, and timidity on the part of the Courts in protecting human rights.

The Supreme Court, which replaced the Judicial Committee of the Privy Council on 1 July 2004 as the highest NZ Court, had as its first appointees the Chief Justice and the four most senior judges of the Court of Appeal. Whilst six appointees are possible, no sixth judge has been appointed, except for a short period in 2010 when Justice Wilson was not sitting due to a Judicial Conduct Commissioner investigation.\textsuperscript{21} Court of Appeal judges but not necessarily the most senior judges have replaced all retiring Supreme Court judges.

On human rights issues, NZ’s superior courts are a weak means of judicial enforcement,\textsuperscript{22} and the Courts’ applications of Covenant rights generally are receding (except in immigration matters, where the Refugee Convention\textsuperscript{23} and


\textsuperscript{22}Interrights, Commonwealth and International Human Rights Case Law Databases <http://www.interights.org/database-search/index.htm> Accessed at 13 March 2013 cites, out of all International and Commonwealth cases [referenced since 2004], only five judgments of the NZ Supreme Court, illustrating the lack of international impact of its human rights jurisprudence. (Whilst this database is not necessarily exhaustive it is comprehensive, and does also report monthly by email cases of note from commonwealth jurisdictions, only those of more significance note reach the database).

\textsuperscript{23}Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p137. Also see Claudia Geiringer 'International Law through the Lens of Zaoui: Where is New Zealand At?' (2006) 17 Public Law Review 300. Saying: It would be naïve to assume that the level of international law expertise on which the Zaoui decision was premised is widely shared by members of the New Zealand judiciary. A large proportion of the current judiciary trained at a time when international law was regarded as a fringe subject within New Zealand law schools, and real depth of expertise on international law matters is accordingly still spread somewhat thinly. The picture is not, however, bleak. It is worth noting in this respect that the basic approach to the interpretation of Art 33.2 of the Refugee Convention adopted by the Supreme Court in Zaoui was, in fact, not all that dissimilar to the approach taken by Glazebrook J in the leading decision of the Court of Appeal below. I have not observed the Courts adopting a similarly advanced position since 2006.
the ICCPR are seriously considered). Whilst the Covenant supposedly informs the Courts’ interpretation of domestic human rights statutes, and should be interpreted so as to minimise conflict between domestic law and rights under international human rights law, to assume that the Courts follow these strictures is often wishful thinking. A declaration that legislation is inconsistent with the NZBORA is possible, this would importantly signal to legislators and to the electorate in general, a conflict between domestic law and international human rights obligations. But the chances of such a declaration being granted are diminishing. Initially envisaged as a possibility in 1999 by a Court of Appeal of five Judges (three is the normal quorum) in Moonen v Film and Literature Board of Review, not a single Declaration of Inconsistency has been issued since that time over ten years ago, other than two mentions, in each case by a dissenting judge. In R v Hansen, the Supreme Court discussed such a possible remedy but did not grant one. The key to this judicial reticence is two-fold: first, the failure by the government to incorporate the Covenant into domestic NZ law, and second, section 4 of NZBORA, which gives legislative supremacy to ordinary

24 See, Zaoui v Attorney-General [2004] 2 NZLR 339; Attorney General v Tamil X [2011] 1 NZLR 721. The Immigration Act 2009 now incorporates New Zealand's immigration-related obligations under both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, and the ICCPR. Perhaps the reason is the well-developed international jurisprudence relating to refugees.

25 Section 92J Human Rights Act 2002 provides for a limited statutory declaration before the Human Rights Review Tribunal, the discussion is mainly at this stage referring to the general law.

Note 9, above (Fourth Periodic Report) at paragraph:
18... The Court observed it had the power, and on occasion the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the United Nations Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum.


27 Moonen v Film and Literature Board of Review, (1999) 5 HRNZ 224, 234 paragraph 20. The writer was counsel for the defendant in this case; the case involved alleged obscene material, its classification, and freedom of expression. The judgment reflected creativity on the part of the Court in applying human rights principles based on a suggestion that was only made in passing by counsel. No inconsistency was found as the case was won on other issues.


legislation that undercuts the NZBORA. The Chief Justice notes in a 2011 speech\textsuperscript{30} that it is striking that some of the more difficult questions relating to the NZBORA are only just emerging more than 20 years after its enactment. That is questionable. The Supreme Court in part controls what is litigated; not granting leave to appeal limits what can be addressed. The NZ Supreme Court grants leave far less than other final appellate common law Courts, only about 20 a year. In 2012, 101 applications were made, 70 leave applications were dismissed, 6 abandoned, and 20 granted, and the balance carried over to 2013.\textsuperscript{31} Of those granted leave, and heard and decided in 2012, 10 (of 14) civil appeals were allowed, and 1 (of 3) criminal appeals allowed. There were 10 active files as at 31 December 2012.\textsuperscript{32}

Better solutions are (1) to effectively ‘affirm, protect and promote human rights’, as contemplated by the long title of the NZBORA, by a form of constitutional entrenchment, preferably while simultaneously giving incorporated status to the ICCPR, or (2) along the lines of the Human Rights Act 1998 (England and Wales), to require public agencies to behave in accordance with the regional obligations of the European Convention of Human Rights. These solutions are only possible by legislative action.

The HRC raised concerns arising from my shadow Report\textsuperscript{33} regarding the implementation of the Covenant in NZ to the NZ Government during its questioning of the Government in March 2010 in New York.\textsuperscript{34} Later, at a NZBORA symposium celebrating 20 years since the enactment of the NZBORA in 1990, the Minister of Justice, Simon Power—much to my surprise—said that his interaction with the Human Rights Committee which we had both attended ‘was

\begin{footnotes}
\footnotetext{30}{Note 20, p 14.}
\footnotetext{31}{Presumably some are reserved or not considered as yet. Ministry of Justice, Case summaries 2012 <http://www.courtsofnz.govt.nz/about/supreme/case-summaries/case-summaries-2012> accessed 13 March 2013.}
\footnotetext{33}{An alternative report, similar to an amicus brief, see Chapter 11 for fuller details.}
\footnotetext{34}{The summary record as at 7 January 2013 is still not yet available on the UN Website.}
\end{footnotes}
the most interesting thing he had ever done. The Minister’s comments reaffirmed my view (brought about by researching and writing this thesis) that the HRC reporting process is a very important, and to date unrecognised in New Zealand, public method of advancing human rights – one that deserves more attention.

The process of lobbying and submitting shadow reports to the HRC necessarily invokes political expression as well as a legal comment. It could be equated to making submissions to parliamentary committees. Political, as well as legal, processes can plainly develop rights; however, this thesis limits its review to those activities that can be construed as primarily legal in nature, and shadow reporting. What does need to be stressed is that, whether a case is domestic or international and whether it is labelled political or not, development of human rights law can be a drawn out process that requires patience.

This thesis demonstrates the inadequacies in human rights protection in NZ arising from the failure to incorporate the Covenant and other lacunae, including failure of the Courts to refer to international human rights law. These failures are shown by reference to domestic and international case studies where I have been counsel, and my shadow reports to the HRC. Whilst 31 NZ cases (“communications”) have been accepted as lodged with the HRC, the writer has lodged 8 of those 31 cases. Two additional communications are works-in-progress. I have to date been responsible for all three successful NZ communications (in 2003, 2007, and 2009), and five unsuccessful


36 See chapter 11 below.

37 As an example, see Beggs v Attorney-General [2002] NZAR 917 (CA), which involved defending political activity by 75 Students who were arrested in 1997 for trespass for peaceful protest in Parliament grounds, a full bench of the High Court stayed the prosecutions, and the 41 plaintiffs received compensation, costs and apologies 12 years after. Amanda Fisher, ‘Apology for protest arrests 12 years ago’ (2009) <http://www.stuff.co.nz/national/politics/3072766/Apology-for-protest-arrests-12-years-ago>.


39 Human Rights Committee General Comment (“GC”) No 33 The Obligations of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, paragraph 7 CCPR/C/GC/33, 5 November 2008.
communications. I have also lodged a communication against an overseas government for a New Zealand resident.\textsuperscript{40}

I am aware that referring to one’s own cases is fraught with bias or its possibility; however, the reality is that few others (if any) appear to have lodged a case from NZ with the HRC that has reached the admissibility stage in the last ten years.\textsuperscript{41}

Of communications from others than the writer three warrant mention. The first is \textit{Apirana Mahuika et al v New Zealand}\textsuperscript{42} where Maori fishing rights, and access to a Court were in issue. The HRC found that whilst minority rights to fishing under Article 27 were engaged, the compatibility between the impugned Act the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and the Treaty of Waitangi was not a matter for the Committee to determine,\textsuperscript{43} …finding that in the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori.

The Committee concluded that the State Party had, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement, and its enactment through legislation, including the Quota Management System, was compatible with article 27.\textsuperscript{44} In respect of the other admissible claim of denial of access to a Court under article 14, the HRC found this claim unsubstantiated.\textsuperscript{45}

Secondly, the claim by a Samoan in \textit{Toala v New Zealand}\textsuperscript{46} of arbitrary deprivation of New Zealand citizenship failed on the facts. The HRC noted\textsuperscript{47} that the authors had no connection with NZ at the time, by birth, decent, ties, or residence, and there was no arbitrary deprivation of citizenship.

\begin{footnotes}
\footnotetext[40]{\textit{Koulaeva v Latvia} 1935/2010.}
\footnotetext[41]{Three other cases in 1993,1995, and 1999 reached admissibility.}
\footnotetext[42]{\textit{Apirana Mahuika v. New Zealand} CCPR/C/55/D/547/1993 (13 October 1995).}
\footnotetext[43]{Ibid, paragraph 9.3}
\footnotetext[44]{Ibid, paragraph 9.8.}
\footnotetext[45]{Ibid, paragraph 9.11.}
\footnotetext[46]{\textit{Toala and Tofaeono v. New Zealand} CCPR/C/70/D/675/1995 (10 July 1998).}
\footnotetext[47]{Ibid, paragraph 11.5}
\end{footnotes}
Thirdly, in *Joslin v New Zealand* the author’s claim to a right of gay marriage was dismissed in a two paragraphs:

8.2 The authors’ essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry. Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term “men and women”, rather than “every human being”, “everyone” and “all persons”. Use of the term “men and women”, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

As Oertly observes, it is not uncommon for communications to the HRC from States Parties regularly to come solely from one practitioner (in NZ I seem to have acquired that role), and building up that experience is beneficial to clients. The easiest way to lose is as at the admissibility stage, or for other procedural errors like failure to exhaust domestic remedies, so prior experience is useful.

As failure to demonstrate exhaustion of domestic remedies is a common error, it helps to understand that all stages of the domestic Court structure need to be exhausted. This includes applying for leave to appeal to the final appellate Court, the NZ Supreme Court.

The views of the HRC are good external checks, on the analysis of one’s own cases, as are independent academic analysis, especially if the analysis is one

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that critiques the HRC’s “views” (as its decisions are known),\(^5\) as was the case with the first finding against NZ before the HRC, *Rameka*.\(^5\) A reader may consider that many of the arguments raised by counsel for the authors are technical in nature; this is common in the context of a deprivation of liberty. The following observation is adopted:\(^5\)

> [22] The purpose of human rights jurisprudence and the rule of law is to protect humanity from abuse by others, especially those who exercise public power. As Mr Ellis submitted, any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5 of the ECHR, namely to protect the individual from arbitrariness (see, among many other authorities, the *Chahal v The United Kingdom* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p 1864, § 118). He cited also *R v Oldbury Justices ex p Smith* (1995) 7 Admin LR 315, 326B-C):

> No person should be imprisoned unless the rules which govern the process by which the step is to be taken have been precisely complied with.

and Lord Woolf in *Brooks v DPP* [1994] 1 AC 568, 582G:

> Where the liberty of the subject is at stake, technicalities are important.

> We respectfully agree both with the submission and with the statements of principle.

**The United Nations Human Rights Committee (HRC)**

I shall be examining the views of the HRC, primarily in the context of jurisprudence where I have been counsel. Communications take considerable time to reach the HRC as all domestic remedies must be exhausted. Once a communication is lodged, it takes from two and a half to four years for the Committee’s views to be released. The HRC has emerged as the most active and innovative UN Human rights treaty body.\(^5\) Tangi Yogesh\(^5\) quoting Nowak\(^5\)


\(^5\) *Rameka, Harris and Tarawa v New Zealand*, CCPR/C/79/D/1090/2002 (2003), and see Chapter 7. See also Claudia Geiringer ‘Case Note: *Rameka v New Zealand*’ (2005) 2 New Zealand Yearbook of International Law 185, 193.

\(^5\) *T v Regional Intellectual Disability Care Agency*, [2007] NZCA 208, paragraph 22.

comments that ‘the UN Human Rights Committee is considered the most important organ striving for the universal enforcement of human rights within the framework of the United Nations’

Of the current 193 member states of the UN, there are 167 States parties to the ICCPR. The human rights identified in the Covenant are internationally monitored and supervised by the Human Rights Committee, set up by Article 28 of the ICCPR. There are 18 committee members. Each member is nominated by a State, but acts in a personal capacity. Terms of office are four years, and re-election is permitted. Election is by secret ballot of states parties. An equitable geographical, political and legal system mix is customarily chosen. Members of the Committee ‘shall be persons of high moral character and recognised competence in the field of human rights’. Three annual meetings are held, two in Geneva, and one in New York. Each annual meeting lasts three weeks, and various preliminary and other functions take place during the week prior to each meeting. Committee members are part-time and the payment provided by the UN is nominal.

**ICCPR Optional Protocols**

There are two Optional Protocols to the Covenant; each is an international treaty in its own right. NZ has ratified both.

There are 114 States Parties to the First Optional Protocol. The First Optional Protocol permits the submission to the HRC of individual complaints alleging violations of the Covenant by that State. This Protocol came into being in 1976 and was ratified by NZ in 1989, ten years after NZ’s ratification of the Covenant.

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56 Article 29.
57 Article 28.
58 Article 31—‘consideration should be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems’.
59 Article 28.
itself. Even though the First Optional Protocol is procedural, arguably this is a self-executing treaty as New Zealand, ratified that procedure, and it is now part of the common law. As of 2011, 2114 communications had been made to the United Nations Human Rights Committee ("HRC") since the First Optional Protocol first came into effect. Of those communications, 764 disclosed a violation of the Covenant, and in 142 the HRC found no violation; the balance were inadmissible. Over the last few years, about 40 cases annually have been successful before the HRC. The Committee annually declares a similar number inadmissible. With new Internet assistance on how to write communications and NGO reports providing further help, it is hoped that the number of successful cases each year will increase. Recently, the CCPR website has become available and produced more and more useful material especially for NGOs. The Petitions Team (secretariat) and the Special Rapporteur for New Communications dispose of a significant number prior to that, and the communications are not registered.

The Second Optional Protocol seeks to abolish the Death Penalty, and is not considered further in this thesis.

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62. See Rt Hon Sir Kenneth Keith, 'Harkness Henry Lecture: The Impact of International Law on New Zealand Law' (1998) 6 Waikato Law Review 1; New Zealand Airline Pilots' Association v Attorney-General, [1997] 3 NZLR 269, 286. From these sources we learn that some provisions of international treaties can be directly incorporated into NZ law whereas others cannot, according to the context. Context is king here. No case has yet tested whether the Optional Protocol is or is not part of the common law.


65. Centre for Civil and Political Rights <http://www.ccprcentre.org/>. The CCPR works to promote the participation of NGOs in the work of the Human Rights Committee, raising awareness, strengthening NGOs’ capacities, and providing technical and legal support at all stages of the reporting process, including the follow-up of the recommendations of the Committee. For example they hosted me when I went to Geneva to address the Committee on the Issues for the NZ’s Government 5th period report in 2009. See "NGO Guidelines" <http://www.ccprcentre.org/en/ngo-guidelines> Accessed 4 January 2013 (NGOs can assist individuals with communications).
Sources of HRC Jurisprudence

There are three sources of HRC jurisprudence:

Views of the Committee;

HRC General Comments; and

Periodic State Reporting (especially Concluding Observations in the State reports).

Seven chapters of this thesis are devoted to specific views of the Committee. General Comments of the HRC are discussed in the next chapter. Chapter 11 deals with the NZ periodic reporting process, and individual shadow reports. As Michael O’Flaherty (an HRC member), in the abstract of his article *The Concluding Observations of United Nations Human Rights Treaty Bodies*,\(^66\) says:

> Arguably, the issuance of concluding observations is the single most important activity of human rights treaty bodies. It provides an opportunity for the delivery of an authoritative overview of the state of human rights in a country and for the delivery of forms of advice, which can stimulate systemic improvements. Its significance is all the greater now that the only accounts of the review of periodic reports, which appear in the annual reports of the treaty bodies, are the adopted concluding observations.

**The process of filing, hearing and determining a communication**

The process for filing a communication with the HRC is that the author,\(^67\) either in person or by counsel, lodges, by mail or courier, submissions with the UN Human

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\(^{67}\) GC 33 paragraph 6, see note, 39 above, Although not a term found in the first Optional Protocol or the Covenant, the Human Rights Committee uses the description “author” to refer to an individual who has submitted a communication to the Committee under the Optional Protocol.
Rights Secretariat in Geneva. The entire process is on the papers; no oral hearings are held.68

Article 14(3)(c) of the Covenant requires trial ‘without undue delay’, but ironically the Committee itself takes up to four years in deciding cases. Whilst the Committee is not itself bound by the Covenant, in the context of Article 14(3)(c) the right of trial without undue delay, the spirit of the right is not helped by lengthy Committee delays.69 In the case of the HRC, all 18 members (if not absent) must sit on all communications, considerably slowing the process. In the first of his recommendations, the UN Secretary-General in September 2011 called for adequate resources from the regular budget as the activities of the Committees was a core activity mandated by international treaties, whose accountability under international human rights laws was suffering.70

**Observations on the role of the HRC**

The HRC is not bound by a strict *stare decisis* regime which is not a doctrine applicable in international law, for example in *Dean v New Zealand* (Chapter 6), the Committee was invited to revisit *Rameka v New Zealand* (Chapter 7). It merely noted the request, but gave no reasons for not revisiting it, by impression accepting this as a routine request. Tyagi71 discusses reopening a case, but only in the context of the same author trying to revisit his/her communication. Whilst there are many recent Internet guides to aid practitioners into how to make a communication, including the 4 mentioned above, Joseph’s handbook whilst

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69 No complaint that the Committee is itself responsible for undue delay has yet been made. Such a complainant could presumably be made to the Secretary-General. This can likely be put down to two reasons. First, authors presumably understand the reality of the Committee’s modest funding and part-time membership, and second, authors may desire, consciously or otherwise, not to side-track the Committee into a difficult political position which would have little benefit to the individual author, even if the debate arguably might in the long-term assist in garnering the political pressure needed to get more funding, and hence resources.

70 Secretary-General, ‘Measures to improve further the effectiveness, harmonization and reform of the treaty body system, A/66/344’ (2011).

71 See note 54 above, p 601.
becoming dated is still the best and most practical. One purpose of this thesis is intended to add some light on the process.

Membership of the HRC changes regularly, and its finding are sometimes obscure, and lack depth. Dominic McGoldrick’s sometimes excellent but dated 1991 text, illustrates a recurring problem with lack of depth in the HRC’s views. He states in the context of Articles 7 and 10(1) (Article 7—No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and Article 10—All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person) which have featured prominently in the HRC’s final views, that numerous violations of both Articles 7 and 10(1) have been recorded. As a large number of the HRC’s views have concerned Uruguay (who consistently failed to put in any defence) the HRC case law is restricted. A much wider range of issues have been considered under Article 3 of the ECHR. McGoldrick is highly critical, and rightly so in my opinion:

Even within its limited scope the HRC’s analyses have been rather sparse, cautious, and unhelpful. This is partly explicable by the consistent failure of the Uruguayan authorities to co-operate with the HRC, for example, with respect to the production of evidence or the specific rebuttal of allegations. The result is that the HRC’s jurisprudence has been developing in a rather abstract, academic manner without the benefit of detailed counter argument. Often the HRC’s views have simply consisted of a recitation of the factual allegations and the HRC’s stating that those facts form the basis of findings of violations of, inter alia, articles 7 and 10(1) of the Covenant. Accordingly, many of the HRC’s views are unsatisfactory with regard to an understanding of a particular decision and also, more generally, in terms of facilitating a comprehensible development of the meaning of the Covenant.

In Antonaccio v. Uruguay A was held in solitary confinement for three months in an underground cell, was subjected to torture over a period of three months and was being denied the medical treatment his condition required. There had been

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73 Ibid, p 367.
75 See note 72, p 367.
violations of Article 7 and 10(1) but no further explanation of the HRC’s views, so it is uncertain whether such a period of and circumstances of solitary confinement alone would have violated Article 7 or Article 10(1) or both. McGoldrick states: 77

It is unfortunate that the HRC does not comment on or explain the circumstances of solitary confinement in this case and thereby afford a useful example of the scope of its General Comment. Similar criticism can be made with regard to the denial of medical treatment to A.

Moving on, the UN Committee Against Torture has now issued General Comments in 2008 and 2012, which have moved the jurisprudence forward. Tyagi’s more recent text,78 which contains a detailed 800-page overview of practice and procedure of the HRC, offers limited case law commentary. Nevertheless, his last chapter is particularly interesting in conceptualising who he thinks had played a more instrumental role in the development of the Committee. This is useful in knowing your forum. His comments on the earlier French, both the German Federal and Democratic republics, and Norwegian members perhaps underplays the role of other non-Europeans, but a more detailed analysis has yet not be provided, so is currently the latest available. In my opinion, more recently, Mdm Chanet, (France), Mr Bhagwati (India), and Mr Llallah (Mauritius) have also been influential players as discussed in Fardon v Australia below.79

With a recent 800-page book on practice and procedure, and 4 Internet manuals, a full literature review is unnecessary, and busy practitioners will prefer the less academic Internet guides. Nevertheless, from an academic perspective the HRC is still a neglected academic topic. There is now often confusion in the public mind with the politically based Human Rights Council created in 2006. The Council is made up of 47 United Nations Member States, which are elected by the UN General Assembly. The Human Rights Council replaced the former United Nations Commission on Human Rights. The Council’s Universal Periodic Reviews seemingly receives more attention from the Human Rights

77 Note 72 above, p 368.
78 Note 54 above.
Commission and other domestic players, as perhaps the forum is less technical and legalistic than the HRC.

Communications from NZ

The number of communications from NZ recorded as having been received by the HRC is 31, 32 or 33. The webpage is unreliable. A far more useful summary of communications with links to the views of the Committee is found on the Ministry of Justice website.

Only 15 countries (of 114) have a larger number as of the same date. On a per capita basis only Jamaica, and Trinidad, with a large number of death penalty communications, and Uruguay with a large number of deaths in custody, disappearances and torture cases undefended by the State have a higher rate of communications. Accordingly, it is fair to say NZ has a high number of communications both absolutely and per capita. A table of those countries with either more communications lodged than NZ or the same number follows:

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81 Statistical survey of individual complaints dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights <http://www2.ohchr.org/english/bodies/hrc/stat2.htm> Accessed 18 April 2013 shows 31. I have read a further communication lodged by an Auckland lawyer who says he has another one accepted as admissible. The only recorded case not lodged since 2002 by the writer Moleni Fa’aaliga and Faatupu Fa’aaliga v New Zealand, CCPR/C/85/D/1279/2004 was declared inadmissible. In reality, communications, like domestic Court cases, can be both successful on one point but not on others, so communications are often both admissible on some complaints, and inadmissible on others.

82 One early case has some domestic follow up. In A (name withheld) v New Zealand CCPR/C/66/D/754/1997 (3 August 1999), a psychiatric patient claimed that he had been subjected to an arbitrary detention. On A’s behalf, I undertook a follow-up pro bono habeas corpus appeal without success in the Court of Appeal. See McVeagh v Attorney-General [2002] 1 NZLR 808.

<table>
<thead>
<tr>
<th>Country</th>
<th>Population (millions)</th>
<th>Number of Communications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>22</td>
<td>124</td>
</tr>
<tr>
<td>Belarus</td>
<td>9.5</td>
<td>46</td>
</tr>
<tr>
<td>Canada</td>
<td>32.5</td>
<td>143</td>
</tr>
<tr>
<td>Columbia</td>
<td>32</td>
<td>47</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>10.4</td>
<td>49</td>
</tr>
<tr>
<td>Finland</td>
<td>5.4</td>
<td>32</td>
</tr>
<tr>
<td>France</td>
<td>65</td>
<td>74</td>
</tr>
<tr>
<td>Jamaica</td>
<td>2.9</td>
<td>177</td>
</tr>
<tr>
<td>Netherlands</td>
<td>16.7</td>
<td>90</td>
</tr>
<tr>
<td>New Zealand</td>
<td>4.4</td>
<td>32</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>48.9</td>
<td>123</td>
</tr>
<tr>
<td>Russia</td>
<td>143</td>
<td>44</td>
</tr>
<tr>
<td>Spain</td>
<td>46</td>
<td>109</td>
</tr>
<tr>
<td>Trinidad and Tobago</td>
<td>4.2</td>
<td>48</td>
</tr>
<tr>
<td>Ukraine</td>
<td>46</td>
<td>83</td>
</tr>
<tr>
<td>Uruguay</td>
<td>3.4</td>
<td>80</td>
</tr>
</tbody>
</table>
There could and should in my opinion be more communications, especially from lawyers. There are at least three reasons for lawyers not engaging. First, there are few human rights lawyers in NZ, and no recognisable human rights bar; consequently, widespread experience and interest in taking cases is missing. I agree with Oertly\(^{84}\) that knowledge of the Optional Protocol process is, an important factor in bringing successful communications. He observed that 29 State Parties had no communications at all lodged against them.\(^{85}\) Secondly, HRC cases—like most human rights cases—usually involve disadvantaged persons, who are invariably poor, and NZ legal aid\(^{86}\) is not available. Of the nine cases I have filed, the majority were pro bono. There are possible other UN alternatives to the HRC; for example a case in progress is being submitted firstly to the UN Special Rapporteur on Independence of Judges and Lawyers, rather than the HRC, which the paying client (a lawyer) originally sought. An extradition case which involves a murder in China and hence the death penalty, and the possibly of torture may go the UN Working Party on Arbitrary Detention, and thereafter the HRC.\(^{87}\) Undertaking multiple representations before the HRC with little compensation requires a major commitment given the complexity of some cases.\(^{88}\) Given the up-skilling required, and the absence of legal aid, it is unsurprising that few lawyers lodge communications. Additionally, apart from myself no NZ lawyer (or author) has lodged multiple communications for clients,\(^{89}\) perhaps reflecting their rather unsatisfactory initial experiences. Finally, significant delay before any meaningful remedy might be received as a result of a communication is off-putting to potential authors. Despite not being formally

\(^{84}\) Note 49, above p 5.
\(^{85}\) No State party, however well behaved, does not have room for improvement. 
\(^{86}\) Tangiora v Wellington District Legal Services (2000) 5 HRNZ 201, 207 (PC). The HRC was found not to be part of New Zealand’s legal system, not being an administrative tribunal or judicial authority within the meaning of s 19 of the Legal Services Act 1991. The Board concluded that the HRC had an independent source of jurisdiction, which made it impossible to regard it as part of the legal system of New Zealand.
\(^{88}\) For example the Jessop communication.
\(^{89}\) According to Jasper Krommendijk, ‘Can Mr Zaoui freely cross the foreshore and seabed? The Effectiveness of UN Human Rights Monitoring Mechanisms in New Zealand’ (2012) 43(2) Victoria University of Wellington Law Review 579, 595 twenty communications have been lodged which is plainly wrong. He also says John Petris has lodged more than one, that may be true but only one is recorded as being dismissed.
binding in international law, or domestic law, at least to lawyers, the views of the Committee can be influential, and can inspire further communications or domestic law arguments, but this does not greatly assist the individual client wanting some certainty, not merely hoping the Government will implement the Committee’s views. In NZ, the Committee’s views are, according to Eichelbaum CJ, ‘of considerable persuasive authority’. In Tangiora the Privy Council observed its functions are adjudicative, and when it takes a final view that a State party is in breach of its Covenant obligations, it makes a final ruling, which is determinative of an issue that has been referred to it.

That considerable persuasive authority looks doubtful when following Dean’s somewhat pyrrhic HRC victory— in that he received only an early parole hearing in 2009 the Attorney-General said: ‘The Government fully accepted its obligations to engage in good faith with the UN committees established under human rights treaties’. This statement is in contrast with the Government’s response following EB, where it rejected the HRC’s views that rights had been violated. The HRC was displeased with the Government’s inaction in EB, noting in their March 2010 conclusions:

8. While welcoming the State party’s decision to undertake a case-flow analysis of the Family Court with a view to reducing delays in issuing decisions following the views adopted in Communication No. 1368/2005 (CCPR/C/89/D/1368/2005/Rev.1), the Committee is concerned that the authors of the case have not yet received reparation. (art. 2)

The State party should give full effect to all views on individual communications adopted by the Committee, in order to comply with article 2, paragraph 3 of the Covenant which guarantees the right of a victim of a human rights violation to an effective remedy and reparation when there has been a violation of the Covenant.

[Bold in original]

91 Unlike the European Court of Human Rights the Committee’s views do not emanate from a Court, however as far as Covenant interpretation is concerned they are final.
92 Nicholls v Registrar of the Court of Appeal [1998] 2 NZLR 385 (CA), 405..
93 Note 86, paragraph 14.
94 See Chapter 9.
95 LawTalk : Newsletter of the New Zealand Law Society, 4 May 2009..
96 See Chapter 10.
As with *Rameka*, discussed in Chapter 5 below, a systemic government response and legislative or policy changes, rather than any meaningful individual gain for the author seemed only to be achieved.

Perhaps a shining beacon for the future is the 2004 Bill of Rights approach in the Australian Capital Territory, which expressly gives effect to provisions of the Covenant, providing that “international law, and the judgments of international and foreign Courts and tribunals, relevant to a human rights may be considered in interpreting the human right.”

“International law” is defined as including “general comments and views of the United Nations human rights treaty monitoring bodies”.

**Flow Charts of NZ Courts**

As domestic remedies need exhaustion before communications can be lodged and readers not familiar with the NZ Court structure are assisted by a flow chart below:

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98 Human Rights Act 2004 (Australian Capital Territory), s 31.
99 Human Rights Act 2004 (ACT), Dictionary (definition of “international law”, paragraph (b)).
The Privy Council was NZ’s highest Court before 1 July 2004. Thereafter the Supreme Court replaced the Privy Council.
The chart is intended to give a general overview only.\textsuperscript{100} The Judicial Committee of Privy Council was the final appellate Court until 2004.\textsuperscript{101} Prior to 2004, criminal cases, unlike civil cases, required special leave to appeal from the Privy Council, as the Court of Appeal was without jurisdiction to grant leave. In reality, this meant that the Court of Appeal was the final appellate Court for criminal cases except on rare occasions. As by 2001, fewer than 15 criminal applicants had been granted Special Leave to Appeal to the Judicial Committee in over 150 years.\textsuperscript{102}

Obtaining Legal aid was a further hurdle (about 90 per cent of criminal appeals in the Court of Appeal were on legal aid),\textsuperscript{103} as the Attorney-General was required to certify exceptional public importance, and that a grant of aid was in the public interest.

Most cases that have been granted leave from any jurisdiction have involved constitutional issues, the test also being \textit{exceptional} public importance. The Privy Council has never in criminal cases—unlike in civil cases—been a further appellate Court.\textsuperscript{104} The Supreme Court has heard only approximately 20 appeals a year both civil and criminal since its inception.\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{100} For example, criminal appeals on summary matters from the District Court are to the High Court, but criminal appeals on indictable matters from either the High Court or District Court are to the Court of Appeal ("COA"). Matters originating in the District Court had the final appeal to the Court of Appeal, and could not seek special leave to the Privy Council. Civil appellants had a right of appeal if over $5,000 was involved, or the COA could grant leave. The rules changed when the right of appeal or right to seek to appeal to the Privy Council was removed in 2004. That money outranks human rights is an interesting issue for another day.
\item \textsuperscript{101} Two more detailed charts can be viewed in the 'Report of the Justice and Electoral Select Committee on the Supreme Court Bill (16 September 2003)' (NZ House of Representatives), 2003) 48-49.
\item \textsuperscript{102} Rt Hon Peter Blanchard, 'The Early Experience of the New Zealand Supreme Court' (2008) 6(1) \textit{New Zealand Journal of Public and International Law}, 175.
\item \textsuperscript{103} Section 6 Legal Services Act 2001, (Now s 7 Legal Services Act 2011). It is still possible to appeal to the Privy Council on pre-2004 cases, but there is choice of venue, and appellants with Crown consent can opt for the Supreme Court.
\item \textsuperscript{104} P. Taylor, \textit{Taylor on Appeals} (Sweet & Maxwell, 2000), 669.
\item \textsuperscript{105} Note 102, above.
\end{itemize}
From time to time, Courts of Appeal of five Judges—rather than the normal three—sit to hear important cases: \(^{106}\) see, e.g. *Moonen v Board of Film and Literature Review*, \(^{107}\) *Leitch v The Queen*, \(^{108}\) *Dean v The Queen* \(^{109}\) and *Belcher v Chief Executive Department of Corrections* \(^{110}\) discussed below. Criminal cases are, in my opinion, treated as second-rate and are a *fraud on the public* as they are normally assigned to the Criminal Appeal Division, \(^{111}\) where a single permanent Judge of the Court of Appeal sits with two High Court Judges on short-term secondment. Civil cases are generally assigned to a permanent division, where three permanent Judges of the Court of Appeal sit. \(^{112}\)

**The Thesis Chapters**

This thesis devotes individual chapters to discussion of lack of entrenched human rights illustrated further by discussing eight HRC case studies from NZ in which the writer served as counsel. The cases are discussed sequentially based on related issues rather than chronologically. The penultimate chapter discusses shadow reporting on the Government formal record of compliance with the Covenant, and the final chapter, the conclusion draws the various themes together.

Chapter two is a detailed discussion of applying the Covenant domestically, and how this impacts on human rights.

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The total number of Permanent Courts sitting with five judges over the years 2001-2005 was 17, broken down as follows: five in 2002, three in 2003, two in 2004 and five in 2005. Of those I was counsel in eight cases.

\(^{107}\) Moonen note 27, above.

\(^{108}\) *Leitch v The Queen* [1998] 1 NZLR 420 (CA).

\(^{109}\) *Dean v The Queen*, CA 172/03, 17 December 2004. .

\(^{110}\) *Belcher v Chief Executive Department of Corrections* [2007] NZCA 174.

\(^{111}\) This comment arises in part on a similar practice applying in Scotland and criticised by Lord Hope, quoting Lord Emslie, Lord President (Scotland) in *Kearney v HM Advocate UKPC*, 6 February 2006, paragraph 29:

It reflected the fact that Lord Emslie had already made it clear that he was firmly opposed to the appointment of temporary judges to sit in the Court of Session and the High Court of Justiciary ... In his view this was rather a *fraud on the public*. It was, as he put it, a *nasty, cheap solution* to the problem caused by the increased workload. [Emphasis added].

Chapter three relates to my most recent communications considered by the HRC, *Taito* and a passing reference to a case with similarities, *Jessop*, however most of the Chapter discusses the significant legal victory before the Privy Council in 2002 for *Taito* and *Jessop* and 10 others considering systemic process\(^{113}\) whereas the communications follow this up and concentrate on substantive individual breaches of the Covenant particularly lack of fair trial (both were convicted of aggravated robbery), and share a common theme of undue delay.

Chapter four is an abbreviated summary of Ms Jessop’s communication to the HRC. This 14-year-old’s experiences through 10 domestic Courts involved over 300 pages of communication. Whilst human rights were advanced by the Privy Council judgment, the HRC views in *Jessop* do not advance rights, and the *Taito* views are still undetermined.

Chapters five, six, seven, and eight, respectively deal with a quartet of HRC communications — three from convicted sex offenders, and one from a convicted murderer. They share the common theme of alleged excessive or arbitrary lengths of detention.

Chapter five discusses the *Rameka, Tarawa and Harris* case, and my first HRC case, decided in 2003. The communication involved the lawfulness of preventive detention, an indeterminate sentence, which at the time carried a minimum non-parole period of 10 years. The Committee’s views were unusually sharply divided, having five groups of differing opinions. A bare majority of 7-6 found a single violation in respect of Mr Harris.

In chapter six, *Dean*, I discuss asking the Committee to reconsider its *Rameka* 7-6 views involving Articles 7 and 10 of the Covenant that address disproportionate penalties. Mr Dean was convicted of indecent assault in groping a 13 year old in the groin over his trousers, and, like Rameka, was sentenced to preventive detention. The Committee noted the request to reconsider, and denied it. *Dean* also raised undue delay questions similar to those raised in *Taito and Jessop*. Both *Rameka* and *Dean* together with *M v Germany*\(^{114}\) were building blocks for

\(^{113}\) *Taito and 11 others v the Queen* [2003] 3 NZLR 577 (Taito PC).

\(^{114}\) *M v Germany*, ECHR, Application No 19359/04, 17 December 2009.
Fardon v Australia\textsuperscript{115} and Tillman v Australia,\textsuperscript{116} illustrating that patience is requiring as human rights can advance slowly.

Chapter seven reviews the case of Mr Van der Plaat, a 70-year old man who invoked Article 15 of the Covenant\textsuperscript{117} with respect to his 14-year imprisonment for seriously sexually abusing his daughter (which he still denies) and the change of parole laws to allow release at one-third instead of two-thirds of sentence. The nature of parole, and whether it is a separate penalty or purely an administrative part of the sentence, were issues of first impression before the HRC.\textsuperscript{118}

Chapter eight is an analysis of Mr Manuel’s case, which arose from a recall to prison after his release on a murder charge, and centred on a determination as to whether the application of arbitrary detention principles from the ECHR case of Stafford v UK,\textsuperscript{119} was appropriate. This case also illustrates the difficulty of exhausting domestic remedies in a HRC communication.

Chapter nine addresses an undue delay theme raised in EB’s HRC communication. EB’s case involved restrictions on his access to his children in light of sexual abuse allegations made against him that were ultimately proved unfounded. The undue delay in police investigating unfounded allegations was fatal to EB’s parental rights. So even winning before the HRC was of little practical assistance to EB.

Chapter ten also discusses undue delay, this time in the context of a habeas corpus. J.S.’s HRC communication raised alleged Covenant breaches arising from his detention in a psychiatric hospital. Again, the delay in having this time a habeas corpus case caused difficulty, which was surprisingly not of concern to the HRC unlike the concern shown by the European Court of Human Rights in like circumstances in E v Norway.\textsuperscript{120}

\textsuperscript{115} Fardon v Australia, CCPR/C/98/D/1629/2007 (12 April 2010).
\textsuperscript{116} Tillman v Australia CCPR/C/98/D/1635/2007 (10 May 2010).
\textsuperscript{117} See Appendix two.
\textsuperscript{118} This issue was touched upon but not determined in 1982 in MacIsaac v Canada 55/79 CCPR/C/OP/2 at paragraph 87, (1990).
\textsuperscript{119} Stafford v UK [2002] 35 EHRR 32.
\textsuperscript{120} E v Norway ECHR (Application no. 11701/85), 29 August 1990.
Sestan’s name, accordingly in domestic Courts he is referred to as Sestan, and as J.S. when referring to the communication.

Chapter eleven discusses shadow reports to the five yearly States Party’s reports on compliance with the Covenant to the HRC. It is a standard part of the reporting process for the HRC to receive shadow reports from NGO’s, including individuals such as myself. The 2010 Conclusions and Observations of the HRC resulting from the fifth periodic report from NZ are also discussed showing their possible effects in advancing human rights.

Chapter twelve contains the conclusions of the thesis.

To avoid repetitive reference in the main body, appendices one and two contain relevant sections of the Covenant and NZBORA, respectively.

Appendix three details the various findings against States Parties in respect of article two of the Covenant a key feature of the thesis.
Chapter 2—New Zealand’s Government and Court’s, ambivalence to international law: and the subordination of treaties to domestic law

Introduction

The NZBORA is narrower than the Covenant; however, while the Covenant may be broader in scope, it has no domestic status other than as an interpretive guide, and it is only selectively used for that interpretive purpose. The Courts in NZ have tended to give the Covenant a narrow interpretation, and not infrequently simply have ignored it, even if lawyers have raised it in argument; many regrettably are not familiar with the Covenant. For those reasons, this thesis argues that NZ is in breach of its international obligations contained in Article 2 of the Covenant, as reflected in various HRC views, General Comments of the HRC, and Conclusions and Observations of the Committee.

NZ’s Core Document

NZ’s Core Document accurately reflects the status of human rights in NZ. That document states that the purpose of the NZBORA is to affirm, protect and promote human rights and fundamental freedoms in NZ and to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights. Section 3 of the NZBORA applies the Act to the legislative, executive and judicial branches of the government of NZ, and to any person or body in the performance of any public function, power or duty conferred or imposed on that

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121 See Appendices 1 and 2 for the relevant provisions of the NZBORA and the Covenant. Section 4 of the NZBORA provides that other legislation overrides it. Cf Article 4 (2) of the Covenant: ‘No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.’ The NZBORA rights are all subject to s 5 as to whether they are necessary and justified in a free and democratic society. Not so with the Covenant, some articles are absolute like Article 7 prohibition of torture and Article 18 protecting freedom of thought. Article 17 of the Covenant, conferring a privacy right, has no NZ counterpart, and Article 26 of the Covenant prohibiting discrimination is wider in having “other status” as a grouping not contained in domestic law.


123 The Core Document of each State Party outlines basic information about that State, such as its geography, its demography, its constitutional, political and legal structure, and other general information.

124 Note 121, above, paragraph 91. See also discussion of ss 4, 5, and 6 of the NZBORA in this chapter.
person or body by or pursuant to the law. The NZBORA is not supreme over other Acts of Parliament. The Courts have no power to strike down primary legislation on the basis that it is inconsistent with NZBORA (although they can strike down secondary legislation that is inconsistent with it).125

**General Comments of the HRC**

In order to understand the ways in which the Covenant might be incorporated into domestic law by legislative, judicial, or administrative means, reference must be made to the Committee’s General Comments. The Committee’s General Comments are the authoritative interpretation of what the Articles of the Covenant mean, and a source of international human rights law.

A recent exposition of the value of the General Comments was contained in a press release emanating from the Eighty-Ninth Session (2007) of the HRC:126

Ruth Wedgwood, expert from the United States, said: “It is about laying down technical rules which the experts think are implicit in the Covenant or in case law.” She said the aim should be to inspire the reader as to the “noble quality” of the fundamental norms of fairness—the rights to a fair trial—to make people learn the main moral and legal lesson of that.

**Legislative, Judicial or Administrative Measures**

General Comments (“GC”) 31/5, 31/7, 31/13, 31/14, and 31/15 are highly relevant to the understanding of States Parties’ obligations.127 GCs 31/5 and 31/7 state as follows:

31/5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by the Covenant has immediate effect for all States parties.

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126 News and Media Division Department of Public information, United Nations General Assembly, ‘Human Rights Committee discusses draft General Comment concerning right to a fair trial, equal treatment before Courts, Media Release, HR/CT/ 686, 16 March 2007, 89th Session 2432nd Meeting’, (New York), 2007

31/7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.

NZ has neither immediately recognised the Covenant (indeed, it has done the reverse as 30 years after its ratification the Covenant remains unincorporated into NZ domestic law), nor has it adopted any of three main means (legislative, judicial or administrative) needed to ensure enjoyment of Covenant rights.

GC 31/13 notes that under Article 2(2) of the Covenant, States Parties must take the necessary steps to give effect to the Covenant rights in their respective domestic orders, and that upon ratification domestic laws must be amended to ensure Covenant conformity. This can be done within a country’s own constitutional structure, and does not require direct enforceability of the Covenant in domestic Courts; however, the Committee’s view is that the Covenant is enhanced by specific incorporation, and it has invited countries not yet incorporating it into domestic law to consider incorporation to facilitate full realisation of Article 2 rights.

GC 31/14 notes that a failure by a ratifying State to give immediate effect to the Covenant within that State’s domestic law cannot be justified by reference to such State’s political, social, cultural or economic considerations.

GC 31/15 recognises Covenant rights can be ensured by the Judiciary by different methods, including direct incorporation, application of comparable constitutional or other provisions of law, or by interpretation of domestic law.

Absence of legislative methods

NZ has no written constitution to protect human rights, and has failed to incorporate the Covenant into domestic law since its ratification in 1979.\(^\text{128}\) Thus, there is no effective legislative protection of international or domestic human rights in NZ from ordinary statutes than abridge those rights. The NZBORA is the best legislative attempt to protect human rights in NZ on any reasonable standard of analysis NZ would be seen to have advanced human rights protection, but it is

\(^{128}\) The date of ratification by NZ was 22 December 1978; the date of entry into force 29 March 1979.
unentrenched and s 4 of the NZBORA means that the rights covered therein can be displaced by any other legislative Act of NZ.

In order to understand fully the status of the NZBORA, one must consider the Long Title, and ss 4, 5 and 6 of the Act itself:

New Zealand Bill of Rights Act 1990

An Act—

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

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

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

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

6 Interpretation consistent with Bill of Rights to be preferred

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

Doctors Andrew and Petra Butler, in their leading text on the NZBORA, say NZ’s Bill of Rights is not a supreme law bill of rights.129 This is emphasised by the terms of s 4 of NZBORA. Specifically, s 4 prevents the Courts from invalidating a provision, rendering a provision ineffective, or declining to apply any provision of an enactment by reason only of its inconsistency with NZBORA.

The Covenant remains an unincorporated treaty. The NZBORA, which purportedly ‘affirm[s], protects and promotes human rights and affirms the Covenant’, does no such thing. It is a dangerous illusion; it does not affirm the Covenant, which is not incorporated into domestic law. It is of course tempting to argue that affirming the Covenant gives it some status, but the affirmation is not in the body of the statute, or in some other generally recognised methods of statutory adoption such as a schedule. Butler and Butler, discussing limits to the use of the Covenant in NZ, say the general affirmation of the Covenant in the long title of the NZBORA cannot be relied upon to fill perceived gaps in human rights coverage offered by the NZBORA itself if such gaps were deliberately created by Parliament.\(^{130}\) This reflects the domestic constitutional grundnorm that international law is only part of domestic law to the extent that Parliament has incorporated it into the domestic system.\(^{131}\) Therefore, the wider guarantees of rights offered by the Covenant are not an aspect of the rights protected by NZBORA.

At least superficially the long title, and case law, give the impression to the outside world of a stronger Covenant status. Whatever the domestic case law like Tavita says, the use by the Courts of foreign jurisprudence with their analysis of rights law, where applicable would help. But as Allen, Huscroft and Nessa observe:

> Conclusion

In our view, the data set out in our appendices provide evidence that supports what we expected to find: overseas authority is not used in a principled or systematic way by New Zealand courts in interpreting the New Zealand Bill of Rights Act. The premises that justify its use are never articulated, either in general or particular terms.\(^{132}\)

Their premise is that judges are selective; this does help the inferior status of the NZBORA. Whilst others will disagree with my premise, and suggest that

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\(^{130}\) Ibid, paragraph 4.5.11.

\(^{131}\) This is not inconsistent with the self-executing doctrine, as the context of the NZBORA does not directly incorporate.

parliamentary sovereignty, is somewhat of a constraint to entrenchment, and that even with some HRC success this of itself shows good protection of human rights, in the end it is a matter of opinion, not fact.

Beth Simmons\textsuperscript{133} gives an extensive analysis of why common law countries have been slower to ratify treaties than civil countries. Her analysis is extremely persuasive\textsuperscript{134} and covers six treaties including the Covenant. It is clear that parliamentary sovereignty is just one factor; internal policies of the common law countries like New Zealand are another. Treaties do not simply reflect politics they also alter them. Eric Posner\textsuperscript{135} challenges her proposition that treaties reflect politics. The main problem he sees is that she does not in fact, explain why liberal democracies would enter a human rights treaty. Posner says Simmons focuses on the cost, plausibly arguing that a State that enters a treaty that does not require it to change its behaviour, does not face any cost.\textsuperscript{136} He criticises her lack of explanation for liberal democracies entering treaties when there is no political cost.

In short, the constraints of executive action in entering a treaty, need to be read alongside the political costs and benefits. If the political benefits outweigh the executive and legislative constraints then the law will be amended. We have not yet reached that stage in NZ: the political will to entrench the Covenant, is still absent.

As Virgilio Afonso da Silva\textsuperscript{137} says treaties can be used in domestic politics as very powerful arguments for a more widespread realisation of the values they express. The political debate is still developing in New Zealand.

\textsuperscript{133} Beth Simmons, \textit{Mobilizing for Human Rights: International Law in Domestic Politics} (Cambridge University Press, 2009).
\textsuperscript{134} Ibid, p 3.
\textsuperscript{136} Ibid, p 3.
**Unentrenched and inferior status of the NZBORA**

Section 4 of the NZBORA is akin to a disguised perpetual domestic reservation to the Covenant enacted in domestic law, effectively ranking rights legislation inferior to all other legislation, in that any other legislation must be upheld even when inconsistent with rights legislation.\(^{138}\) Consistently with the responsibilities imposed upon the legislative branch, In *Boscawen*\(^{139}\) the Court of Appeal concluded it would be contrary to comity to interfere with the Attorney-General’s section 7 role, as it had to protect parliament’s rights. So the Attorney-General’s obligation to bring to the attention of the House of Representatives any provision in a Bill that “appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights”, has no bite if he fails to draw attention to it. Even at a symbolic level this suggests the Act is a failure, and 27 negative reports that bills breached rights in the NZBORA, take the failure from symbolism into reality.

Section 4 is in itself a serious Covenant breach—an argument advanced in both J.S. and *EB*.\(^{140}\) The NZBORA’s affirmation of the Covenant is window-dressing, as it is subsidiary to other statutes when it suits Parliament. The Act and the so-called affirmation of the Covenant are displaceable by *any* other Act of Parliament by virtue of s 4. There is no entrenchment, or superior constitutional status afforded to the NZBORA or the Covenant. Legislation that violates the

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\(^{138}\) See Janet McLean, ‘Bills of Rights and Constitutional Conventions,’ (Paper presented at the Bills of Rights and Constitutional Conventions Victoria University, Wellington 30 August 2011): Expressing alarm about negative section 7 reports, emphasising that in the case of all 27 negative reports the Government was prepared to proceed with a Bill, which “it openly acknowledged as limiting protected rights unreasonably in a way that could not be justified”. In few cases of an adverse report did the House debate the report. Prof McLean contrasts this record with that in the UK since enactment of Human Rights Act 1998 where there have been only two negative reports: Also see: ‘Strengthening of human rights protection mechanisms, New Zealand Law Society, 24 June’ (2013). The NZLS said ‘There have been twelve pieces of legislation in recent years that have been identified as inconsistent with the rights and freedoms protected in the New Zealand Bill of Rights, and on a number of occasions urgency has been used in Parliament to limit or bypass select committee scrutiny…” : The Law Society is also concerned that there has been legislation prohibiting review of government decisions by the Courts, and proposing restrictions on rights to legal representation in Family Court proceedings. Other significant concerns include giving the power to amend legislation by regulation without parliamentary scrutiny, and not vetting late amendments to draft bills for their consistency with the Bill of Rights.

\(^{139}\) *Boscawen v Attorney-General* [2009] 2 NZLR 229.

NZBORA and/or the Covenant cannot be struck down. Note that s 7 requires the Attorney-General to report to Parliament on Bills (but not supplementary order papers amending Bills) which are inconsistent, nevertheless inconsistent legislation is still passed.\(^ {141}\) The NZBORA is a masterpiece of unintentional deception. It provides a façade affirming human rights and the Covenant, while it actually creates a subsidiary apartheid status for both. The subordinate status of human rights law in NZ is evidenced by at least 20 statutes enacted since 1990 that are inconsistent with the NZBORA,\(^ {142}\) and ample judicial decision-making influenced by this legislative approach.\(^ {143}\) So long as s 4 remains on the statute book, both the NZBORA and the Covenant will retain second-rate status in NZ.\(^ {144}\)

**Absence of Judicial Methods and Interpretative Effects**

In addition to the lack of a statutory scheme that would effectively support the Covenant in NZ, it is jurisdictionally impossible to seek a Covenant remedy in the NZ Courts. In *Miller and Carroll v New Zealand Parole Board and the Attorney-General*,\(^ {145}\) the Court of Appeal summarily dismissed an application for a declaration of breach of the Covenant, because it found that the Courts do not give such declarations based on *Taunoa v Attorney-General*.\(^ {146}\) However, some progress was made in *Miller* where the Court of Appeal said:\(^ {147}\)

> although the ICCPR does not give rise to rights which can be enforced directly by Messrs Miller and Carroll, we will, nonetheless, address in some detail the relevant provisions of the ICCPR and the associated jurisprudence. This is because the particular provisions of the NZBORA relied upon are in general terms. The best argument for construing these

\(^ {141}\) See notes 97, above.

\(^ {142}\) Note 122, above.

\(^ {143}\) Note 140, above.


\(^ {145}\) *Miller and Carroll v Attorney General and the NZ Parole Board* [2010] NZCA 600, paragraph 11(e).

\(^ {146}\) *Taunoa and Others v Attorney-General and Others* [2008] 1 NZLR 429 (SC). Quoting the Court of Appeal’s footnote 11 where leave to appeal on arguments relating to international covenants was refused by the Supreme Court because such arguments did not raise separate grounds of appeal, a complaint to the United Nations Human Rights Committee is the appropriate mechanism for addressing ICCPR compliance; *R v D* [2003] 1 NZLR 41 (CA) at [26].

\(^ {147}\) Ibid, note 145, paragraph 13.
provisions in the way contended for by Mr Ellis is that such construction is necessary to ensure congruence with international jurisprudence on the corresponding provisions in the ICCPR.

Another argument, discussed further below, was that s 4 does give power to decline to apply an enactment, or declare it invalid, on the basis of inconsistency with the Covenant or with common law, as the s 4 prohibition applies by reason only of inconsistency with the NZBORA itself. This argument was simply ignored by the Court of Appeal in *Miller v New Zealand Parole Board*.148

**Bad Faith by the Government**

Failing to implement the Covenant for 30 years is neither immediate, nor in good faith—it is bad faith. This bold proposition brings into play the Vienna Convention on the Law of Treaties (‘VCLT’).149 NZ’s failure means both a bad faith breach of the VCLT simpliciter, and when read in conjunction with GC 31, a bad faith non-implementation of the Covenant, and a clear breach of Article 2 of the Covenant, discussed later in this chapter.

**Independence of the judiciary**

As the thesis progresses there are recurring themes on independence of judges. This is a pivotal proposition in Article 14(1) of the Covenant, and section 25 of NZBORA that tribunals are independent and impartial. For example this theme arises in the context of knighthoods for sitting judges, recusals applications, independence of bodies such as the New Zealand Parole Board, as well as independence of individual judges, and possible homophobia of judges.

**Judicial condemnation for raising covenant issues**

That the impact of the Covenant and the views of the HRC take a backseat in light of the total number of cases in which NZBORA rights are raised is illustrated by the Government, reporting to the HRC that there were over 2,500 Court

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148 At the time of writing, only three breaches of the Covenant have been found against NZ since the First Optional Protocol took effect in respect of NZ in 1989. It has not captured the legal profession’s, or most of the media’s, or the public’s attention, that Covenant breaches can be found by an international human rights body.

149 Note 8, above.
decisions that referred to NZBORA between 2000 and 2009, while there were 156 judgments of the superior Courts that mentioned the Covenant.\textsuperscript{150}

Just raising a covenant issue is not without peril. It now invites either being described as embarking on a ‘political treatise’\textsuperscript{151} or even ‘having costs awarded against counsel’,\textsuperscript{152} if the judiciary do not like the direction advocates take. In \textit{Exley}, the Court of Appeal observed:

\begin{quote}
[21] Mr Ellis’s attack on the legislature here is effectively a political treatise in support of the abolition of the preventive detention regime. Section 4 of the Bill of Rights prevents us undertaking such an inquiry into the desirability or otherwise of such a regime. In any event, such an inquiry cannot sensibly be conducted in the context of a sentence appeal.
\end{quote}

\textbf{Role of the Lawyer}

Arguably, the Role of the Lawyer is not well understood in New Zealand. UN Basic Principle No 16 of the Role of Lawyers reads:\textsuperscript{153}

\begin{quote}
\textit{Guarantees for the functioning of lawyers}

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
\end{quote}

In \textit{Miller},\textsuperscript{154} an application was made to recuse William Young P and Chambers J from the case for breach of Principle 18 of the Basic Principles, which prohibits identifying Counsel with his client. Arguably the \textit{Exley} comment made by William Young P and Chambers J and a third judge, had been breached as submissions were not counsel’s, they were the client’s. This \textit{Exley} criticism of a “political treatise” became merely “robust criticism”, and no costs against counsel were

\textsuperscript{150} Replies to the List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of New Zealand, CCPR/C/NZL/Q/5/Add.1 (2010) at 11.
\textsuperscript{151} \textit{R v Exley} CA279/06 [2007] NZCA 393, paragraph 21.
\textsuperscript{152} \textit{Charta v The Queen} [2008] NZCA 466 (10 December 2008). Paragraph [39] Such indulgence is unlikely to be extended to any future applications made on the same grounds and Mr Ellis may well be at risk of a personal costs order being made against him if similar applications are made in future cases.
\textsuperscript{154} Note 145, above, paragraph 7.
sought. In 2013 in *Lawler v R*\(^{155}\) a challenge to the independence of the bench of

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\(^{155}\) *Lawler v R* [2013] NZCA 308; CA 777/2010, CA655/2012, CA 656/2012 paragraph 78:

[78] We convened a special hearing to deal with Mr Ellis’s application. He included in his
bundle of authorities two letters he had written to the Attorney-General on the subject of
Knighthoods for Judges and a copy of a response from the Attorney-General. This made
clear that the issue of honours for Judges is something of a political crusade for Mr Ellis.
Unfortunately, he choose to extend that crusade to the Court.

I sent two letters jointly to the Attorney-General and the Chief Justice. The first drew
attention to the Bangalore Principles and the Hungarian case referred to in the next
footnote, and the second enclosed a copy of an extract of a book chapter by Professor
Philip Joseph, a well-known constitutional lawyer.
The text of the second letter was:

1. I wrote to you on 12 April 2102 on this topic, and the Honours system.
2. I am pleased to say that Professor Philip Joseph has something to say on the
topic as well, which is worthy of note and adoption.
3. In his chapter on *Appointment, Discipline & Removal of Judges in New Zealand in
Judiciaries in Comparative Perspective*, Ed H.P.Lee, C.U,P, 2011, p 93 (annexed) he
says:

Knighthoods

Knighthoods under the Royal Honours system demonstrably raise arguments
about executive patronage. What marks out some judges for Royal largess but
not others? Not all superior court judges are knighted. Five of the tenured
Supreme Court judges have knighthoods (Dame Sian Elias, Sir Peter Blanchard,
Sir Andrew Tipping, Sir John McGrath and William Young) but not the sixth
judge (Justice Bill Wilson before he resigned from the court). Sir William Young received
his knighthood when he was President of the Court of Appeal, which
distinguished him from all of his judicial colleagues on the court. Sometimes, even
High Court judges receive knighthoods, either before or following retirement.
What distinguishes these judges from the rest? It is not any special judicial quality
or selfless public service.

Fifty years ago, a commentator observed the anomaly of some puisne judges
receiving knighthoods, while others did not. He made the damning observation
that ‘a judge is not free from hope of discretionary benefit from the executive
benefit from the executive’. During the 1930s depression, the Attorney-General
requested the superior court judges to refund part their salaries, but they refused,
citing the constitutional guarantee against a diminution in judicial salaries. During
that government’s term, no judges (current or retired) were conferred
knighthoods. The government broke with convention and even refused to knight
the senior puisne judge, who received his knighthood only after a change of
government. Knighthoods were at the grace and favour of the government and
were an instrument for exerting pressure on the judiciary.

The 1930s precedent supports an ‘all or nothing’ approach to Royal Honours:
confer knighthoods on all judges above a certain rank, or confer none at all. In the
United Kingdom, knighthoods are automatic for judges of the High Court upon
their elevation to the bench.

Yours faithfully [signature].

Leave to appeal has been sought (*Lawler v R* SC77/13) relying in part that my political
opinion was not expressed. Two of the knighted judges have since retired, two non-
knighted (as yet) Glazebrook and Arnold JJ now sit. The remaining three with honours,
office in breach of the Bangalore Principles of Judicial Conduct\textsuperscript{156} met with the comment that counsel was on a ‘political crusade’.

The submission in \textit{Miller} that Param Cumaraswamy, a previous Special Rapporteur on Independence of Judges and Lawyers, had indicated that identifying lawyers with their clients’ causes (unless there is evidence to that effect) could be construed as intimidating and harassing the lawyers concerned\textsuperscript{157} was not recorded in the judgment.

In \textit{Charta v The Queen}\textsuperscript{158} the Court said that a responsible counsel [the writer] would not have made recusal applications, [based upon Covenant jurisprudence] which were all without merit, and he should have advised his client accordingly. How they knew what instructions were given is not explained.

\textit{Charta} resurfaced in \textit{Miller} as the Crown, on an application by Mr Miller to recuse the entire bench on the grounds of failure to select the bench randomly,\textsuperscript{159} raised the costs issue in bringing such applications. \textit{Charta} had involved an application for disclosure of how one of the members on secondment from the High Court was appointed, and whether the method of appointment assured

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\textsuperscript{156} The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002. The 2007 Commentary on the Principles reads: ‘38.[3](d) A practice whereby the Minister of Justice awards, or recommends the award, of an honour to a judge for his or her judicial activity, violates the principle of judicial independence. The discreitional recognition of a judge’s judicial work by the executive without the substantial participation of the judiciary, at a time when he or she is still functioning as a judge, jeopardizes the independence of the judiciary. On the other hand, the award to a judge of a civil honour by, or on the recommendation of, a body established as independent of the government of the day may not be regarded as inappropriate, depending on the circumstances.’


\textsuperscript{158} Note 152, above, paragraph 37. How the Court knew what counsel had or had not advised his client is not made clear. The assumption that the client had not been advised was wrong. The client, self-represented at trial, had made 42 pre-trial applications including recusals.

\textsuperscript{159} Random selection of judges is a proposition recommended by the Special Rapporteur to all States. Despouy, Note 157, above, paragraph 47, recommendation 103. This recommendation was the principal reason advanced in respect of Miller’s application, yet another argument not mentioned in the judgment.
independence. Miller J was appointed at very short notice, and obviously had not read the papers. At one point His Honour offered not “to ask any questions”. I had specifically asked the Registrar for the appointment details.

Glazebrook J, presiding in Charta, who had intercepted the application to the Registrar, then declined to release the information. Her Honour then reviewed her own decision and upheld it, thus effectively preventing judicial review of the Registrar. An application to recuse Her Honour was made together with a request for the Court to review her refusal to provide the information. Submissions included Joseph et al, quoting GC 13/3 as to the manner of appointment of Justices, and their tenure, going to the question of independence, and Bahamonde v Equatorial Guinea. Like many a Covenant argument, this point was simply ignored by the Court.

Regrettably, some NZ Courts do not take McHugh J’s view that legal agitators are a necessary part of the system, and help advance the common law.

**Courts ignore Covenant points when it suits them**

General Comment 13/15 on Article 14 (right to a fair trial) requires that Judges should have authority to consider any allegations made of violations of the rights

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160 This argument was made relying on the European Court of Human Rights in Findlay v UK (1997) 24 EHRR 221, 244-245, and at least 57 subsequent cases, applying the rationale that the manner and method of appointment is the starting point for establishing the independence of the Court. I argued the same rationale was equally applicable to Article 14 of the Covenant. In Charta, two High Court Judges were seconded to the Court of Appeal for the case.

161 None of which is included in the judgment. Transcripts were not then available as there were no recordings made if no witnesses gave evidence. That practice changed in mid-2010 and recordings are now made of submissions.

162 This was a request to the Executive Branch of Government, not the Judicial Branch.

163 See Joseph et al, Note 64, above.

164 Human Rights Committee General Comment (“GC”) No 13, Administration of Justice, HRI/GEN/1/Rev.9 (Vol. I), 1984 replaced by the later GC 32/19. Human Rights Committee General Comment (“GC”) No 32, Right to equality before courts and tribunals and to a fair trial, CCPR/C/32, 23 August 2007.


of the accused during any stage of the prosecution is also ineffectual.\textsuperscript{167} That seems a simple enough proposition but it is easy to ignore. See \textit{R v Te Kahu and Ors};\textsuperscript{168} a pre-trial appeal relating to the taping of conversations in police cells located at the trial Court. None of the three accused’s lawyers in that case had raised any Covenant issues in the High Court. This consideration of a breach at any stage of the prosecution is particularly important in my appellate practice,\textsuperscript{169} as few lawyers raise Covenant issues at trial or at pre-trial evidential challenges. My attempt to raise a Covenant issue in the Court of Appeal relying upon the General Comment met with failure: the Court simply ignored the submission.

In \textit{Kim v Prison Manager of Mt Eden Prison},\textsuperscript{170} a habeas corpus appeal, the Supreme Court found that where the appellant was in danger of extradition to China, it was “premature”\textsuperscript{171} to rely on \textit{Israil v Kazakhstan}\textsuperscript{172} as to the possibility of the death penalty or torture, hardly consistent with being able to use Covenant points at any stage of the prosecution.\textsuperscript{173}

Whilst Oertly\textsuperscript{174} reflects that NZ has been forthright in its support of the international treaty regime,\textsuperscript{175} I disagree, as do Butler and Butler,\textsuperscript{176} who consider support for the international human rights treaty regime mere rhetoric. There is no noticeable support for ensuring international human rights treaties are enacted in domestic law, or interpreted positively by the NZ judiciary, in stark contrast to the strong support for incorporation found in the UK.\textsuperscript{177} As Oertly observes,\textsuperscript{178} if a

\begin{itemize}
\item \textsuperscript{167}HRI/GEN/1/Rev.6 (2003).
\item \textsuperscript{168}R v Te Kahu and Others [ 2006] 1 NZLR 459 (CA).
\item \textsuperscript{169}I occasionally undertake trial work in criminal cases.
\item \textsuperscript{170}[2012] NZSC 121.
\item \textsuperscript{171}Ibid, paragraph 31.
\item \textsuperscript{172}Israil v Kazakhstan CCPR/C/103/D/2024/2011.
\item \textsuperscript{173}The habeas appeal was a criminal case as extradition is treated as criminal, even if it were a civil case e.g. judicial review, Covenant jurisdiction should still be able to be relied upon.
\item \textsuperscript{174}Note 49, above.
\item \textsuperscript{175}Oertly was referring to the then six core UN Human Rights Treaties; this thesis covers only two of those original core treaties the Covenant and UNCAT. Racial Discrimination, and the Rights of Women and the three newer ones (regarding Disabilities, Migrant Workers, and Enforced Disappearance) are not discussed. NZ has not yet ratified the treaties on Migrant Workers and Enforced Disappearance.
\item \textsuperscript{176}Note 129, above paragraph 4.5.1.
\item \textsuperscript{177}Anthony Paul Lester, Baron Lester of Herne Hill, QC, ‘European Human Rights and the British Constitution’ in Jeffrey Jowell and Dawn Oliver (ed), \textit{The Changing Constitution} (Oxford University Press, 3rd ed, 2007): ‘the impressive line-up of judges who expressly support the incorporation of the Convention into United Kingdom law: two Lord Chancellors (Hailsham & Gardiner); Lord Scarman; Lord Woolf, and the [then] present Lord Chief
\end{itemize}
Court were to refer to the Covenant, while it may not arrive at what the Committee later consider a Covenant-consistent meaning, the likelihood that it will is much increased. At the very least, judicial reference to the Covenant would show comity and good faith.

Dr Andrew Butler\textsuperscript{179} is in agreement that there are few human rights lawyers, as he is reported as stating in Council Brief that ‘very few senior members of the bar would even have a notion of how to structure or argue a Bill of Rights case … if you were in the UK, that might be a cause for embarrassment, but I don’t know that is the case here … ’ and noting further that some lawyers and judges found it is easy to be dismissive about human rights, which he ‘attribut[ed] … to some strange cultural generational artefact which generates scoffs’.\textsuperscript{180} What was not reported was that we agreed that young lawyers were more able to marshal a NZBORA argument, and present it, having benefited from more recent university education.\textsuperscript{181}

\textbf{Lack of Political Will from the Government}

This thesis will next examine the lack of political will advanced by the NZ Government in its third, fourth and fifth periodic reports as a reason for failure to more effectively implement the Covenant.\textsuperscript{182}

The HRC, in its 1995 Concluding Observations to NZ’s third periodic report,\textsuperscript{183} recommended incorporating the Covenant and ensuring effective remedies as set


\textsuperscript{179} A leading author on the NZBORA, and co-author of Butler and Butler.


\textsuperscript{181} Since then The New Zealand Centre for Human Rights Law, Policy and Practice has been set up at the University of Auckland its two staff are relatively young. Public interest law groups, blogs and other social media outlets also are increasing.

\textsuperscript{182} Note 9, above.

\textsuperscript{183} Note 9, third report, paragraph 19.
forth in Article 2 of the Covenant, and repeated those recommendations in its Concluding Observations to the fourth periodic report. In its Concluding Observations on the fifth periodic report of NZ, the Committee stated:

7. The Committee reiterates its concern that the Bill of Rights Act 1990 (BORA) does not reflect all Covenant rights. It also remains concerned that the Bill of Rights does not take precedence over ordinary law, despite the 2002 recommendation of the Committee in this regard. Furthermore, it remains concerned that laws adversely affecting the protection of human rights have been enacted in the State party, notwithstanding that they have been acknowledged by the Attorney-General as being inconsistent with the BORA. (art. 2)

The State party should enact legislation giving full effect to all Covenant rights and provide victims with access to effective remedies within the domestic legal system. It should also strengthen the current mechanisms to ensure compatibility of domestic law with the Covenant.

[Bold in original]

Not to give effect to the Covenant for 30 years makes a mockery of GC 31, and not giving immediate effect but some 30 years delay offends the very raison d’être of the Covenant. NZ’s fourth periodic report (2001) to the HRC states: ‘it may be some time yet before NZ is ready for a fully-fledged Bill of Rights. Canada, a country with a similar constitutional tradition, took over 20 years to develop a Bill of Rights Act into a supreme constitutional charter.’

The fifth periodic report (2008) merely repeats in essence the same formula. Whilst it is regrettable that Canadian political will took 20 years, NZ already has taken 30 years, and cannot rely on the Canadian example as an excuse. ‘Immediate implementation’ means what it says – not deferred implementation for

184 Note 9, fourth report, paragraph 19.
185 Ibid, paragraph 10.
186 Note 9, fifth report, paragraph 7:

7. The principal concern that led Parliament to decide against according the Bill of Rights a higher status than ordinary legislation was that this would involve a significant shift in the constitutional balance of power from Parliament to the judiciary. It was also considered that such a fundamental shift might lead subsequently to some intrusion of political factors in the appointment of members of the judiciary. Although the courts cannot strike down legislation, they do wield considerable power in protecting rights and freedoms. This has been achieved in a number of ways, including the judicial creation of new remedies to give effect to the rights guaranteed by the Bill of Rights Act and the use of the direction in Section 6 of the Bill of Rights Act that legislation be interpreted consistently with rights and freedoms where possible.

Also see Chapter 11 below.
30 years, or for however long NZ finally takes to comply with its obligations. The Chief Justice disagrees, and thinks that the cultural shift needed to implement the Covenant needs longer; she says *Twenty years is not a long time for a cultural shift. And the New Zealand Bill of Rights Act is a bigger shift in the legal culture than followed the adoption in Canada of the Charter of Rights and Freedoms.*\(^{187}\) Whilst it is possible such a view is correct, it also looks like a view that excuses judicial and legislative inaction. Surely the culture would change faster if the NZ judiciary, like the British higher judiciary, actively promoted rights promotion. Whilst it undoubtedly easier for the British, over shadowed by the ECHR, there is now the British experience to draw on.

**Declarations of Inconsistency as Interpretative Aid**

Declarations of Inconsistency are a perennial topic. In December 2010, Sir Anthony Mason, in giving the annual Robin Cooke Lecture at Victoria University of Wellington, said:\(^{188}\)

> The possibility that a judicial finding of inconsistency might be at variance with the basis on which Parliament considered the Bill is one factor telling in favour of the power to make a declaration of inconsistency. Another factor is the high importance of compliance with the recognised human rights and fundamental freedoms, in conformity with the international obligations arising from New Zealand's ratification of the International Covenant on Civil and Political Rights, evidenced by the enactment of the statute itself. The existence of a power to make a declaration of inconsistency is simply a recognition of that high importance and a signal which will alert both the executive and Parliament to the possibility that consideration might be given to a legislative response to the declaration.

NZ advised the HRC in its fourth periodic report that in *Moonen v. Film and Literature Board of Review*,\(^{189}\) a five-Judge Court of Appeal had created the Declaration of Inconsistency (i.e. a judicial finding on inconsistency) in respect of the NZBORA being inconsistent with other legislation, but had not granted one in that case.\(^{190}\) The case involved my client who was charged with possession of child pornography. The Office of Film and Literature Classification classifies

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\(^{187}\) Note 20, above, p 14.


\(^{189}\) Note 27, above.

\(^{190}\) Ibid, paragraph 18.
material as ‘objectionable’ if it meets the statutory test.\textsuperscript{191} That classification as made by the Office of Film and Literature Classification is ‘conclusive evidence’ in the criminal Court.\textsuperscript{192} The case set forth a five-point test for reconciling the NZBORA with another statute encroaching on rights (to the extent reconciliation is possible), and also determined:\textsuperscript{193}

Section 5 of the New Zealand Bill of Rights Act 1990 gives the Court the power, and on occasions the duty, to indicate that although a statutory provision must be enforced, it is inconsistent with the Bill of Rights Act in that it constitutes an unreasonable limitation on the relevant right in a free and democratic society. Such judicial indications will be of value to the Human Rights Committee constituted under the International Covenant of Civil and Political Rights and also to Parliament.

Such an indication from the Court would not, in any event, be an effective Covenant remedy, because it only would be a finding of inconsistency with the NZBORA, and not with the Covenant itself.\textsuperscript{194} In recent years, I have tried unsuccessfully to obtain such a declaration.\textsuperscript{195} My latest unsuccessful attempt in the Court of Appeal was in \textit{McDonnell v Chief Executive of the Department of Corrections},\textsuperscript{196} in which the topic is fully canvassed.

In \textit{Belcher v Chief Executive of the Department of Corrections},\textsuperscript{197} plaintiff’s counsel in the High Court had not sought a Declaration of Inconsistency that the Extended Supervision Order (“ESO”) sought by the Chief Executive was inconsistent with the NZBORA. On change of counsel, I sought to obtain a Declaration before a five-Judge Court of Appeal. The Court was at first interested in a declaration. They heard argument for two days then adjourned for seven

\begin{footnotesize}
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\item 191 Section 3, Films, Videos, and Publications Classification Act 1993, Section 3.
\item 192 Ibid, Section 41(3).
\item 193 \textit{Moonen}, above, Note 27, paragraph 20.
\item 194 Cf \textit{Human Rights Act} (E&W), s 3 and sch 2, which provide for a power to grant a declaration and for the executive to remedy the inconsistency.
\item 195 See, eg, \textit{Manawatu v The Queen} [2007] NZSC 13. (Leave to appeal refused), \textit{Manawatu v The Queen} (2006) CA111/05 & CA 112/05, Hammond, Chambers, O'Regan, Robertson and Ellen France JJ, 10 November 2006. In this case the plaintiff complained of a discriminatory system whereby Judges of the Court of Appeal but not of the Supreme Court or the High Court were not permitted to dissent in a criminal case without the leave of the majority. Plaintiff sought a Declaration of Inconsistency that s 398, s 398 Crimes Act 1961 was in breach of Articles 14(1), 19(2), and 26 of the Covenant. (As yet only declarations of inconsistencies with the NZBORA, and not the Covenant have notionally been available, which further hinders developing Covenant jurisprudence).
\item 196 \textit{McDonnell v Chief Executive of the Department of Corrections} (2009) 8 HRNZ 770 at paragraph 123.
\item 197 Note 110, above.
\end{itemize}
\end{footnotesize}
months to allow the Chief Executive\textsuperscript{198} to run as 5 NZBORA argument as to why the ‘ESO allowable as a result of retrospective legislation permitted a post sentence ESO and how that could be reasonably justified in a free and democratic society’. I was not happy about that, believing the Chief Executive’s chance to run that argument had passed. During the seven-month gap, the Court interpreted a Supreme Court judgment as removing jurisdiction to granting such a Declaration of Inconsistency. However, when the case reached the Supreme Court, for leave to appeal\textsuperscript{199} the three leave Judges (despite finding error of the five Court of Appeal Judges on other grounds), declined to grant leave to appeal as the Court of Appeal had found that the ESO legislation was inconsistent with the NZBORA, but concluded that it had no jurisdiction in the circumstances to make a formal declaration of inconsistency.\textsuperscript{200} If the Court had other reasons for not granting leave it is not apparent in the short reasoning.

Alternatively, in the Belcher Court of Appeal I had relied upon \textit{R v Hansen},\textsuperscript{201} where the reversal of the burden of proof under s 6(6) of the Misuse of Drugs Act was found to be inconsistent with the presumption of innocence affirmed in s 25(c) of the Bill of Rights Act and (per Tipping, McGrath and Anderson JJ; Blanchard J dissenting) was not a justified limitation on that presumption in terms of s 5 of the Bill of Rights Act. Even if there was a rational connection between the admittedly important statutory objective and the limitation imposed, that limitation was greater than reasonably necessary and was not a proportionate response. The Belcher Supreme Court said the decision to decline a formal declaration of inconsistency meant it was entirely appropriate for the Court of Appeal to leave the matter as essentially the majority in \textit{R v Hansen} had\textsuperscript{202} the inconsistency being described, but no declaration being made.

The current position of the Courts with respect to the granting of declarations is expressed in \textit{McDonnell}.\textsuperscript{203}

\textsuperscript{198} Represented by a Deputy Solicitor-General.
\textsuperscript{199} \textit{Belcher v Chief Executive of the Department of Corrections} [2007] NZSC 54.
\textsuperscript{200} Ibid, paragraph 6.
\textsuperscript{201} \textit{R v Hansen}.
\textsuperscript{202} Note 29, above.
\textsuperscript{203} Note 196, above.
[123] In summary, the position after the *Belcher* litigation is:

(a) No decision has yet been made by the Supreme Court on whether declarations of inconsistency are available in criminal proceedings. However, this Court has indicated (in an obiter comment) that they are not; a separate civil proceeding is required: see paragraph [119] above. The Supreme Court did not give leave to appeal from that decision and did not contradict that comment (though it did contradict another aspect of the decision).

(b) The preferred approach to identifying inconsistencies is to do so in the reasons for judgment, without issuing a formal declaration.

(c) A declaration will be unnecessary where s 5 of the Bill of Rights does not need to be considered in order to determine the questions at issue between the parties.

(d) There is no jurisdictional bar to the Court of Appeal granting a declaration of inconsistency where such a declaration was not first sought in the High Court but was technically available.

The likelihood of a NZ criminal barrister seeking a declaration is further inhibited in practice, as obtaining remuneration in the form of civil legal aid, which is required for the civil case seeking a declaration, is difficult for most criminal lawyers. Unsuccessful attempts were made to apply *R v Hansen* in *R v Exley* and *R v McMillan*. These failures (and the pejorative characterisation of the arguments as a ‘political treatise’ by the Court of Appeal), together with *McDonnell* and the Geiringer articles, may foretell the death of the Declaration of Inconsistency, unless the Human Rights Review Tribunal, or the legislature resurrects it.

As Geiringer notes in a move that is somewhat incongruous from a constitutional perspective, s92J Human Rights Act 1993 empowers the Human Rights Review Tribunal to formally declare legislation to be inconsistent with section 19 of the NZBORA: the right to be free from discrimination. For a jurisdictional discussion of the application of the NZ Human Rights Act, see

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204 Human rights lawyers operate in other areas than criminal law; most criminal lawyers do not however operate in the civil law arena.
205 Note 29, above.
206 *R v Exley CA279/06 [2007] NZCA 393* (Exley and McMillan were heard together, but have separate judgments).
208 Geiringer, note 26, above.
209 Ibid, On a Road to Nowhere, p 620.
Howard v Attorney-General,\textsuperscript{210} declining leave to appeal from the granting of a declaration. The decision was reported to Parliament with the comment that the legislation had been amended to reflect the Court decision.\textsuperscript{211} A second declaration was made in Ministry of Health v Atkinson\textsuperscript{212} in respect of disabled support services. Asher J and two lay assessors dismissed an appeal\textsuperscript{213} as the Ministry failed to make its case under s 5 of NZBORA that the discrimination\textsuperscript{214} was justified in a free and democratic society. As the Human Rights Act now allows statutory declarations of inconsistencies, perhaps the door is open for legislative or a judicial rethink as declarations in other areas not yet legislatively covered. The Justice Minister in response to a question I posed at the NZBORA symposium\textsuperscript{215} as to whether he supported a statutory right to making declarations replied he had not considered a detailed proposal but had not closed his mind to the idea. In the Australian High Court the question of such declarations was discussed in Momcilovic v The Queen\textsuperscript{216} and the Court divided 4:3 on views on this issue.\textsuperscript{217}

\textsuperscript{210} Howard v Attorney-General [2011] 1 NZLR 58 (CA).
\textsuperscript{212} Ministry of Health v Atkinson, High Court, Auckland, Ellis J, CIV 2010-404-287, 30 June 2010 (procedural hearing only). The substantive case was appealed and the appeal dismissed in Ministry of Health v Atkinson [2012] 3 NZLR 456 (CA).
\textsuperscript{214} The claim made by Mr Atkinson relates to a Ministry of Health policy that affects the way in which the Ministry assesses disabled people as being in need of disability support services funding. The Tribunal declared that the Ministry’s policy was discriminatory on the grounds of family status. This decision is the first occasion on which a “declaration of inconsistency” has been made under the Act in relation to government policy. Section 19 of the NZBORA prohibits unlawful discrimination.
\textsuperscript{215} Note 35, above.
\textsuperscript{216} Momcilovic v The Queen [2011] HCA 34.
\textsuperscript{217} Tony Blackshield and George Williams, Australian Constitutional Law and Theory: Commentary and Materials (Federation Press, 2010), Supplement to Chapter 15, p 2 says: “The outcome as to the declaration of inconsistent interpretation in s 36(2) was less clear-cut. This section was upheld by 4 to 3, but with members of the Court applying a number of different approaches. French CJ and Bell J held that s 36(2) was valid in conferring a non-judicial function on the Victorian Supreme Court, but that no appeal could be made to the High Court from such a declaration. Crennan and Kiefel JJ also held s 36(2) to be valid, but that a declaration of inconsistent interpretation should not have been made in this case. Gummow, Hayne and Heydon JJ dissented in holding s 36(2) invalid because it impaired the institutional integrity of the Victorian Supreme Court.
Human Rights Training

The absence of awareness of the Covenant amongst both the legislative and the judicial branches of government as well as the older members of the legal profession in NZ is distressing, but understandable given the historic lack of human rights training in NZ. It finds its genesis in the domestic inadequacy of human rights protection in NZ. Sir Ivor Richardson, a retired President of the Court of Appeal, commented on the lack of human rights recognition, observing that whilst the NZBORA quickly became a significant part of the workload of the Court of Appeal, the majority of appeals raising NZBORA issues addressed criminal justice rights rather than other political and civil rights. He also observed that the transfer of power to judges was seen as undemocratic, presumably by the public, and that there was no particular constituency in favour of the NZBORA. The NZ Law Society strongly opposed it, as did many other political and public and special interests groups, (lack of support needs to be seen in the then context of the domestically untested view that such legislation was anti-democratic, and gave too much power to judges) including the politically important Maori, who objected to having the Treaty of Waitangi brought into the legal system in that way. Those various players may well have different attitudes 30 years on. The then lack of constituent support may be contrasted

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218 At the NZBORA symposium, note 35, above, the Minister of Justice told the symposium that NZ officials favoured my suggestion that the conclusions of the HRC be debated in Parliament, and that he himself was not against the idea, but that it was all a question of available time.

219 It is difficult to provide details of lack of training, as I have been unable to obtain details as to what training in human rights or other matters, if any, NZ Judges received. A comparison with the UK's approach to such training may be useful—British funding of £15 million was allocated for judicial training on the Human Rights Act when that legislation was enacted, whereas no funding was allocated for training of the NZ judiciary for the NZBORA upon its enactment.


221 Ibid, p 260. Until fairly recently, NZBORA cases were almost wholly focused on criminal justice (including prison administration), with free expression cases notable exceptions.


223 Ibid, 171. The Treaty being sacred to Maori, was perceived by Maori as being capable of amendment if included in the Bill of Rights.

224 A Constitutional Advisory Panel appointed by the Government reported in November 2013. It’s report included that public discussions continue and in respect of a written constitution, it said:
with the strong political support in the UK behind the Bringing Rights Home campaign.225

The HRC is conscious of the failings of NZ Courts to cite international and Covenant jurisprudence in human rights cases. In 2010 the Committee recommended for NZ that ‘[l]aw enforcement officials and the judiciary should receive adequate human rights training, in particular on the principle of equality and non-discrimination.’226

Absence of Administrative Methods

Recalling that GC 31/13 notes that Article 2 of the Covenant requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations, it is unsurprising that in the absence of any legislative or judicial methods of effective Covenant relief in NZ, there are no administrative measures for such relief either. As a result of the absence of enforcement mechanisms for the Covenant in NZ, the Human Rights Commission is becoming increasingly active in discrimination matters.

A written constitution

- notes that although there is no broad support for a supreme constitution, there is considerable support for entrenching elements of the constitution
- notes the consensus that our constitution should be more easily accessible and understood, and notes that one way of accomplishing this might be to assemble our constitutional protections into a single statute
- notes people need more information before considering whether there should be change, in particular information about the various kinds of constitution, written and otherwise, and their respective advantages and disadvantages
- supports the continued conversation by providing such information, and notes that it may be desirable to set up a process whereby an independent group is charged with compiling such information and advancing public understanding.


Note 9, above fifth report, paragraph 12. [Bold in original].
Covenant Window Dressing—New Zealand's Actions and Inactions are not in Good Faith

With some exceptions, the Covenant has become window-dressing in NZ. As there is no effective affirmation of the Covenant or NZ’s commitment to it, the Covenant provides woeful protection for human rights in such a developed country. The high water mark of acknowledgement of such status of the Covenant in NZ was Tavita v Minister of Immigration, wherein President Cooke said:227

the main burden of [the respondents’] argument was that in any event the Minister and the Department are entitled to ignore the international instruments. That is an unattractive argument, apparently implying that New Zealand’s adherence to the international instruments has been at least partly window dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution…

[Emphasis added]

As will be seen, the tide has turned, and we are retreating from that high water mark. Court of Appeal judge, Justice Glazebrook agrees.228 But first the VLCT needs to be considered.

Vienna Convention on Law of Treaties 1969

The VCLT states:

Article 26

“Pacta sunt servanda”

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

227 Tavita v Min of Immigration, Note 3, above.
Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46. [after becoming aware of facts the State agrees or acquiesced to the position]

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The VCLT is itself an international treaty. NZ has duly ratified both the Covenant and the VCLT.

For a fuller discussion of the VCLT see the Berlin conference,\(^\text{229}\) where Articles 31(3) (subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation) and 32 (supplementary means of interpretation) are discussed. It is clear that similar or identical norms can be contained in a treaty as well as embodied in rules of customary international law, but it does not follow that the overlap is total. The reference in article 31 to subsequent practice—as with so many other provisions in the VCLT—is written as if a treaty had established no monitoring body such as the HRC. Human rights treaties are different in some important respects from the presumed ideal type of a multilateral treaty that underpins the formulation of the individual provisions of the VCLT.\(^\text{230}\)

The HRC in GC 9/3, relying on Article 27 of the VCLT, clearly states that ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’\(^\text{231}\) NZ therefore has an obligation at international law to perform


\(^{230}\) See, for example, Therodor Meron and Council of Europe. Ad Hoc Committee of Legal Advisers on Public International Law, The implications of the European Convention on Human Rights for the development of public international law (Council of Europe, 2000) at 4-6.

\(^{231}\) Fatima Shaheed, Using International Law in Domestic Courts (Hart Publishing Limited, 2005).
the requirements of these treaties in good faith under the principle of *pacta sunt servanda* set forth in Article 26 of the VCLT.\textsuperscript{232}

Good faith is lacking when Covenant remedies are claimed in a domestic Court, and the claim is not only ignored for lack of incorporation, but counsel may be threatened with personal costs,\textsuperscript{233} or the claim struck out on the basis of non-justiciability as in *Clark v Attorney-General*.\textsuperscript{234}

Plainly, NZ is not performing all its obligations under the Covenant at all, let alone in good faith. Its invocation of the provisions of its internal law as justification for its failure to perform these treaties is in direct breach of Article 27 of the VCLT, thereby compounding the lack of good faith.

The implementation of a treaty begins with the conventional proposition that a treaty, when accepted by the Executive, does not by that fact alone become part of the domestic law of New Zealand. It is assumed that legislation is required if

\textsuperscript{232} Committee on Economic, Social and Cultural Rights, GC 9, The domestic application of the Covenant reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003). Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in Article 27 of the VCLT, is that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations.

\textsuperscript{233} Note 152, above.

\textsuperscript{234} *Clark v Attorney-General* High Court Wellington, Gendall AJ, 27 May 2005, CIV-2004-485-1902, stated:

[16] The defendants appear to accept that obligations of education, review, investigation and protection of complainants in respect of torture and ill treatment do arise under the Convention. They also accept that the ICCPR creates the obligation to provide an effective remedy for breaches of rights against torture and ill treatment. However, in relation to both the Convention and the ICCPR, the defendants contend that it is settled law that obligations at international law do not provide causes of action before NZ courts, citing *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) and *New Zealand Airline Pilots’ Association v Attorney-General*, [1997] 3 NZLR 269, 286; *MacLaine Watson & Co Limited v Department of Trade & Industry in Related Appeals* [1989] 3 All ER 523 (HL); *R v Lyons & Ors* [2002] 4 All ER 1028 (HL). The defendants submit that the plaintiffs cannot rely directly on these international law obligations to found causes of action in domestic courts...

[79] The plaintiff’s claims with regard to the defendants’ obligations of funding education and training on issues of torture and ill-treatment and for reviewing the interrogation and treatment procedures cannot succeed as they are executive matters that are not of a justiciable nature per se and have not been expressly incorporated into domestic law.
the treaty is to become part of domestic law, and in particular, if it is to directly affect the rights and duties of individuals. There was limited parliamentary scrutiny of the Executive signing and ratifying the Covenant, or public debate. Sir Geoffrey Palmer later commented:

It is hard to resist the conclusion that the whole episode [the lack of implementation the Covenant’s discrimination provisions] shows that the impact of international law, and the importance of the human rights obligations that New Zealand has solemnly assumed by treaty, are not well understood within the Executive branch of the Government outside the Ministry of Foreign Affairs and Trade and the Ministry of Justice. Neither, it appears, do these human rights issues enjoy much political support.

The matters reviewed here passed with little public commentary, analysis or debate. It is doubtful that many ordinary New Zealanders know anything about them. The Government must have calculated that any adverse comment that may be directed at New Zealand by the Human Rights Committee [Conclusions on third periodic report] can be shrugged off.

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8 The Treaty making process involves three stages: negotiation; acceptance; and implementation. The way these three stages function is connected to the constitutional separation of powers in New Zealand. Treaty making stages one and two, negotiation and acceptance, have been and at present remain the task of the Executive, the organ of government which “embraces the administrative powers and functions of central government and includes all the government departments under ministerial control”.
9 Under the separation of powers Parliament is the second organ of government, exercising its dual “functions of law-making and holding to account the political Executive”. Under the first function – lawmaking – Parliament is involved in the final stage of the treaty making process, that of implementation. When the implementation of treaty obligations involves the passage of domestic legislation, Parliament’s role is readily apparent.
10 The third organ of government, the judiciary, which “exercises powers for adjudicating disputes according to the law including disputes between individuals and the state”, is increasingly involved in the construction of statutes which fulfil or may fulfil New Zealand’s international obligations and in developing the common law, and in that capacity is involved in the third stage of treaty making – treaty implementation.

Domestic attempts to invoke the Covenant

The following cases illustrate some of my to-date-unsuccessful attempts to get the judiciary to interpret the Covenant positively or otherwise apply it in NZ: Sestan SC, Jessop, ER v FR, Clark, Exley v The Queen, Te Kahu, Chatha, and Miller. Also see another practitioner’s attempt in Wellington District Legal Services Committee v Tangiora.

In Jessop, the Supreme Court effectively ignored submissions which included extracts from Oertly’s article which read:

Oertly provides an interesting view on this topic in his article, in which he states:

It is striking that in the single case to date where the Committee has found a violation, a full Bench of the Court of Appeal had on an earlier occasion, in somewhat startling fashion, simply found it unnecessary to address any challenges based on the Covenant to the preventive detention regime, including precisely the claim of insufficient review prior to the 10 year point of sentence which was later successful before the Committee.

[Emphasis added]

The Court of Appeal were similarly dismissive in ER v FR (which became EB v New Zealand) where the Court of Appeal said that absent statutory reception of the Covenant into our domestic law, there is no similar [to NZBORA] need for declarations of inconsistency.

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237 Sestan v The Director of Area Mental Health Services, Waitemata District Health Board [2007] NZSC 5 (SC) (‘Sestan SC’).
240 Note 234, above.
242 Note 168, above.
243 Note 152, above.
244 Note 145, above.
245 Wellington District Legal Services Committee v Tangiora [1998] 1 NZLR 129 (CA), upheld in the Privy Council, see note 86 above.
246 Note 49, above.
248 The initials of the author.
249 Ibid, paragraph 30.
Leitch was decided prior to the first notion of a declaration arising in Moonen.\textsuperscript{250} I had not therefore considered a Declaration of Inconsistency as a possible argument. The inability to have international points considered by the NZ judiciary is further clearly exhibited in the Supreme Court in Exley v R\textsubscript{251}, where the appellant’s submissions included the statement:

The entire appeal(s) was premised on the fact that not only was Dean wrong, but so were the majority of the HRC in Rameka v New Zealand (relying on the substantial minority), and that the HRC itself had now been invited to depart from Rameka in Dean v New Zealand.

The judgment of the Court, once again ignored the Covenant, which given parliamentary sovereignty was predictable. The Court relied upon s 4 of the NZBORA, saying:

\begin{quote}
[2] The suggestion that the sentence of preventive detention is unlawful in itself cannot withstand s 4 of the New Zealand Bill of Rights Act 1990…
\end{quote}

\textit{[Emphasis added]}

A similar approach in Miller\textsuperscript{252} discussed above raising the criticism of a political treatise by counsel.

It is perhaps unfortunate that so few lawyers engage in these international arguments. If they did, the law might advance, equally it could slow advances as losing cases might make negative precedents.\textsuperscript{253}

\textbf{Concluding Comments by the HRC in respect of Article 2}

As failure to comply with Article 2 of the Covenant appears to be endemic throughout the globe, it is common for the HRC to comment on that fact in its Concluding Comments or Observations to the Periodic Reports provided by State

\textsuperscript{250} Note 27, above.
\textsuperscript{251} Note 206, above.
\textsuperscript{252} Note 145, above.
Parties. A list of extensive conclusions for the period 1999-2012 is set out in Appendix One.

That list does not purport to be fully inclusive; some countries have spotty reporting records. For example, the Democratic Republic of Korea (North Korea) reported for the first time in 17 years in 2001, and has not made a report since that time; Sri Lanka reported last in 1994; and Turkey, which did not ratify the Covenant until 2003 (effective 2004), has not as yet filed a periodic report.

For examples of failure to comply with Article 2, see the discussion immediately following of three developed countries: Australia, Germany, and Ireland. Regarding Australia, the HRC comments included concern that Australia was undermining the Optional Protocol (the ability of an individual rather than a State to make a Covenant complaint).

Additionally, the HRC were concerned with Australia’s lacunae in the protection of Covenant rights, including the absence of an effective Covenant remedy, and the existence of federal/state arrangements that may restrict rights. NZ has the most in common (at least in respect of developed countries) with Australia in terms of the manner in which it does not fully respect Covenant rights, primarily because Australia lacks a Federal Bill of Rights. In its comments regarding Ireland, the HRC was concerned with a range of broad discrimination

254 Concluding Observations of the Human Rights Committee; Australia, UN Doc A/55/40 (2000) heading 3. The Committee is concerned over the approach of the State party to the Committee's Views in A v Australia CCPR/C/59/D/560/1993 (30 April 1997). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.
255 Ibid, Concluding Observations, heading 3. (Principal subjects of concern and recommendation).
256 Ibid, heading 3: The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated. The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy (art. 2).
257 Ibid: The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.
issues relating to women and religion, and with the limits of the Human Rights Commission to take court action, as not all Covenant rights are recognised in domestic law in Ireland. In Germany, the HRC was concerned with the provision of the Covenant not applying to the operations of overseas-stationed troops and police.

On the international level, judiciaries’ lack of appreciation of the Covenant, and international human rights norms generally world wide, caused the Special Rapporteur to effectively endorse the HRC’s views, and call for judicial and legal training. He also called for an international conference in its 2010 report.

I sent this recommendation with others in May 2010 to the Attorney General, the Chief Justice, the NZ Law Society, and the Council for Legal Education. It was

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258 Concluding Observations of the Human Rights Committee: Ireland CCPR/C/IRL/98/2, 28 April 1999 paragraphs 422-45:
11. The Committee expresses continuing concern that not all Covenant rights are guaranteed in the domestic law of the State party…
12. The State party should ensure that all Covenant rights and freedoms are guaranteed and that effective remedies are available to any person whose rights or freedoms are violated, in accordance with article 2 of the Covenant.


260 Ibid, paragraph 11:
The Committee notes with concern that Germany has not yet taken a position regarding the applicability of the Covenant to persons subject to its jurisdiction in situations where its troops or police forces operate abroad, in particular in the context of peace missions. It reiterates that the applicability of the regime of international humanitarian law does not preclude accountability of States Parties under article 2, paragraph 1, of the Covenant for the actions of its agents outside their own territories. The State party is encouraged to clarify its position and to provide training on relevant rights contained in the Covenant specifically designed for members of its security forces deployed internationally.

261 Gabriela Carina Knaul de Albuquerque e Silva, ‘Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/14/26’ (25 March 2010). (First recommendation) 91. The Special Rapporteur would like to stress the need for magistrates, judges, prosecutors, public defenders and lawyers throughout the world to receive, in addition to legal training, continuing education in international and regional human rights standards and systems.
101. …
(a) Identify the internal and structural features of judicial systems that affect their capacities to implement international and regional standards on human rights.
(b) Identify means of improving the continuing human rights education of judges in order to improve the work of courts to vindicate human rights and provide justice;
(c) Enquire of judiciaries and judges as to what they are doing and what they might do to address and provide redress in relation to deeper patterns of human rights violations that persist year after year in their States;
(d) Explore how the advances in international human rights law can be used more effectively by judges and national courts at all levels.
placed on the Agenda of the latter,\textsuperscript{262} and the Chief Justice advised that she had sent it to the Chairperson of the Institute of Judicial Studies, Justice Glazebrook.

**Conclusion**

It remains to be seen what steps (and when) the NZ Government will take to make domestic law fully compliant with the Covenant. There may be some gradual improvement, but what is needed is for the Executive, Legislative, and Judicial branches all to engage in a proper debate on the meaning of s 4 NZBORA, legislative incorporation of the Covenant into domestic law, and a training program for all legislators, Judges and lawyers. In my opinion full recognition of the International Human Rights treaties in domestic law, and its acceptance as justiciable in domestic courts is required.

\textsuperscript{262} With no perceivable result, as late as December 2012 in a bail application of 5 hours I was asked by an experienced District Court judge to explain what the HRC was.
Chapter 3—*Taito v The Queen*—‘ex parte decisions were purely formalistic or mechanical acts involving no exercise of judicial judgment’

This chapter, the first of the case studies, shows the difficulties of working as a human rights lawyer, and what results from overcoming those difficulties. Challenging the Court of Appeal, the effective final court of appeal for the majority of criminal appellants, and its system of criminal appeals for over 10 years, required courage. It was not for the faint hearted. Confidence in oneself is required, as is a firm belief in the case one is advancing. It may be necessary even to confront your co-counsel who may not share your views, which is disturbing. As funding may be non-existent you may also need to be prepared to work for nothing.

In the Privy Council *Taito v The Queen*, Antony Shaw, Prof Bradley, and I challenged how the criminal appeal system operated in the Court of Appeal for the 90% of appellants who were legally aided. I was lead counsel; Antony Shaw also took on a substantial load and Prof Bradley, an English administrative lawyer, dealt with the bias of the NZ Court of Appeal judges. The case was taken on behalf of 12 appellants.

In summary, whether legal aid decisions were properly made, whether the Court of Appeal acted according to law, and was the discriminatory provision of the case on appeal to counsel for the rich, but not to counsel for the poor were the main issues. (What a case on appeal contained is set in *Smith* immediately below)

The legal issues in *Taito PC* were aptly described in the follow up case in the Court of Appeal of *Smith v the Queen*:

[8] … In brief, the practice for the determination of criminal appeals varied according to whether the applicant was represented by counsel (either privately instructed or through grant of legal aid) or not. For most

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Note 113, above.

*Philip John Smith v The Queen* [2003] 3 NZLR 617. (CA).
appellants the availability of representation depended upon whether legal aid was granted. No case on appeal containing the trial transcripts, summing up, and sentencing notes was made available to appellants unless they were represented by counsel. The power to grant legal aid was conferred by legislation upon the Registrar of the Court, but was in practice exercised by three Judges of the Court who each considered the file separately. Where legal aid was declined and the appellant was not legally represented by privately retained counsel, the appeal was decided ex parte, without the appellant being present and on the papers. In effect, the opinions of the three Judges who considered the legal aid application on the papers became the decision of the Court on the substantive appeal. If written submissions had been received, a written ex parte judgment was prepared, usually by one of the Judges who had earlier declined legal aid and in the names of the three Judges who had considered legal aid. It was read out in Court, but the Bench did not necessarily include all or even any of the three legal aid Judges. If no written submissions were received, no written judgment or reasons were given. In that case, the appeal was formally dismissed at a sitting of the Court which did not necessarily include all or any of the legal aid Judges...

I categorised this primary issue as one law for the rich, and another for the poor. Rich and poor is not a commonly prescribed illegal discrimination. A legal basis for the challenge was the Statutes of Westminster the First, 1275, the oldest constitutional statute in force in NZ (but not in force in England). All the other issues raised were procedural or statutory. As this was a systemic challenge, it is unnecessary to detail the history or details of Taito’s or the eleven others offending, as they were not in issue.

Douglas J eloquently describes the reality of the miscarriage of justice that occurred for indigent appellants in Douglas v California 372 US 353 (1963) from which case the rich and poor distinction was taken:

... Where the merits of the one and only appeal an indigent has are of right, decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor ... The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot.

[Emphasis added]

The Privy Council at paragraph 20 found:

Moreover, undoubtedly well intentioned as the practice of the Court of Appeal was, one is also driven to the conclusion that it had a discriminatory effect.

The Statutes of Westminster the First 1275, Ch 1 The King willeth and commandeth ... that common right be done to all, as well poor as rich, without respect of persons.

An agreed set of facts is set out in a few lines for each appellant in the judgment as a form of appendix following paragraph 25 disposal.
Nicholls [and Tikitiki] v Registrar of the Court of Appeal—Appellate Legal Aid for serious offenders

To understand Taito (PC), reference to its predecessor Nicholls [and Tikitiki] v Registrar of the Court of Appeal (‘Nicholls’)\(^{268}\) is needed.\(^{269}\) Nicholls challenged the way in which the Court of Appeal conducted its criminal appeals by appellants seeking legal aid. Aid was statutorily grantable by the Registrar, but the Court of Appeal judges had unlawfully taken over the system, and three judges considered whether aid should be made. Invariably the Registrar agreed.

Nicholls (a convicted murderer) and Tikitiki (convicted of raping his paraplegic partner) both had been denied aid for their appeals. On the basis of ECHR precedent,\(^{270}\) I sought a judicial review of these denials because the individual appellant’s ability to pursue appeals were not a reality for the majority of criminal appellants unless they were granted legal aid. It seemed absurd that such requests for aid were routinely denied. Section 7 of the Legal Services Act 1991 required the merits of the appeal to be considered, and my proposition was that, given the gravity of the sentences (life and eight years respectively), at least one appeal was necessary, and as such aid must be granted. Whilst the challenge technically failed, on the then current statutory scheme, both appellants received assistance for their appeals, Mr Nicholls by a grant of legal aid, and Mr Tikitiki by way of an ex gratia payment from the Ministry of Justice. On the systemic level the Legal Services Act 2000 amended appellate legal aid brought about principally because of Tipping J’s judgment recommending the system change in the Nicholls decision.\(^{271}\) That Act also removed the decision-making powers of the Registrar of the Court of Appeal with respect to the granting of aid and replaced it with the Legal Services Agency. Chief Justice Eichelbaum during presentation of the appellants’ submissions orally advised appellate counsel that

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\(^{268}\) Note 92, above.

\(^{269}\) The short High Court judgment, which transferred the case to the Court of Appeal, is not considered. *Nicholls v Registrar of the Court of Appeal* [1997] BCL 1266 (HC).

\(^{270}\) Maxwell v United Kingdom (1994) 19 EHRR 97.

\(^{271}\) [p 442] In my opinion, it should be changed, and for more than one reason. Under the present system, there is the potential for no less than four Judges of this Court to consider a criminal legal aid application ñ three as part of the initial consultation process and one on review. In passing it might be said that the concept of one Judge reviewing what has effectively been the decision of three adds oddity to oddity.
“this case should never have brought”. He was plainly wrong, it should have. The impact of the legislative change (which mirrored the appellants’ submissions) was dramatic, as most new appellants seeking aid were then granted aid; significant human rights advances had been achieved despite losing the case.  

_Dissenting Judgment in Nicholls_

In _Taito PC_, the Privy Council noted that doubts had surfaced in _Nicholls_, in particular, that Smellie J, who dissented, had thought that the internal arrangements put in place by the Court of Appeal worked against the scheme of the Legal Services Act 1991, and that there was distortion caused by the three Judge consultation/consideration of the legal aid question.

The ultimate judgment of their Lordships in _Taito_ stated: ‘It will be obvious from this judgment that their Lordships are in respectful disagreement with many of the dicta in _Nicholls_. Given that there is now legislation, which incorporates new safeguards, it is unnecessary to discuss the lengthy judgments in _Nicholls_. It is sufficient to say that it has been overtaken by legislation and by the decision of the Privy Council in the present case.’

_Human Rights preliminary difficulties and solutions (Nicholls)_

The case was brought as a judicial review. Unsurprisingly, the High Court judge hearing it Ellis J (no relation), transferred the case to where logically it should be, the Court of Appeal, as it concerned Court of Appeal process.

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272 _Taito PC_, paragraph 10:
... Under the old system an average of 160 appellants per year for the last five years had been refused aid. Under the new system in 2001 (shortly before the end of the Court year), some 318 applications were lodged for legal aid for criminal appeals. There were 223 grants and 22 refusals; 11 applications were abandoned or withdrawn and 62 were pending. The Solicitor-General pointed out, however, that the increase in the grant of legal aid was in a large measure due to a change in the rules which was advantageous to appellants.

273 _Taito PC_, paragraph 9.

274 Now retired.

275 Hon Robert Smellie, _Few Regrets Reflections on a Life in the Law_ (Auckland District Law Society 2008) 84, 89, include the following remarks regarding the matter:
When the judgment of the Privy Council came out counsel who appeared for the appellants sent me a copy with a short message, which reads:
Dear Judge,
Your judgment in _Nicholls_ was inspiring and has been vindicated.

276 _Taito PC_, paragraph 24.
However, that had the problem of the case being heard by judges in their own cause. With that in mind, I discussed with my fellow counsel, Antony Shaw and Francis Cooke how to obtain a suitable Court. I advised them that I proposed to ask the President and as many as possible permanent judges to recuse themselves and have a Court sit with, unusually, more than one High Court judge on a panel of five. This led to a heated argument that this would be the end of my career. Nevertheless, with the sole moral support of George Barton QC, my long time mentor, I made such an application.

A hearing was arranged in the President’s chambers. The Solicitor-General and his junior a Crown Counsel, attended, as did John Gibson QC and his junior for the Legal Services Agency. I took Francis Cooke as my junior. The only seat left in his large chambers was next to the President’s desk. I perched there asking can I use a bit of your desk? To my delight, the President said ‘I have read your memo, I will not sit neither will all the other judges of the Court except Tipping J’ the most junior Court of Appeal judge who has the least experience of the legal aid system [jurisdictionally a minimum of one Court of Appeal judge had to sit]. He said you could have the Chief Justice who has no involvement with legal aid, and similarly Smellie J an ‘independently minded senior High Court judge’. The President asked me if that was acceptable. I was somewhat nervous about pushing my luck, but said ‘no, I would like a court of five judges’. I agreed to the three judges suggested, and felt somewhat relieved that my co-counsel’s view of what would happen was wrong. I was, however, concerned that they appeared to have no belief in winning the case, and they were not taking a long-term view.

Apart from that problem, there were problems with proper payment which were finally resolved when John Rowan QC used his good offices to ensure us a decent sum from the Legal Services Agency.

277 His Honour was correct; Smellie J issued a strong dissenting judgment ultimately upheld in the Privy Council.
278 Five judges were unavailable due to a large commercial case that was then set down for 9 months with 5 judges. It later settled for hundreds of million of dollars, and no hearing was necessary.
It became apparent that challenging the system might also be achieved by legislative as well as judicial means. I had noted along the way that a simple request to see the appointment letter of the Registrar, led to retrospective legislation rushed though the House of Representatives urgently on a single day to retrospectively validate appointments of all Court Registrars.

Despite having lost their appeals, (and before a leave to appeal to the Privy Council hearing) the refusal to grant Mr Nicholls legal aid was reversed by the Registrar, and he was granted legal aid, and the Department of Justice paid me an ex-gratia payment to conduct Mr Tikitiki’s appeal. Both Mr Nicholls’ and Mr Tikitiki’s appeals were subsequently unsuccessful but at least they had their day in court.

*Leave to appeal to Privy Council*

The appellants sought leave to appeal *Nicholls* from the Court of Appeal, to the Privy Council without success.²⁷⁹ The cases were civil (judicial reviews) in the High Court, and Court of Appeal. Miraculously, on seeking leave to appeal to the Privy Council they suddenly became criminal cases not civil, and the Court of Appeal therefore said it had no jurisdiction to grant leave. Additionally, the Court of Appeal determined there was no live issue upon which to rule, as they were both now funded.

*Successful Recusal Application at Privy Council*

*Taito PC* was plainly an attack on the established legal order, and inevitably unpopular with the Judiciary. It was also my first recusal application²⁸⁰ with respect of a Superior Court judge. I objected to Elias CJ sitting on the Privy Council on the Special Leave application.²⁸¹ Recusal applications are always

²⁷⁹ Note 269, above. The Court noted that it would be ironic that the appellants would be seeking legal aid to pursue an appeal against an earlier decision to refuse legal aid, now that their appeals were being funded. It is more ironic that the Privy Council effectively reversed the substantive decision.

²⁸⁰ Of subsequent numerous ones.

²⁸¹ There is no written decision on the application, but see the Joshua Rozenberg, 'Brief Encounters', *Daily Telegraph* (London), 6 February 2001 <http://www.telegraph.co.uk/news/uknews/1321324/Brief-encounters.html>. I understood from feedback from other NZ counsel in London for other Privy Council cases that the Chief
difficult as judges can and do take them personally, despite the fact they should not.  

After a short explanatory briefing to the Privy Council Registrar, there followed a very lengthy phone discussion in which I responded to questions of the Senior Law Lord relayed by the Registrar regarding the reasons for the application. After I explained Elias CJ was being sued in a judicial review arising from the cases underlying Taito PC, the recusal application was granted. Lord Clyde sat in place of Elias CJ. The very fact that the Chief Justice considered she could sit under such circumstances underlines the importance of initiating recusal

Justice was annoyed at the recusal application, however that annoyance presumably didn’t last long. When the judgment finally issued the Chief Justice phoned, and left a message on my answerphone on Thursday 21 March 2002 at 9:35 a.m.:

‘Tony, it’s Sian Elias, I’m just ringing to congratulate you on an outstanding win. I did think that would happen, but there are very few times in one’s professional life that you carry through a case as difficult, and requiring as much courage, so very well done. Thank you, Goodbye.’

Public Issues Committee, ‘Judicial Conduct’ (Auckland District Law Society, 14 November 2007) 1 said:

**Freedom to Complain**

Wilentz has noted the importance of judicial conduct, and its impact on litigants and others involved in the judicial process:

... This means there must be appropriate complaints processes. There is an understandable reluctance on the part of many members of the bar to complain openly (let alone vociferously) about the conduct of members of the bench...

**The same problem of course arises in cases of alleged bias, where it is, if anything, more acute. In such, failure to complain can ultimately be fatal to ones position (and could arguably amount to professional negligence); yet simply by raising the issue there is a perceived risk of alienating the decision maker.**

[**Bold added**]

Also see: Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing Limited, 2009) p 148: There is a hopeless tension between the state-fostered guarantee of a neutral and objective arbiter of a case and the state’s current process arrangements for disqualification decisions, whereby it is the challenged judge who decides. This disjunction, and its bearings on a fair trial, are further revealed by the requirements of modern human rights instruments. There is also a very human dimension to this issue. At least some judges appear to be very sensitive on this score, and take such applications as a professional slur on their objectivity. Doing away with personal determination should have the consequence of reducing this unfortunate tension between bench and bar.

[**Bold added**]

I was only advised of the coram in London shortly before the hearing date.

Lord Bingham.

The judicial review set out in a 76 page Statement of Claim all the detailed alleged breaches. The judicial review was simply parked awaiting the *Taito* judgment. The Respondent in the judicial review was the Attorney-General, who was being sued in respect of (1) The Court of Appeal, (2) all the permanent Judges of the Court of Appeal (which included the Chief Justice) and such temporary Judges of the Court of Appeal, who either alone or with others purportedly acted as the Court of Appeal in each of the Applicants’ “appeals”, (3)…, (4) the Rules Committee, a statutory board consisting of the Chief Justice, two High Court Judges, the Attorney-General, the Solicitor-General. The judicial review was discontinued after the Privy Council decision.
applications. The Chief Justice’s conviction that she could remain a part of related proceedings manifested itself later in the Jessop case, where Her Honour managed to sit three times on Ms Jessop’s various appeals (excluding the Taito PC appeal), despite objections on the last occasion.\textsuperscript{286}

In any discussion of the Taito and Jessop cases it is important to recall the top five Judges (the Chief Justice and the next four most senior) that administered and applied the unlawful ex parte system of criminal appeals in the Court of Appeal, were promoted to the Supreme Court on its creation. In my opinion they did not all wholeheartedly accept the Taito PC judgment of the Privy Council.\textsuperscript{287} Their feelings regarding Taito PC appear to have influenced their subsequent approach as Judges of the Supreme Court in the leave to appeal applications to the Supreme Court for Mr Taito and Ms Jessop (and other cases). Neither of the Courts of Appeal, which ultimately heard their cases, nor the Supreme Courts, was willing to accept that the Court of Appeal’s behaviour in creating an unlawful system warranted a stay in these cases. Significant criticism of the propositions of the judiciary has been subsequently made in the Taito and Jessop communications. As at January 2013 leaving aside the Chief Justice, McGrath J\textsuperscript{288} remains as the only sitting judge from the ranks of the pre-Taito Court of Appeal, so first-hand experience and institutional memory are fading.

**Taito v The Queen**

There were finally\textsuperscript{289} 12 appellants, including Mr Taito, and Ms Jessop, (dealt with in the next chapter 5), both convicted of aggravated robberies. They and the 10 others who were convicted or a range of offences from murder to minor offences successfully brought a coordinated attack on the way in which the Court of Appeal ran criminal appeals after the passage of the NZBORA.

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\textsuperscript{286} On the first appeal there was no reason for her then counsel to object, on the second occasion the Court sat “on the papers” and did not advise who would sit, on the third occasion Ms Jessop objected that the Chief Justice had sat on the second occasion, and sought recall of the judgment.

\textsuperscript{287} The Chief Justice was not one of the doubters, or did appear so to me.

\textsuperscript{288} Appointed to the Court of Appeal in 2000, and previous Solicitor-General and involved in the judicial review, and other Taito prejudgment events.

\textsuperscript{289} Originally special leave was sought for Taito and separate special leave for Bennett and 10 others, on special leave being granted for both, they were consolidated.
Early Taito stages: judicial review

On being contacted by Ms Tui (one of the eventual 12 Taito PC appellants), I was somewhat surprised by her allegations of miscarriages of justice. However, when the Court of Appeal Registrar advised me personally that I could not have Ms Tui’s Case on Appeal\textsuperscript{290} for review because the Court did not construct such records for legal aid applicants,\textsuperscript{291} I knew I had struck gold. Further research netted a total of 12 clients together with convincing evidence of an alarming extra-judicial system created by the Court of Appeal of not hearing appeals. On 23 December 1999, one of the worst examples of extra-judicial decision-making occurred when Mr Boyd and Ms Donaldson had their appeals dismissed by Keith J with the Registrar apparently sitting as a judicial officer. A minimum judicial coram of 2 judges was required. On the Court of Appeal being challenged by judicial review, and counsel\textsuperscript{292} protesting the jurisdiction as spent as judgment had been given and entered in the record book, and seeking at a notified hearing that the dismissal not be re-entered into the record book, the judgments were nevertheless redelivered and recorded.\textsuperscript{293} The Court of Appeal’s first record in Mr Boyd’s case read simply “Dismissed” (reasonably indicative of any ex parte appeal where no written submissions were lodged). The entire record reads:\textsuperscript{294}

\begin{quote}
“Thursday December 23 1999

Keith J

Madame Registrar

…

For Decision (ex parte)

…”
\end{quote}

\textsuperscript{290} Taito PC Judgment at paragraph 8: \ldots The Case on Appeal will typically include the Notice of Appeal, Indictment, Notes of Evidence, Summing Up (if relevant), Reports filed for Sentencing, Sentencing Remarks, any other trial rulings that are relevant and an Index prepared by the Registry.

\textsuperscript{291} Such a failure to construct records is in breach of s 392, s 398 Crimes Act 1961, and Rule 10 of the Court of Appeal Rules, and natural justice.

\textsuperscript{292} Mr Antony Shaw, and I represented one of the two clients each in order to make the point twice.

\textsuperscript{293} By Henry and Tipping JJ. i.e. the difference was the judgment was now delivered by two judges, not a judge and registrar.

\textsuperscript{294} Court of Appeal Record Book, 23 December 1999.
Ms Donaldson’s record was similarly perfunctory in stating the dismissal of her appeal. As their Lordships in Taito PC recorded with respect to the Boyd matter, ‘This ex parte decision was also delivered in breach of the Judicature Act in that only one Judge was present at its delivery. The decision was re-delivered on 29 June 2000.’

My initial strategy to challenge this unlawful system had been to file a judicial review. Cases for eleven of the appellants that would ultimately make up Taito PC (all except Mr Taito himself) were put together in a draft judicial review, sent to the Solicitor-General, and then filed in the High Court a month or so afterwards.

**Early Taito stages: Legislative amendments to validate process**

In hindsight, I believe that filing the judicial review initiated the Crimes (Criminal Appeals) Act 2001, the subject of the Smith case, to validate the Court of Appeal’s process. By lobbying hard, and getting the NZLS and Bar Association onside, the amendment Bill which essentially validated the current Taito processes was removed from the Government Administration Select Committee (where no lawyers sat) to a Justice Select Committee where MP’s with a legal background sat. Further extensive lobbying resulted in significant amendments to the proposed Bill being made. Whilst the 12 Taito appellants were not ultimately caught by the proposed legislative amendments, neither was anyone else, as Smith effectively neutered the legislative attempt to confine the Privy Council decision to only the 12 Taito appellants. That legislation failed as it was passed before the Taito PC judgment, and did not anticipate the width of the Privy

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295 Taito PC, 602. (Boyd and Donaldson were both treated identically.)
296 Note 264, above.
Council judgment, so it extended to all the estimated 1500 appellants who received a *Taito* type appeal in the Court of Appeal over approximately 12 years.

**Early Taito stages: Application for Special Leave to Privy Council**

On a strategic reconsideration, I decided to apply for Special (Criminal) Leave to the Privy Council for my clients, to avoid another *Nicholls* scenario in which the Court of Appeal would find itself at liberty to determine its own procedures.

For the hearing itself, I recruited Professor Bradley, an English administrative law expert, to run the argument on bias (or appearance of bias) in respect of Court of Appeal Judges.

**Early Taito stages: Legal Aid refused**

Our request for legal aid on behalf of the appellants was initially refused, and therefore our first trip to London to seek Special Leave to Appeal was self-funded. Given the importance of the case we went anyway. The London solicitors also were prepared to work pro bono. At the close of the first hearing for Special Leave to Appeal, their Lordships orally effectively invited the Solicitor-General to support a grant of legal aid, and the NZ authorities promptly reversed their decision. Legal aid was granted retrospectively, for that Special Leave Application, and prospectively for the remaining hearings, and the case was funded without any further problems.

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298 The legislation validated only cases with legislatively identified procedural error, not a denial of the minimum standards of criminal procedure, so the legislation not being broad enough was of no effect.

299 Jonathan Cohen—a recently admitted barrister in Professor Bradley’s Chambers—also appeared. He was there to gain experience and played no active role.

300 This is unsurprising. Given a certificate of exceptional public importance and public interest was required from the Attorney-General, the Attorney was prepared to concede exceptional public importance in general, but not in the specific case. He considered it not in the public interest to grant aid. Given that at least 10 years of criminal practice in the COA was under challenge, it was difficult to get legal aid as the specialist Legal Aid adviser—a senior criminal barrister believed many of the claims had no chance of success. A QC’s opinion agreed.

301 The Solicitors in question were *Sheridans*, with whom Professor Bradley was connected.

302 The remaining hearings included a consolidation special leave hearing, and the final four-day hearing.
The Taito Judgment

As Allan Bracegirdle, the Legislative Counsel, Office of the Clerk of the House of Representatives (NZ), pointedly stated: ‘The Privy Council had some harsh and uncompromising things to say about those practices in finding the Court’s decisions dismissing the appeals to be invalid.’ Superior Court Judges are unlikely to forget such a harsh judgment. It provided me with the confidence and stimulus needed to develop my international human rights practice.

The headnote records: ‘The dismissal by the Court of Appeal of all the appeals under the ex parte procedure had been of no force or effect. The decisions had not been in accordance with the opinion of the Judges present, as required by s 59 of the Judicature Act 1908, but had been purely formal or mechanical acts relying on the earlier decision that legal aid should not be granted and involving no exercise of judicial judgment. The Solicitor-General had not appeared as required by s 390 of the Crimes Act 1961 and the appellant had not been given a choice of submitting written argument or appearing in person as required by s 388(1) of the Crimes Act. The participation, in the decisions to dismiss the appeals, of a Judge who had taken part in the decision to decline legal aid would have suggested to a fair-minded and informed observer that the Judge was not independent… The circulation of papers between Judges without face-to-face discussion or collective decision did not satisfy minimum standards of adjudication by an appellate Court and the applications were dismissed without reasons being given.’

In response to the Solicitor-General’s argument that the overall process met natural justice, their Lordships commented: ‘Decisions that the appeals were in truth unmeritorious could only be made after observance of procedural due process. Unfortunately, the system failed this basic test. ...The overall process had failed to meet the requirements of natural justice.’

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304 Ibid, paragraph 19.
305 Ibid, paragraphs 19 and 20.
Their Lordships further found that the ‘ex parte decisions were purely formalistic or mechanical acts involving no exercise of judicial judgment’.  

I had previously considered the unlawful scheme of not hearing appeals invented by the Court of Appeal inherently discriminatory. Their Lordships agreed with my discrimination challenge distinguishing between rich and poor as a rich appellant received an oral hearing, and a poor one—denied legal aid—did not.  

The Solicitor-General argued, when faced with the central question of when, by whom, and how were the appeals dismissed, that they were implicitly authorised by the legislation, and it was a practical necessity not to actually hear the appeals in the traditional fashion i.e. that is by not having a hearing but passing the papers around the judges. Their Lordships rejected these arguments, saying that as the final Court of Appeal they could not accept an extra-judicial scheme for determining appeals of those who had been denied legal aid.  

In the 2009 HRC communication by Taito, it was advanced that the failure to apply the statutory tests of having an appeal heard was the point of strongest attack in the Privy Council case, and that consideration by the Court of Appeal was given, wrongly, to limiting expenditure from the public purse. It was submitted that notwithstanding the presence of a right to appeal, in effect, a leave to appeal provision had been interposed, unlawfully. Since a rich appellant had no similar threshold test, a rift was created between the rich and the poor. I advanced support from extra-judicial statements by the then-President of the Court of Appeal, Sir Robin Cooke (as he then was), in 1986 and 1993. Both statements were on similar lines. In the former, when asked in an interview whether the Court received a lot of worthless appeals, Sir Robin Cooke was recorded as replying that to some extent it was possible to control the problem through the legal aid mechanism. He said that if the appeal had no merit at all, aid could be and is refused. He considered there was quite a fine line to be drawn.

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308 Ibid, paragraph 19.  
309 Taito PC, paragraph 13.
between a hopeless appeal and a just arguable appeal, and in that area that was perhaps some room for manoeuvre.\textsuperscript{310}

The Auckland District Law Society’s submission on the Supreme Court Bill in 2003 picked up Sir Robin Cooke’s point,\textsuperscript{311} saying,\textsuperscript{312} ‘The \textit{Taito} appellants were in parlous circumstances. The Privy Council nevertheless upheld the rule of law, and the principles of natural justice—principles overlooked in the Court of Appeal, which may have been subconsciously influenced by the limited resources allocated by the executive.’

\textit{Comments by third parties on the judgment}

The literature provides additional useful analysis. Robert Lithgow’s highly critical article,\textsuperscript{313} commented:

The successful appeals of Taito, Bennett and ten others is an unambiguous humiliation for the Court of Appeal of New Zealand. The guts of the decision is a step by step lesson in what a criminal appeal should be and how it should be conducted. The concepts are so basic, and so irrefutable when stated succinctly, that it is hard to understand how they could have been lost sight of. The brief history is that the Court of Appeal, for many years, used its control of the grant of criminal legal aid as a tool to manage its workload.

The power was given to the Registrar with advice from a Judge. The imprisoned appellant required the permission of the Court of Appeal in order to attend. The net result was that a refusal of legal aid was in most cases the end of an appeal. Appellants were given the opportunity to make submissions but not the simple resources, such as the trial papers. Their sometimes thoughtful, sometimes clumsy, and often non-existent submissions were then “considered”, often by the same Judge or Judges who refused legal aid and the appeal dismissed … Another Alice-in-Wonderland situation included an occasion when to meet the obligation to deliver the decisions in open Court decisions were “delivered” at 9.30 even though the Court was not opened until 10. On one occasion a single Judge roped in the Registrar and had her listed as a Judge for the purposes of a quorum. In short, the Court had lost its way.

Mr Lithgow’s brave and fearless article continued:


\textsuperscript{311} Auckland District Law Society, ‘Submission on Supreme Court Bill 2003’ (10 April 2003).

\textsuperscript{312} Ibid, 21.

If at any stage you think my language is intemperate then I suggest that you read the judgment of the Privy Council delivered by Lord Steyn...

But the lawyers were pronounced right by the Privy Council in every particular and the Judges of the Court of Appeal wrong.

Contrast this with the dry and almost apologetic tone of academic Janet McLean\textsuperscript{314} commenting correctly that there was no attempt before the Privy Council to address the merits of the cases. It was \textit{purely} a systemic challenge resulting in the finding that the appeals were ‘irredeemably flawed … [and] purely formalistic or mechanical acts involving no exercise of judicial judgement’.\textsuperscript{315}

\textit{Single point not upheld—undue delay}

Actually, Robert Lithgow was wrong on one point we were not pronounced right on every particular. On the single issue of undue delay we the lawyers were pronounced wrong. The Privy Council later reversed itself on that point in \textit{Mills v Her Majesty's Advocate & Anor (Scotland)}.\textsuperscript{316} A reduction in sentence was an appropriate remedy for undue delay in hearing an appeal, the Privy Council observed in \textit{Mills},\textsuperscript{317} pointedly noting its earlier inconsistent finding in \textit{Taito PC}:\textsuperscript{318}

\begin{quote}
In respect of Bennett\textsuperscript{319}... and Taito, counsel invited the Board to allow their appeals and to enter acquittals. For this ambitious submission counsel relied on \textit{Darmalingum v The State} [2000] 1 WLR 2303. … \textit{Darmalingum} was ... a wholly exceptional case. Moreover, \textit{Darmalingum} was a case where the defendant ‘had the shadow of the proceedings hanging over him for about 15 years’ ... This argument must be rejected.

… The holding in \textit{Taito} is inconsistent with the proposition that the normal remedy for such a breach is the quashing of the conviction … In my view \textit{Darmalingum} must be regarded as modified as I have indicated.

… A reduction of the sentence by nine months was a just disposal in the spirit of article 6(1). [fair trial right]
\end{quote}

\begin{flushright}
\textsuperscript{315} Ibid.
\textsuperscript{317} Ibid, \textit{Mills}, paragraph 19.
\textsuperscript{318} \textit{Taito PC}, paragraph 22.
\textsuperscript{319} The lead client in the other eleven cases joined with Taito.
\end{flushright}
Post Privy Council Appeal Hearings

After the judgment was issued in Taito PC, all 12 appellants had their cases remitted for the first lawful hearings of their appeals. Mr Shaw and I divided most of the 12 cases between us, and a few were given to trial lawyers with particular expertise on the points under appeal. I took on Taito, Jessop, and Savelio.

The only subsequent winning appeal was Timoti. Initially the Court of Appeal dismissed his 2005 appeal, but the Supreme Court ordered a rehearing. Arguably, counsel could have sought recusal of Blanchard J and Tipping J, as they were members of the 1996 Court of Appeal who had dismissed Mr Timoti’s Taito ex parte appeal on the basis of the appellant’s own written submissions. At the rehearing, he was convicted of manslaughter and not murder.

Of the 1500 appeals I had estimated that could be reheard on the basis of the Taito PC judgment striking down the ex parte process by which such appeals had been dismissed, I estimated a likely hearing number of 100. By 2006, 69 had been heard, and of those, nine had succeeded, reflecting approximately the same ratio of one in nine successes for legal aid appeals applying in 2000. The numbers have slowed in recent years; no new figure is currently available.

Mr Taito’s Communication to the Human Rights Committee

Neither the communication from Mr Taito or Ms Jessop will receive more than superficial comment in this thesis as Mr Taito’s has yet to be decided, and Ms Jessop’s which was 375 pages long was dismissed in 2011, and is simply too long to commit much space to.

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320 The statistics advanced to the Privy Council were that one in nine legal aid appeals were successful, compared to one in three for private counsel.
321 There is no report of this criminal trial.
322 R v Timoti [2005] 1 NZLR 466(CA).
323 R v Timoti [2006] 1 NZLR 323(SC, Elias CJ, Gault, Keith, Blanchard and Tipping JJ. Greg King, a local trial specialist with a detailed knowledge of provocation—the principal issue—and Antony Shaw) represented Mr Timoti at the 2006 hearing of his appeal. Original Taito appellants received their first appeal; other appellants received a “rehearing” (a bit of a misnomer in that they had never had a “hearing” to begin with).
324 The number was uncontested in R v Phillip John Smith note 264, above.
Mr Taito was convicted and sentenced in 1995, and released from jail by 2005. His first lawful appeal was dismissed in 1996. Ms Jessop, was convicted and sentenced in 1999, and sentenced to imprisonment of 4 years and eight months. Her HRC communication was filed in 2008, and his in 2009. Given the work required bringing a communication let alone pro bono I prioritised, and of the 12 Privy Council appellants only Mr Taito and Ms Jessop took HRC communications.

The principal arguments in Mr Taito’s as yet undecided communication (Taito HRC) are: (1) discriminatory approach to the appeal, (2) absence of the summing up (loss through passage of time), (3) improper selection of jury (no available Samoan persons), (4) inadequate analysis of appeal points, (5) undue delay (in common with Jessop and EB) and (6) judicial lobbying (in common with all 12 Taito PC cases including Jessop) causing a lack of an impartial tribunal.

**Conclusion**

When I first embarked on Nicholls, I had no idea that it would become a major human rights case or if it would be the end of my legal career. After my experiences with Nicholls, my pursuit of legal aid for my clients in Taito PC was a natural progression having learnt more about the legal aid system.

Without having launched the Nicholls and the Taito PC challenges and served my final appellate Court apprenticeship, I very much doubt that on the abolition of appeals to the Privy Council I would have undertaken HRC work, but I had been enthused that the last word did not lie in Molesworth Street. Significant human rights advances had been achieved, as legislative and judicial change meant appellants now received legal aid.

However, the last word apparently moved from London to Wellington in 2004 with the creation of the Supreme Court. But perhaps not quite, as I was now realise

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325 *R v Fa'afete Taito* [2005] 2 NZLR 815. (CA).
326 Where the Court of Appeal was and is located, and where the Supreme Court first sat before moving to permanent quarters around the corner.
the HRC sitting in Geneva and New York, on the papers, as possibly having the last word, on human rights matters.

Human rights in NZ were advanced by this case as counsel could see the local judiciary were not immune from challenge, both as to systems and recusal in the Privy Council. It encouraged as did Nicholls legislative change. It also inspired challenges to the HRC, and ultimately this thesis, as the creation of the local final court of appeal, the Supreme Court with promoted Court of Appeal judges, meant there was no longer any apparent off-shore check. Human rights do indeed evolve.
**Chapter 4—Synopsis of Jessop case and communication—14-year-old conviction and appeals in 10 domestic courts**

*Ms Jessop’s case*

Ms Jessop was one of the Taito twelve. A short discussion on Jessop follows, anything more would require another thesis as the Jessop communication, exceeds 116,000 words, and went through 10 domestic courts. The HRC synopsis of the alleged breaches alone was 30 pages.

On 2 June 1998, Ms Jessop was charged in the Youth Court with aggravated robbery, involving a violent attack and robbery of an 87-year-old man in his home. Ms Jessop’s 15-year-old cousin gave evidence at the trial stating that Ms Jessop was not present when the offence was committed. That evidence coincided with the victim’s initial statement that only one girl robbed him. After two young girls were arrested, and the victim’s son advised him that two girls had been arrested, the victim’s later statements alleged that two girls robbed him. Due to the victim’s ill health, he did not give evidence at trial, and Ms Jessop was never able to confront her accuser. Whilst she purportedly confessed (after pressure from police), her so-called confession begins, ‘I am going to lie now’, spoken in her native Niuean. She always maintained her innocence.

Tipping J presided at Ms Jessop’s original *Taito* appeal. The Court Record Book—as with the Boyd and Donaldson cases above—merely records “Dismissed”, as the entire record of the appeal judgment. No reasons for the dismissal were provided. On 30 March 2000, the Registry sent Ms Jessop a standard form Notice of Result of Appeal as follows:

“The CRIMES ACT 1961

NOTICE TO APPELLANT OF RESULT OF APPEAL 13/00

Emelysifa Jessop v The Queen

To the above named appellant
This is to give you notice that the Court of Appeal has considered the matter of your appeal and finally determined the same and has this day given judgment

THAT

The appeal against conviction is dismissed.

…"

His Honour Tipping J could only have concluded that the appeal should be dismissed if he was satisfied there was no miscarriage of justice. That finding of no miscarriage of justice implied in the single word “dismissed” was the essence of His Honour’s submission to Parliamentary Select Committees when His Honour lobbied in respect of validating legislation, the Crimes (Criminal Appeals) Amendment Act 2001. Remarkably, and ironically, when this Taito case was called in the Supreme Court, it was decided yet again by an ex parte process now known as on the papers, and now statutorily authorised, and applicable to all the Taito appellants except the named twelve, and Tipping J sat yet again.

Another irony was that despite winning the de jure right to the Case on Appeal as a result of the judgment in Taito PC, it still took some considerable time and effort, and two supplementary Cases on Appeal, to collect all the relevant materials needed for Ms Jessop’s appeal. Included in the documents we needed to collect was her first appeal judgment, which granted a rehearing but not a stay. That judgment was very relevant for an undue delay argument, and for claims of a lack of impartiality on the part of the judges as Elias J (as she then was) sat, and then sat again on later appeals by Jessop, despite a successful recusal of her seat in the Privy Council. It does seem remarkable that having not sat in the Privy Council after objection, she then went on to sit in the Supreme Court.

On a practical level, how the appellants including Ms Jessop were supposed to write their own legal submissions on the appeal without access to the prime

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327 Section 27(2) Supreme Court Act 2003.
328 As became clear it was not technically her first appeal; she had managed to be convicted and sentenced to 4 years’ imprisonment without entering a plea (Jessop Emelysifa v The Queen, CA 404/98, 2 March 1999, BC9960195) but that conviction was set aside as a nullity. Eichelbaum CJ, Robertson J and Elias J sat on that appeal. This Taito appeal was an appeal from the rehearing.
documents was something about which no one had ever complained formally. How Ms Jessop—as a then 15-year-old⁴³²⁹ and relatively uneducated appellant—was expected to write her own appellate submissions was a classic indictment of a system that failed to grant legal aid for indigent appellants as a matter of course.

The Jessop communication has what I considered that rare confluence of great facts, and serious human rights violations that was powerful enough to have generated a one-hour TV documentary shown on TV1 in July 2009.③³⁰ Regrettably the HRC did not share my opinion. But the Committee’s views not finding a single breach were observed by the Crown Counsel defending New Zealand’s position, as the longest views he had ever read. That the views only extend to 23 pages, indicate that the lengths of the Committee’s views have been normally refined to a fine art of brevity. Detailed reasoning is not a virtue of Covenant jurisprudence. This compounds any lack of understanding of why cases are lost, as it gives the impression of ICCPR compliance, which may be correct, but it could simply be poor advocacy, or lack of time devoted to determining the Committee’s view especially in complex cases.

⁴³²⁹ Due to the delays, she had now become 15 years old.

③³⁰ Bryan Bruce, ‘Real Crime: The Investigator: Emelysia Jessop Case ’ (2009) <http://www.throng.co.nz/real-crime-investigator/real-crime-investigator-emelysia-jessop-case> accessed 9 May 2013. In an email to me on 31 March 2008, Professor Anthony Bradley, Barrister and Author (and, from 2002 to 2005, legal adviser to the House of Lords Select Committee on the Constitution), who appeared with me in the Privy Council in Taito, said: ‘The full Jessop story is possibly the worst in a civilised and democratic country that I have read. I will be pleased to assist the TV investigator if I can—although the record speaks eloquently for itself.’ Professor Bradley appeared in the TV documentary.
Two flow charts

These charts, illustrating first the complexity of the case evolving through ten courts and secondly, the numerous Judges who were involved at more than one stage of the case without disqualifying themselves—especially the Chief Justice—are set out below:
Summary of Timeline Events in respect to Ms Jessop 1998-2007

**2 June 1998**
- 7.30 p.m.

**July 1998**
- 10.58 p.m.

**22 July 1998**
- 13 Oct 1999

**30 March 2000**

**27 Oct 2005**

**27 March 2006**

**30 Nov 2007**

**Police Identity Parade:**
Senior Sergeant Khuessein sees 2 girls, approximately 14 and 15 years old wearing clothes as described, in Great South Road, Auckland. Stopped and obtained their identity, and asked the girls to attend an informal ID parade. They were intoxicated. Constable Miller takes to the ID scene by police car. Constable Radcliffe collects Ivan Miller at 7.45 p.m. for ID parade. Miller identifies girls by clothing. Constable Radcliffe told to “uplift” defendant Jessop and her associate to Police Station.

**Offence:**
Colin Keoghan attacked and robbed at approx. 6.00 p.m. Neighbour Ivan Miller speaks to police and reports he has seen 2 girls and can describe clothing.

**First Sentencing**
Sentenced to 4 years by Potter J in High Court.

**Plea without Consent**
Guilty plea entered by Author’s lawyer without consent.

**Youth Court**
First Court appearance.

**“Confession:”**
Second video interview; author says in Niuean “I will now lie” then confesses.

**First Domestic Appeal**
Court of Appeal allowed appeal and remitted to Youth Court for entry.

**Second Domestic Appeal**
Court of Appeal unlawfully dismiss appeal (as determined by Privy Council in March 2002).

**Dismissed Application to Set Aside Judgment**
Supreme Court dismissed application to set aside dismissal of leave to appeal (8 paragraphs).

**Dismissal of Leave to Appeal**
Supreme Court dismissed leave to appeal (4 paragraphs).

**Appeal to Privy Council**
Flowchart of Judges Involved in the Ms Jessop’s Case
1998 - 2008

Key: **Judge** = Judge who has sat/been allocated to sit more than once in the Author’s ten sets of domestic proceedings

<table>
<thead>
<tr>
<th>Judicial Committee of the Privy Council x1</th>
<th>Supreme Court1 x1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>R v Taito</strong> hearing 18-21 February 2002, (Elias CJ stands aside upon objection made by Counsel after informal notification by Registrar. Lord Clyde takes Her Honour’s Place.)</td>
<td>1. Elias CJ, Tipping J and Blanchard J dismiss application for leave to appeal in March 2006</td>
</tr>
</tbody>
</table>

**Court of Appeal x3**

1. Eichelbaum CJ, Robertson J and Elias J (as she then was) allow appeal and remit to Youth Court for entry of plea on 2 March 1999
2. (i) Legal aid refused by Deputy Registrar after consulting with Keith J on 1 February 2000
   (ii) Tipping J reviewed the refusal of legal aid and upheld refusal on 10 March 2000
   (iii) Tipping J, Doogue J and Cartwright J dismiss appeal in one word Judgment on 30 March 2000
3. Elias CJ nominated Panckhurst J to sit on the Court of Appeal
4. Glazebrook J (as acting President) refused to provide Counsel with Panckhurst J’s warrant.
5. Glazebrook J (as Acting President) reviewed her refusal to provide warrant.
   Glazebrook J, O’Regan J and Panckhurst J dismiss appeal on 27 October 2005. (Before the appeal, Robertson J stands aside upon objection made by Counsel. Glazebrook J takes His Honour’s place)

**High Court x2**

1. Potter J sentences Author to 4 years imprisonment on 22 July 1998
2. Potter J hears voir dire on admissibility of confession under s344 Crimes Act on 1 October 1999
3. Day before trial, Robertson J hears application for discharge under s347 Crimes Act on 12 October 1999
4. Potter J presides over Jury Trial on 13 October 1999
5. Potter J sentences Author to 4 years 8 months imprisonment on 12 November 1999

**Youth Court x2**

1. Unidentified Judge records that the charge was “not denied” on 3 June 1998 and Judge Gilbert convicts and remands for sentence to the High Court on 30 June 1998
2. Unidentified Judge records first appearance on 13 April 1999 and unidentified Judge refuses Youth Court Jurisdiction and remands to High Court for trial on 24 June 1999

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1 New Zealand’s highest Court replacing the Judicial Committee of the Privy Council after 1 July 2004.
Ms Jessop complained in her communication of breaches of Articles 2(3)(a), 9(1), 9(3), 10(2)(b), 14(1) 14(2), 14(3)(a), 14(3)(b), 14(3)(c), 14(3)(d), 14(3)(e), 14(3)(g), 14(4), 14(5), 17, 24, and 26 of the Covenant.\(^{331}\)

Born of Niuean\(^{332}\) parents, this young immigrant was a victim of the most basic failures of guarantees of due process, and her status as a child before the law was not upheld. She was unfamiliar with Court processes and legal concepts, yet her special circumstances led to an ordeal through ten courts,\(^{333}\) where significant rights were systemically ignored.

This 14-year-old child was sentenced to four years imprisonment after a plea of guilty was entered on her behalf without her knowledge or consent. At a re-trial, before the same High Court Judge who had already sentenced her to four years imprisonment, the judge re-sentenced the now-pregnant 15-year-old girl to four years and eight months imprisonment.

**Views of the Committee**

The Privy Council case of *Taito*, including Ms Jessop was a landmark domestic case, was long in the making. I allow myself a couple of comments only. These revolve around the circumstances leading to the “confession”, and the “confession” itself. The “confession” began with the words “I am going to lie now” and was unsatisfactorily dealt with. The Committee observe\(^{334}\) that the author’s contention she could not cross-examine at trial due to the absence of the complainant, and the importance of the evidence of the victim at trial, magnified by contradictory statements of the victim, considers that the victim’s statement

\(^{331}\) As far as they are applicable, given that the breaches of rights alleged overlap, she also claimed breaches of the United Nations Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (“Convention”) and of breaches of Articles 3, 12, 37, 40, and 41 of the Convention.

\(^{332}\) Niue is a remote Polynesian island in the Pacific Ocean with 2,166 inhabitants. It is self-governing in free association with New Zealand, with Niue being fully responsible for its internal affairs. New Zealand is responsible for the country’s external affairs and defence. Niuean is a Polynesian language, which is closely related to Tongan and Samoan. The Author is fluent in the language, maintaining strong links with her Niuean community. Only 3 countries, Niue, the Cooks Islands, and Taiwan, are not members of the UN. The first two are in free association with NZ.

\(^{333}\) In chronological order, these nine Courts comprised of the Youth Court, High Court, Court of Appeal, Youth Court, High Court, Court of Appeal, Privy Council, Court of Appeal, and the Supreme Court twice.

could have fallen short of Article 14(3)(e) a proper opportunity to cross examine, however in the particular circumstances it does not amount to a violation—why not? Brevity here is very unhelpful.

The Committee refer to the case twice in its footnotes to Draft General Comment 35 for proposition that you are not detained if voluntarily at the police station. How a drunk 14 year-old can consent to be at the police station escapes the writer.

The Court of Appeal in paragraph 48 dismissed the question of voluntariness of the confession:

[48] Mr Ellis also suggested that Mrs Jessop had pressured the appellant into admitting involvement in the robbery, and that this meant that the confession was not voluntary. Potter J rejected a similar argument in the High Court on the basis that nothing Mrs Jessop did was overbearing, and also on the basis that Mrs Jessop was not a "person in authority" in relation to her daughter. There was nothing in the submissions made in this Court which indicated the Judge's first finding was wrong, and her second was undoubtedly correct: Naniseni v R [1971] NZLR 269 at 276-277.

By contrast, the High Court of Australia in Tofilau v The Queen takes over 100 pages of analysis in respect of a voluntary confession in the context of undercover police officers.

At paragraph 284, Callinan, Heydon and Crennan JJ state ‘The person in authority requirement has never been challenged in Australia, and many Australian authorities have accepted that it exists, although there has been debate about its extent.’

Clearly a mother might be a person in authority.

336 Tofilau v The Queen [2007] HCA 39.
337 For example, the conclusion that the mother in (R v Scofield (1988) 37 A Crim R 197) is a person in authority.'
Lastly, the Committee said\textsuperscript{338} that at the end of the second interview the author confessed ‘It therefore cannot be sustained, within the meaning of article 9, paragraph 1 of the Covenant, that the author was arrested, detained, or otherwise deprived of her liberty. Nor, \textit{a fortiori}, can it be maintained that she was subjected to criminal proceedings at this time, as she had not been charged yet at this point.’

This ignores she was a drunk 14 year old, and the Identification Parade procedures did not even meet adult requirements as to the minimum number of 6 (only 4 here) required for a line up. How a drunken 14 year old can consent to a flawed line-up is unexplained. If a drunk 14 year old is not detained under the factual scenario here, not many persons could ever be unlawfully detained.

\textbf{Conclusion}

Given that a drunk 14-year-old can confess by using the words “I am going to lie now” without a proper analysis such as in \textit{Tofilau v The Queen}, it is perhaps unsurprising I lamentably failed to advance any human rights in Ms Jessop’s communication.

\footnotesize\textsuperscript{338} Note 334, above, paragraph 7.10.
Chapter 5—Rameka v New Zealand—Is preventive detention an arbitrary detention?

Introduction

Rameka et al v New Zealand was my first HRC case. To understand the case, and the NZBORA and Covenant analysis, requires a discussion of R v Leitch, my first preventive detention case. Leitch became the leading NZ case on the issue of preventive detention. Because it was seen as important, five (rather than the usual three) Court of Appeal Judges sat—including both the Chief Justice and the President of the Court of Appeal. I launched a full-scale NZBORA and Covenant attack on the lawfulness of the sentence in Leitch. These arguments were later developed in Rameka before the Privy Council, and the HRC.

The Court of Appeal agreed with the defence and Crown that Mr Leitch should not have preventive detention, and substituted eight years’ imprisonment, thereby managing to avoid dealing with the human rights and international issues inherent in preventive detention. The Court of Appeal summarised Mr Leitch’s submission as follows: first, that the sentence of preventive detention was in breach of s 9 of the Bill of Rights which affirms the right ‘not to be subjected to … disproportionately severe treatment or punishment’; and second, that as currently applied preventive detention was is in breach of the Covenant because the detainee’s position is not regularly reviewed within the 10-year detention period and the detainee is not provided with treatment until near the end of the 10-year period. The Court of Appeal also took note of the claim by Mr Leitch that the sentence of preventive detention incorporates punishment for possible future offending. The Crown’s response to these submissions was that NZ was not in breach unless the sentence imposed was so excessive as to outrage standards of decency, and that ss 5 and 4 [NZBORA] also required consideration.

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Note 51, above. There were three authors Rameka, Harris, and Tarawa.

See Dean v The Queen, CA 172/03, 17 December 2004, para 57.

The Chief Justice and President who did not get on with each other rarely appeared on the same bench together.


Was the section necessary in a free and democratic society, and did the Criminal Justice Act trump the NZBORA.
Crown also responded that the central issue for the Court was the appropriateness of the sentence imposed in terms of domestic law, and that the question of whether NZ is fulfilling obligations under the International Covenant was best left to the complaints machinery of the Optional Protocol to which New Zealand had acceded and the periodic reporting requirements to the United Nations Human Rights Committee. The Court adopted that approach. It will be recalled that Oertly found the Court’s behaviour in not addressing the Covenant ‘startling’.

I had orally abandoned a ‘cruel and unusual punishment’ submission (but not a disproportionate treatment argument) because of the unfavourable judgment of the former topic by the Supreme Court of Canada in *R v Lyons*. That was a mistake as I subsequently concluded the Canadian case had only applied domestic—and not international—jurisprudence, but disproportionate treatment was still in issue, and argued before the HRC.

*Leitch* held that preventive detention accorded with a fundamental purpose of sentencing: the protection of society. The threshold under s 75(2) of the Criminal Justice Act 1985 (“CJA”), a stand-alone sentencing provision that provides for a sentence of preventive detention, was that ‘it is expedient for the protection of the public’ that the offender should be ‘detained in custody for a substantial period’. Factors likely to be relevant under ss 75(2) and 75(3A) (which required a psychiatric report and the judge on receipt of that and any other report ‘to be is satisfied that there is a substantial risk that the offender will commit a specified offence upon release’ included a check list approach—the nature of the offending; its gravity and time span; response to rehabilitation efforts; time elapsed since previous offending; steps taken to avoid re-offending; acceptance of responsibility and remorse; and predilection and proclivity for offending taking

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344 Note 49, above.
345 The Bill of Rights 1688 (UK) uses the phrase cruel and unusual, as does the eight amendment to the US Constitution. NZ and various Australian States and Territories Imperial Laws Application Acts confirm the imperial statute is still in force. See also *McCann v Canada* (1975) 29 CCC (2d) 337. Similar hierarchies of prohibitions of unlawful treatments are contained in modern domestic statutes and international law. Section 9 of the NZBOR A uses the language ‘torture, cruel, ... disproportionate’. Article 7 of the Covenant, also uses ‘Torture or cruel’.
347 Note 108, above, p 429.
into account risk assessments. The sentencing or appellate Court had
discretion to impose the sentence but it was then considered to be a sentence
of last resort. The Court needed ordinarily to consider a finite sentence first, if a
finite sentence reasonably would satisfy the statutory tests; if not, then a
sentence greater than normal could be imposed under s 75(2) to protect the
public. The Court of Appeal in Leitch quashed the sentence of preventive
detention and substituted eight years’ imprisonment.

Whilst the Court of Appeal applied general legal principles without having to
resort to the language of the Covenant, it adopted the checklist approach. The
Leitch ‘checklist approach’ was, however, a significant human rights advance
over the then current approach, which was largely an ad hoc approach by
individual judges.

It was also a backwards step in one respect; Mr Rameka, who also had
received prevention detention, received that sentence as a sentence of last
resort, the Letich judgment no longer required the sentence to be classified as
one of last resort. It could be imposed without consideration of the effect of the
previous sentence the offender had served, or indeed be imposed on a first
offender of a qualifying offence.

In 1997, the Covenant had reached its high point in NZ jurisprudence after the
1996 Tavita decision (‘not window-dressing’), and as such I had hoped for a
meaningful 1998 Covenant analysis in Leitch, which did not happen. Overall,
Leitch was a human rights advance, and is still regularly cited today.

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348 Ibid, p 419.
349 Only a High Court Judge had originating jurisdiction to impose the sentence.
page. (No page or paragraph numbers).
351 Note 108, above, p 431.
352 See above second page of this chapter.
353 Note 350, above.
354 Note 3, above.
355 LexisNexis search 10 January 2013 showed 103 occasions in the last 5 years.
**Introduction to Dangerousness**

The most important issue in preventive detention cases, striking me forcibly in *Leitch*, was the concept of *dangerousness*. Not only was preventive detention conceptually a sentence of last resort,\(^{356}\) but also it exposed the weakness of the whole concept of future dangerousness based on psychiatric guesswork as to future offending. The court in *R v Rameka* said:\(^{357}\)

> The chance of a person in Mr Rameka’s category committing a further sexual offence has been estimated to be of the order of 20 per cent. However that is viewed, such a possibility clearly represents a substantial risk.

[Emphasis added]

I was quite appalled that dangerousness of someone in a category of offenders but not the individual him/herself could be determined on a 20 per cent likelihood test (otherwise viewed as an 80 per cent likelihood to not reoffend), which test was converted by the Court to meet the required statutory test of a ‘substantial risk’. I eventually submitted to the Privy Council and HRC that this approach to a 20 per cent risk is fundamentally wrong. Four issues converge here: accuracy of the probability of recidivism predictions, the degree to which the prediction can be confidently predicted, (even if accurate there is still a 80% chance of not reoffending), and how risk is presented to the Court to show actual individual rather than group risk. According to some commentators, psychiatric estimates of specified re-offending within a set period were at the time only 50 per cent accurate\(^{358}\) (i.e. no better than chance).\(^{359}\) I relied on Cathy Cobley:\(^{360}\)

> The difficulties of predicting dangerousness for these purposes [similar to the present case] have to be acknowledged. A survey of available studies suggests that no method of prediction has yet managed to do better than predicting one false positive for every true positive, i.e. a success rate of 50% in predicting dangerousness, and that actuarial methods of prediction, based on selective objective characteristics of the offender, are

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\(^{356}\) Note 350, above.  
\(^{357}\) Ibid, 5.  
\(^{358}\) Arguably, if the true risk was that the person was in a group whose characteristics showed a 50% risk that the probability rating is correct.  
\(^{359}\) The American Psychiatric Association had argued that psychiatrists ethically should not be permitted to make such predictions in its amicus brief in *Barefoot v Estelle* 463 U.S. 880 (1983), stating that these predictions are wrong in at least two out of every three cases.  
In any event, the categorisation of a 20 per cent risk of re-offending could never reach a standard of ‘substantial risk’, especially for an individual in a group, where it is the group risk, not the individual risk, that is 20 per cent. Nevertheless this had become the NZ legal test, in Rameka’s domestic case.

Later developments now make plain the emphasis should be on the individual, not on the fact that an appellant is a member of a group, which may have an [alleged] high, medium or low risk of re-offending.\(^{361}\) Whilst Mr Leitch was highly satisfied with the result, I was not satisfied with the wider human rights effects. I wanted to explore before the HRC those NZBORA and Covenant arguments that had been avoided by the Court of Appeal. Accordingly, I approached Mr Rameka’s counsel, and was subsequently instructed to undertake representation of Mr Rameka before the HRC. Both Mr Harris and Mr Tarawa similarly instructed me. Mr McGee—who had stabbed his partner and was the only prisoner on preventive detention for a non-sexual offence—also had instructed me, but unfortunately he had a heart attack, and died in prison.

**Brief facts of the Rameka, Harris and Tarawa domestic cases.**

Mr Rameka was found guilty of two charges of rape, one of aggravated burglary, one of assault with intent to commit rape, and one of indecent assault. Pre-sentence and psychiatric reports noted his ‘previous sexual offences, his

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361 See R v Exley, above note 151, paragraph 32—[Dr Judson] observed: ‘[a]ssessment of risk behaviour is inaccurate and inexact and the prediction of behaviour in the future is far more uncertain than prediction of behaviour in the short term.’ Those limitations are well known to sentencing judges and appellate Courts; see, e.g., R v Peta [2007] 2 NZLR 627 at paragraph 50-52, especially 52: [52] Risk assessments and the related judicial decision making for risk management are best informed through an individualised formulation of risk. This should draw upon a variety of different sources of information in an attempt to identify risk factors within an aetiological (causative) framework. This recognises that risk is contingent upon factors that are both environmental and inherent in the individual. Such an approach also helps avoid the shortcomings of a mechanical and potentially formulaic assessment of risk, one that is overly reliant on static historical factors and potentially insensitive to features of the individual that change with time and context. In our view, s 107I(2) in any event requires an individualised assessment.

This is logical and fair an individualised risk assessment (if accurate) is treating the prisoner as a person, not a member of a group. Sentencing must be based on the individual not the likelihood of someone with similar characteristics reoffending.
propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that that there was a 20 per cent likelihood of further commission of sexual offences’. For the first count of rape, he was sentenced to preventive detention, with the statutory minimum of 10 years non-parole, to be served concurrently with 14 years for the second charge of rape. The second rape was on the same complainant and took place within four hours of the first rape as part of the same incident. Mr Rameka was sentenced to two years’ imprisonment for the burglary, and to two years’ imprisonment for the assault with intent to commit rape.

Mr Harris had been found guilty of 11 sexual offences committed over a three-month period against a boy under the age of 12. Mr Harris had two prior convictions for unlawful sexual interference with minors. The Solicitor-General appealed his sentence of six years on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. In June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. In imposing the sentence, the Court had noted that ‘no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence’.

Mr Tarawa had been found guilty of a number of charges including sexual violation by rape and by unlawful sexual connection, indecent assault, burglary, aggravated burglary, kidnapping, aggravated robbery, demanding with menaces, and unlawfully entering a building. He had been convicted of multiple previous offences involving breaking into homes and engaging in sexually motivated violence, including two rapes. Some of the offences were committed while Mr Tarawa was on bail. He was sentenced to preventive detention in respect of the three sexual violation charges. On appeal, the Court of Appeal held that in light of

362 Note 350, towards the end of the short judgment.
363 Ibid, paragraph 2.
Mr Tarawa’s criminal background, the preventive detention sentence was appropriately open to the sentencing judge.\textsuperscript{364}

The literature on the subject of dangerousness is vast and emphasises the difficulty of prediction. In addition to Cathy Coblentz,\textsuperscript{365} a survey of available studies conducted by Mark Brown and John Pratt (the latter being one of NZ’s leading criminologists) led those authors to say that risks are frequently calculated in different and often contradictory ways, and those different conceptions of risk are used to justify a set of equally disparate and conflicting responses to a supposedly dangerous individual.\textsuperscript{366}

Matters developed further at the HRC. NZ’s submissions claimed that risk prediction is a science that has been the subject of voluminous research and writing, and that there is no basis in the literature to support the view that predicting future offending in a limited range of offences is so arbitrary that a sentence cannot have a preventive component.\textsuperscript{367}

The authors revised their position to make it clear that the risk prediction undertaken was even worse than tossing a coin, especially if an offender has been labelled a psychopath. These offenders actually could be sentenced more harshly on the approach taken in the NZ Courts than if the Judge were to toss a coin. Support for this notion is supplied by Freedman, who (on the basis that the PCL-R\textsuperscript{368} is the best predictor of repeat offending, a proposition not then usually disputed) conducted a meta analysis finding that the PCL-R had a false positive rate for violent recidivism of 54.3\%, meaning its prediction rate for psychopaths was 46\% i.e. worse than chance. Tossing a coin has a 50\% chance of heads or heads.


\textsuperscript{365} Note 360, above.


\textsuperscript{367} Rameka, paragraph 58.

\textsuperscript{368} Psychopathy Checklist Revised. For a detailed study see Robert Hare, 'The Hare PCL-R: Some issues concerning its use and misuse' (1998) 3(1) Legal and Criminological Psychology 99 101-122.
tails.\textsuperscript{369} Freedman postulated that the excessive false positive rates and widely varying positive predictive power of the PCL-R raised substantial questions as to whether the instrument has been adequately tested and validated at this time.\textsuperscript{370} R v Peta also cautions against the use of non-validated instruments.\textsuperscript{371} A useful review of some more recent surveys is contained in Dennis Barker's article\textsuperscript{372} that confirms that the bulk of the literature supports the view that dangerousness cannot be predicted with any exactitude.\textsuperscript{373} There was at the time of Rameka no information provided as to whether the instruments used in testing the authors were validated in NZ.\textsuperscript{374} What can be predicted is not whether an individual offender will re-offend, but whether as a member of a group with similar characteristics that X\% of that group will re-offend.

As the State had used unvalidated tools, my submission included the obvious retort: if the State actually believed that risk assessment was 'a science', then why had they not applied this science to the prediction of future dangerousness in these cases?

\textit{Privy Council}

In my opinion, despite winning Mr Leitch's case, the Court's jurisprudence was wrong, I determined that further challenges were needed. Rameka, Harris and Tarawa jointly made a Special Leave Petition to the Privy Council. Un unusually, after first being refused Legal Aid, such aid was granted for the 2001 Special Leave Petition to the Privy Council of the three petitioners when I combined the


\textsuperscript{370} Ibid, 97.

\textsuperscript{371} R v Peta [2007] 2 NZLR 627, paragraph 22.

\textsuperscript{372} 'Dennis Baker, "Punishment without a crime: is Preventive Detention reconcilable with Justice?"' (2009) 34 \textit{Australian Journal of Legal Philosophy} 120, 134.

\textsuperscript{373} Ibid, 135.

request with one of the Taito appearances. As no fares to London were needed, the cost was fairly modest. The grounds of appeal included:

GROUND A—Leitch Wrongly Decided

1. *R v Leitch* was wrongly decided, in that it fails to give any meaningful guidance as to ‘substantial risk’ … a substantial risk that the offender will commit a specified offence upon release’ s 75(3A) Criminal Justice Act [hereafter ‘CJA’] and/or;

2. *R v Leitch* wrongly analyses ‘expedient for the protection of the public’ ‘… it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention.’ Section 75(2) CJA, and incorrectly reversed the previous jurisprudence of the ‘last resort test’.

3. *R v Leitch* fails to take into account when considering the protection of the public or otherwise, the international considerations, the NZBORA …

On 24 July 2001—not unexpectedly—the Privy Council orally gave the case short shrift, and declined leave to appeal. Whilst it was rare for the Privy Council to give reasons for refusing leave, I asked for written reasons in accordance with NZ law. I was ignored. However, the Privy Council had facilitated the opportunity to rehearse my dangerousness hypothesis.

**The HRC Communication**

**Introduction**

My theory was that I had a better chance before the HRC than before the Privy Council, not simply because s 4 NZBORA trumped any Covenant argument, but because the HRC was likely to engage in the argument as it earlier had expressed interest in the issue in its concluding observations to NZ’s Third Periodic Report. The HRC concern was that the imposition of punishment in respect of possible future offences in a sentence of indeterminate detention for offenders who are likely to re-offend in a similar matter is inconsistent with
Articles 9 and 14 of the Covenant, and it recommended revision of the Criminal Justice Act to conform to Articles 9 and 14.

This is a fine example of Michael O'Flaherty's comment that the single most important activity of human rights treaty bodies is concluding observations. I picked up on this recommendation by the HRC in its concluding observations, and filed the authors' collective communication. There were therefore some grounds for optimism, which was ultimately rewarded. I was also hoping for success on a disproportionate treatment claim, and advised the HRC that as at 30 June 2005 there were 202 preventive detainees in NZ prisons. This number comprised 2.8 per cent of the total prison population. By comparison, as at 31 March 2004, Germany had 304 preventive detainees, comprising 0.47 per cent of its prison population, and as at 10 April 2005, Canada had 318 incarcerated on a preventive sentence comprising approximately 0.9 per cent of its prison population. Thus, on a per prisoner basis, NZ had approximately three times as many detained on preventive detention as Canada. New Zealand also has a high rate of imprisonment generally, as at December 2008 there were 185 per 100,000 persons imprisoned.

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379 Third Report, above note 9, paragraph 179.
380 Ibid, paragraph 189.
381 Note 66, above.
382 No one took exception to the three individuals filing a single communication.
385 Canada is used for the example as it has the nearest comparable number of prisoners per capita to NZ.
386 Correctional Service of Canada—approximate only.
387 In 1975, the Supreme Court of Canada agreed with Ouimet’s Committee’s conclusion that the habitual offender legislation had been wrongly used in about 80% of cases to incarcerate indefinitely many individuals who were no more than persistent petty nuisances. 'Evolution of Penal Policies and the Debate on Imprisonment in Canada and Québec: 1969 to 1999, Direction de l’administration et des programmes,' (2000) Anecdotally, sex offenders’ and drug dealers’ appeals—especially sentence appeals—are the hardest to win in domestic Courts. The problem (if there is one) reached a head in R v Dean note 109 above and discussed in the next chapter when the judiciary were described as homophobic, a type of discrimination.
**The HRC’s views**

The HRC decided that NZ’s system of ‘preventive detention’, by which convicted offenders who are considered to pose a serious risk to the safety of the community can be given an indeterminate sentence of imprisonment, which then carried a minimum sentence of 10 years’ imprisonment, violated article 9(4) of the Covenant. The primary premise, that preventive detention as a sentence itself was a Covenant breach, failed. Seven members found a single breach, and six to varying degrees found substantially more, whilst three members found none at all.\(^{389}\)

**Seriously Divided Views**

The Committee was seriously divided in its views; there was a bare majority of seven to six. Strikingly, according to Geiringer,\(^{390}\) the HRC’s view on the merits was supported by only seven of the 16 members. The remaining nine subscribed to one of five dissenting opinions.\(^{391}\) The dissents split broadly into two camps: those who thought there were extensive violations of the Covenant, and those who thought there were none at all. This left the seven members who supported the Committee’s official view commanding the middle ground. The majority views holding a breach of Article 9.4 in respect of Mr Harris were:

7.3 Turning to the issue of the consistency with the Covenant of the sentences of preventive detention of both the remaining authors, Messrs. Rameka and Harris, once the non-parole period of ten years expires, the Committee observes that after the ten-year period has elapsed, there are compulsory annual reviews by the independent Parole Board, with the power to order the prisoner’s release if they are no longer a significant danger to the public, and that the decisions of the Board are subject to judicial review. The Committee considers that the remaining authors' detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must

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389 The majority and dissenting views are analysed below; whilst the Committee attempts to reach a consensus, over recent years some dissenting opinions have not been uncommon. Nonetheless the number and range of views here was unusual. Sir Nigel Rodley (UK) chaired the session, and told me during my oral examination for my M.Phil thesis (what is obvious) that it was difficult to get a consensus in this particularly interesting case.

390 ‘Case Note: Rameka v New Zealand’ (2005) note 51, above.

391 Formally known as individual opinions, annexed to the views of the HRC, pp 19-25.
thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public. The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard. Accordingly, the remaining authors have not demonstrated, at the present time, that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences…

[Emphasis added]

**Major dissenting views**

Three dissenters, Mr Bhagwati, (India) Mdm Chanet, (France) Mr Ahanhanzo, (Benin) together with a fourth member, Mr Yrigoyen (Peru) (dissenting in part), concluded detention based solely on an assessment of potential future dangerousness was necessarily arbitrary, and thus that preventive detention was violative of the Covenant per se.\(^{392}\) The science underlying such an assessment of potential future dangerousness was in their view unsound and the forecasts impermissibly vague:

The science underlying the assessment in question is unsound. *How can anyone seriously assert that there is a “20% likelihood” that a person will re-offend?*

*To our way of thinking, preventive detention based on a forecast made according to such vague criteria is contrary to article 9, paragraph 1, of the Covenant.*

*Paradoxically, a person thought to be dangerous who has not yet committed the offence of which he/she is considered capable is less well protected by the law than an actual offender.*

However far any checks made when considering parole may go to prevent violations of article 9, paragraph 4, of the Covenant, *it is the very principle of detention based solely on potential dangerousness that I challenge, especially as detention of this kind often carries on from, and becomes a mere and, it would not be going too far to say, an “easy” extension of a penalty of imprisonment.*

*While often presented as precautionary, measures of the kind in question are in reality penalties, and this change of their original nature constitutes*

\(^{392}\) Ibid, p 19.
a means of circumventing the provisions of articles 14 and 15 of the Covenant.

For the defendant, there is no predictability about preventive detention ordered in such circumstances: the detention may be indefinite. To rely on a prediction of dangerousness is tantamount to replacing presumption of innocence by presumption of guilt.

Such a situation is a source of legal uncertainty and a great temptation to judges who may wish to evade the constraints of articles 14 and 15 of the Covenant.

[Emphasis added]

Dissenting Views—No Breach

Mr Shearer (Australia) and Mr Roman Wieruszewski (Poland) jointly,393 and Mr Nisuke Ando (Japan) separately,394 found no breaches of the Covenant, finding it inappropriate to separate indefinite preventive detention into punitive and preventive segments. In their view, sentences of preventive detention are designed solely to protect the community against future dangerous conduct by an offender in respect of whom his or her past finite sentences have manifestly failed to achieve their aims.

This opinion is also out of step with the ECHR jurisprudence on punitive and preventive segmentation of a sentence.395

Dissent of Mr Kalin

Mr Kalin, (Switzerland) dissenting in part,396 found breaches for both Mr Harris and Mr Rameka, but was of the view that whilst preventive detention for protection of the public was not Covenant-prohibited, its application requires strict procedural safeguards including periodic reviews. Such reviews are necessary because anyone can change and improve and become less dangerous, as a result of inner growth, or therapy, or reduction of physical ability to commit

393 Views, p 24.
395 See, e.g., Stafford v UK note 119, above. [Sentences have a tariff and then rehabilitative period]. See Chapter 8 below.
396 Note 51, above p 20.
specific crimes. He noted Mr Harris had received no finite punitive sentence, and was therefore solely detained for public protection; his article 9(4) rights were therefore violated not just for the last two and one half years of his detention but for the whole 10 years, and likewise so were Mr Rameka’s.

Dissent of Mr Lallah

Finally, Mr Lallah—the then longest serving Committee member, and former Chief Justice of Mauritius—was clearly very disturbed by the preventive detention process. For Mr Lallah, the key was a Covenant provision not expressly relied on by the authors, article 15(1), which reads in part: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed’. First, Mr Lallah stated that a criminal offence relates only to past acts. Secondly, the penalty for that offence can only relate to those past acts. It cannot, in Mr Lallah’s view, extend to some hypothetical future psychological condition that might or might not lead to further offending. For these reasons, and also because the law does not prescribe a finite sentence, it was Mr Lallah’s view that violations of article 15(1) had occurred. Additionally, he said, the facts disclosed violations of article 14(1) (the right to a fair trial), because a fair trial requires the court to have jurisdiction to pass a finite sentence, and that the State party had in effect delegated that jurisdiction to an administrative body [The Parole Board], that may at some future time determine the length of sentence without Covenant due process safeguards. Additionally, Mr Lallah noted that article 14(2) (the presumption of innocence), was violated as there was an anticipatory assessment of what may happen after 10 years or so, before the benefits of treatment, reformation and social rehabilitation required under article 10(3) had taken place, and that assessment could not meet the essential burden of proof required to overcome a presumption of innocence. Accordingly, if any breach of article 9 was required, Mr Lallah opined that it should be of 9(1) (the right to freedom from arbitrary detention), and not 9(4) as the majority had found.

This dissent was important later for Mr Dean (next Chapter), whose physical abilities must have deteriorated with age, being over 70 at the time of his appeal.

Views pp 21-23. Regrettably, Mr Lallah on died 3 June 2012.
The HRC’s diverse views, with the obvious possibility for further development of Covenant jurisprudence in this area of preventive detention, were encouraging.

*International Commentary*

After release of the views of HRC, a UN press release found the case to be: 399

interesting in terms of jurisprudence … The Committee found one individual’s case inadmissible [Tarawa] for failure to exhaust domestic remedies. Of the other two, the Committee found a violation of article 9, para 4, with respect to one author.

Professor Joseph comments on Mr Lallah’s dissent, 400 noting he found a breach of Article 14(1), and this was fair enough except for judicial review, which he found to be insufficient:

Mr Lallah … [found] (ii) an administrative body should not have the power to determine the length of the sentence, without abiding by the fair trial provisions of Article 14.

This point is the subject of *Miller and Carroll v New Zealand*, a communication lodged in January 2014. 401

*Matters not raised by the authors*

In respect of Mr Lallah’s additional finding that the Parole Board has been delegated the task of determining the length of the sentence, and that this was a breach, The majority dismissed the matter in Paragraph 7.4 of its findings on the basis that the authors had not raised the issue:

7.4 Furthermore, in terms of the ability of the Parole Board to act in judicial fashion as a “court” and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee notes that the remaining authors have not advanced any reasons why the Board, as constituted by the State party's law, should be regarded as insufficiently independent, impartial or deficient in procedure for these purposes.

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399 News and Media Division Department of Public information, United Nations General Assembly, ‘Human Rights Committee and Committee Against Torture rule on complaints from individuals HR4712’, (New York), 5 December 2003.


401 Awaiting a communication number.
I had not considered that point. Those comments and others inspired a challenge to the independence of the Parole Board in *Miller and Carroll v New Zealand*.402

Additionally, Keyser and Blay correctly observe that ‘the Committee made no specific reference to the issue of double jeopardy. The focus of the majority decision was on the opportunity for periodic review of preventive detention’.403

Whilst double jeopardy is an ingredient of any second or subsequent offence sentencing exercise and therefore a disproportionality issue, it does take on a different emphasis if conjoined with an Article 15 breach, and I had not raised it in that context.

Professor Joseph commented that the divisions in the HRC were largely caused by disagreements over the nature and characterisation of the violations in the case, and she speculated that these disagreements were likely caused by my failure to specify in detail exactly how preventive detention breached the Covenant.404 While she acknowledged that she had no access to the submissions, her speculation was wrong. More than 50 pages of submissions by the authors—not to mention the State’s reply, and my response—were distilled by the majority to 18 pages. This demonstrates the difficulties for any commentator because of the sometimes-sparse recording of submissions by the Committee, the absence of oral hearings, and the absence of transcripts. The views of the Committee are often far too short to permit a full analysis, or aid legal development, or allow meaningful criticism from commentators.

**Domestic Commentary**

As the first successful communication from NZ, *Rameka* attracted some domestic attention, including three academic articles: a substantial article by Claudia Geiringer405 and two short commentaries by Alex Conte406 and Greg Newbold.407

402 Note 145, above. Leave to appeal was refused by the Supreme Court *Miller and Carroll v Attorney-General and the NZ Parole Board* [2011] BCL 306, SC 15/2011.

403 Note 51, above pp 19-20.

404 Note 400, above.

405 Note 51, above, pp 185-203.

406 ‘Alex Conte, 'Human Rights, Non-Parole Periods and Preventive Detention' (2004) 5, (June 2004) *New Zealand Law Journal* 202, 202-204. To avoid repetition, no further reference is made to Conte’s useful article, as it has been overtaken by Geiringer’s lengthy specialised article.
Newbold described the case as a ‘landmark’ decision. Regrettably, despite Oertly’s crystal-ball-gazing that one win might create more communications, this has not eventuated from other practitioners. My very simple explanatory article in the same NZLJ issue on how to submit complaints was obviously of little assistance. Nonetheless, the success in Rameka did create legislative change, and more work for me.

Newbold raised a fundamental problem regarding preventive detention that was subsequently litigated in Miller. The problem was summarised in the judgment in Miller as:

[145] The 35th cause of action is a systemic challenge to the arrangements for the provision of treatment for preventive detainees. Both applicants claim that Corrections has failed to provide them with adequate treatment and rehabilitation so that they had a realistic chance of being granted parole at their first Parole Board hearing. It is alleged that such failure amounted to breaches of the ICCPR (in particular arts 7, 9(1) and (4), 10(1) and (3) and 26) and BORA (in particular ss 9, 22 and 23(5)).

In operation, the average time to get out on a preventive detention sentence is actually 14 years, not 10 years (the minimum pre-2002 statutory period). The prime requirement for release is successful completion of a sex offenders’ treatment programme; however, to be admitted to such a course requires that an offender get the approval of Department of Corrections psychologists. That prerequisite raises the issue of whether the executive branch has taken over a role more appropriate to the judicial branch; if it has, that fact brings separation of powers issues related to arbitrary detention into play.

If one views Mr Harris’s position in the context of this 10-year sentence plus four-year treatment delay, then it is not surprising that he has not been released 10-

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408 Note 49, above.
410 See the subsection ‘What happened next?’ below.
411 Note 407, above, pp 205 & 207.
412 Note 401, above.
413 Note 145 and 401, above.
415 Treatment needs to begin before parole is sought to a fair chance of parole, otherwise not having been treated would mean no parole. As the waiting list was about two years at the
plus years after his initial sentencing.\textsuperscript{416} This issue of delayed release was tackled in the communication but met no success. The HRC held:

5.4 As to the provision of courses in prison, the authors clarify that they only refer to the non-provision of courses related to their "dangerousness" until near the time of release. They therefore claim that they have no opportunity to cease to be "dangerous" earlier in their sentence, which should occur as early as possible. This is said to be cruel and unusual, lacking humanity and not in line with the notion of rehabilitation. Moreover, early parole requests may be adversely affected by failing to have undergone treatment…

6.4 As to the contention that certain rehabilitation courses were not available to the authors in prison, contrary to articles 7 and 10 of the Covenant… The Committee accordingly considers that the authors have failed to substantiate, for the purposes of admissibility, that the timing and content of courses made available in prison, give rise to claims under articles 7 and 10 of the Covenant.

Professor Joseph criticises the Committee’s response; she says the majority finding is not well explained, and then points to the obiter of the Court of Appeal that indicates a seven and a half year sentence may have been imposed but was not.\textsuperscript{417} Professor Joseph finds it doubtful that the obiter remarks of the Court of Appeal that Mr Harris could have had a finite seven and half years should be so crucial. They were, as Mr Remaka was not treated the same, presumably as he also had a concurrent finite sentence of 14 years,\textsuperscript{418} and then Joseph suggests the majority seems to have split Harris's sentence into an artificial punitive component of seven and a half years, and a non-punitive (preventive) component of two and a half years, and considers:\textsuperscript{419}

Indeed, it is arguable that the ‘violation period’ for Harris should be dated from the period of time at which he would have been eligible for parole under a seven and a half year sentence, an amount equal to two thirds of that sentence, five years.

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\textsuperscript{416} As at 23 January 2013.
\textsuperscript{417} Note 400, above, p 122.
\textsuperscript{418} Ibid, p 120.
\textsuperscript{419} Ibid, p 121.
With respect, the potential seven and a half years is crucial, and that approach was adopted by NZ in its response. It is also in conformity with *Stafford v UK*\(^{420}\) considered in the *Manuel* chapter.

**Tarawa**

A subtle irony occurred with Mr Tarawa. This appellant had his appeal unlawfully dismissed by the Court of Appeal under the pre-*Taito* system. Having won *Taito PC* and *Smith*,\(^{421}\) Mr Tarawa was now belatedly entitled to a re-hearing of his appeal. As such, he now technically had not exhausted his domestic remedies, despite having actually exhausted them in lodging his communication seven months prior to the *Taito PC* judgment. His communication was rejected as inadmissible because *Taito PC* had succeeded, and he had not lodged a new domestic appeal. The Committee did not address the submission made in reply that an appeal would be futile as a recent appeal raising the issues in *Dean*\(^{422}\) (next chapter) had been rejected by the Supreme Court, and hence the decision not to lodge such a domestic appeal should not preclude admissibility of his communication.

**The Government’s response**

To reconcile the law with the HRC’s view, the Government created a special class of persons eligible to be considered for early parole. A Parole Act s 25(3) special class of persons\(^{423}\) was designated in a NZ Gazette notice.\(^{424}\) This appears to put Mr Harris in a class of one, and given the subsequent legislative change to a minimum five years instead of 10 years non-parole period for preventive detainees, he will remain the only individual to whom Parole Act s 25(3) is applicable.

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\(^{420}\) Note 119, above.

\(^{421}\) Note 264, above.

\(^{422}\) *Dean v The Queen* [2005] BCL 454; [2005] NZSC 15.

\(^{423}\) The special class is described as follows: ‘The Minister of Justice may designate a class of offenders who have not yet reached their parole eligibility dates for early consideration by the Board for parole.’

\(^{424}\) Designation of a class of offenders who have not yet reached their parole eligibility dates for early consideration by the board for parole, New Zealand Gazette, Notice No 1142, 26 February 2004, p 417.
The Government’s formalistic response failed to exhibit a purposive approach, as Geiringer explains.425

Although New Zealand has, to its credit, provided Mr Harris with a timely and adequate remedy, it has failed to engage with the underlying themes of the Committee’s decision and has thereby exhibited a commitment to the individual communication process that is, at best, half-hearted.

Newbold agreed.426

**Response to the Government’s Response—Fresh Complaint?**

Both Geiringer427 and Newbold428 noted this was not the end of the matter. My client’s response before the HRC to the government’s response was, however, deemed ‘a fresh complaint’.429 Newbold summarised the response. He said I invoked Article 15(1) to the effect that when a change in law occurs that provides for a lighter penalty, persons sentenced before the law change must benefit from it.430 On that argument, all of the authors (and by extension, most other preventive detainees sentenced to standard periods under the 1985 law), should be permitted a parole hearing.

I also argued that the right in s 27 of the Parole Act (the right to postpone a Parole Board hearing for up to three years in the case of persons serving indeterminate sentences) also violated Article 9(4) of the Covenant, which guarantees a right to prompt review. Newbold suggested I was on less sure

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425 Note 390, above p 202.
426 Note 407, above.
427 Note 390, above.
428 ‘It is appropriate to end with a prediction that the saga of New Zealand, the Human Rights Committee and preventive detention is not over. The deficiencies in New Zealand’s response to the Rameka case identified above have the potential to found future violations that may find their way back before the Human Rights Committee. In addition, the Sentencing Act 2002 (NZ) gives rise to some problems of its own that have yet to be aired before the Committee. Some of these were raised by counsel for the authors, Mr Ellis, in his response to New Zealand’s response on Rameka. The Committee took the view, however, that these matters really amount to a fresh communication and refused to address them in the context of follow up to the Rameka decision. It is likely, therefore, that such matters will make their way back to the Human Rights Committee once they have been thoroughly aired in the domestic courts’. Prof Newbold is correct, Miller and Carroll v New Zealand was lodged with the Committee in January 2014.
430 Note 407, above pp 206-207.
ground with this argument because s 27(3) of the Parole Act allows any person subject to a postponement order to apply to the Board for a hearing at any time, if 'there has been a significant change in his or her circumstances'. Newbold does postulate that application of Article 15 to a large number of prisoners sentenced to finite terms under the old law would see them become eligible for parole hearings after serving one third of their sentences (two-thirds under the 2002 legislative change). In the absence of remedial legislation, he surmises that the Government remains in breach of its obligations under the Covenant. This became the subject of the Van der Platt communication.

**What happened next?**

In addition to legislative change to minimum periods of imprisonment, applicable to preventive detainees, and Mr Harris’s supposed remedy, at least five other events have occurred in the aftermath of *Rameka*. First, the breach of Article 15(1) was taken up in the case of *Van der Plaat*. Secondly, the postponement of parole consideration for up to three years was challenged in *Evans v New Zealand Parole Board* and *Miller v New Zealand Parole Board*, although these challenges were unsuccessful. While no international challenge specific to NZ has been made yet, there is now significant European case law that states a failure to review an offender for parole for more than about 20 months into a sentence is insufficient to meet the European Convention Article 5(4) right (the equivalent right to the one provided in Article 9(4) of the Covenant). Thirdly, in *Dean*, the HRC was asked to reconsider *Rameka*. Fourthly, *Miller* challenged both the independence of the Parole Board and the lack of provision of timely rehabilitation. That issue is being taken up in *Miller and Carroll v New Zealand*. Fifthly, Mr Harris did not receive a Parole Board hearing at seven and half years, despite the Government accepting the views of the Committee. In further domestic proceedings on behalf of Mr Harris, mandamus was sought. Following a

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431 Ibid, p 208.
432 Ibid.
433 *Evans v New Zealand Parole Board* [2005] NZAR 328 (HC).
434 Note 145, above.
435 Both clients however won their cases on other grounds, and the issue awaits further attention in the follow up *Miller and Carroll v New Zealand*.
436 See, e.g., Cawser, R (on the application of) *v Secretary of State for the Home Department* [2003] EWCA Civ 1522.
telephone conference with a High Court Judge, the Parole Board granted an urgent hearing, without needing to determine mandamus. The Parole Board then set out a hearing and declined parole on 9 September 2009 on the basis that he had not completed his sex offenders’ programme.

Subsequent developments

I have since gained significantly more understanding of the ‘dangerousness’ area, and now realise that the so-called 20 per cent risk is not even that. Risks have been mislabelled. Such words as ‘high’, ‘medium’ or ‘low’ to describe risk have clear meaning in common use, but health professionals have disguised the truth by utilizing these terms in counterintuitive ways, such that ‘High’ could mean ‘low’ risk. This difficulty is covered in the discussion of *R v Peta* above.

Following submissions by others and myself to the Select Committee considering sentencing reform, two health professionals rather than one are now required to provide reports before preventive detention can be imposed. Psychologists rather than psychiatrists have taken over the lead role of providing those reports, but I doubt if their predictions are more valid. It will be recalled psychiatrists acknowledge the ethical dilemmas in reporting risks, but no such problem seems to concern the psychology profession. Whether the observations made in *Director of Public Prosecutions (WA) v GTR* can be applied to psychologists remains to be seen. In that case, the Court observed in respect of Mangolamara:

Conclusion on psychiatric opinions and reports under s 7(3)(a), (b)

109. In *Director of Public Prosecutions (WA) v Mangolamara* [2007] WASC 71; 169 A Crim R 379, Hasluck J conducted, with respect, a very comprehensive review of the DSO Act and its requirements. In particular, Hasluck J set out issues that concerned expert evidence and particularly the use of risk assessment tools before concluding:

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437 Note 371, above.
439 Tony Ellis, ‘The Use or Misuse of Psychological Reports to Assess Offenders for Extended Supervision Orders in NZ’ (Paper presented at the Australian Psychological Society College of Forensic Psychologists Conference, Melbourne, Australia, 25-28 February 2009).
440 *Director of Public Prosecutions (WA) v GTR* [2007] WASC 318.
441 *Director of Public Prosecutions (WA) v Mangolamara* [2007] WASC 71,169 A Crim R 379.
In the end, bearing in mind that the rules of evidence reflect a form of wisdom based on logic and experience, I am of the view, for the reasons I have referred to, that little weight should be given to those parts of the reports concerning the assessment tools. In my view, the evidence in question does not conform to long-established rules concerning expert evidence.

Determination of dangerousness is a growth area, given the larger number of detainees on preventive detention,\textsuperscript{442} and the advent of Extended Supervision Orders post-release. Since 2002, even a dedicated professional journal—Law, Probability and Risk—has been established, and Scotland has a statutory Risk Management Authority.\textsuperscript{443} NZ seems has a long way away to go before reaching the level of professionalism exhibited by the Scottish Risk Management Authority, whose functions include policy and research, and specific standards for risk management techniques, particularly in the high-risk group.\textsuperscript{444} There remains a risk that NZ will continue to mis-sentence those supposedly high-risk offenders unless risk management becomes better understood.

What is perhaps more worrying is that psychologists are now employed by the Department of Corrections, and have become gatekeepers in respect of release for preventive detainees. To get out of preventive detention, an offender must not to be seen as a risk, the preserve of the psychologists; in order not to be deemed a risk, an offender needs to successfully complete a sex offender’s treatment programme.\textsuperscript{445} There are limited places available in these programmes and the psychologists determine the waiting lists. All of this is subject to challenge in \textit{Miller and Carroll v New Zealand}.

\textbf{Conclusions}

Because s 4 NZBORA realistically meant no likely progress on the issue in the NZ Courts, except on the possibility of a declaration of inconsistency, inevitably an international challenge needed to be made. It was.

\textsuperscript{442} According to the Parole Board chairperson as at 8 October 2010 there were 269 preventive detainees, of whom 16 were on parole. Of the 400 life sentences for murder, 216 prisoners were on parole. Andrea Vance, ‘Preventive detention rates rocket’, \textit{DominionPost} (Wellington), 8 October 2010Accessed 16 May 2013.

\textsuperscript{443} Criminal Justice (Scotland) Act 2003.


\textsuperscript{445} Very few preventive detainees are imprisoned for other than sex offences.
As preventive detention was declared a breach of the Covenant on the Committee’s prior analysis in its third concluding observations,\textsuperscript{446} the \textit{Rameka} case had good prospects for success, and was a useful learning exercise on how to advance a communication.

The Committee’s views in \textit{Rameka} partially validated its prior views articulated in its third concluding observations, and the dissenters’ comments added inspiration for further challenges.

Success at the HRC had some political fruits with legislative advancements reducing the minimum non parole period from ten to five years, two health assessors’ reports instead of one, and the ad hominen gazette notice response.

Whilst the Privy Council declined leave, \textit{Rameka} illustrates that was not the last word. The HRC communication is now listed in Leading Cases on the Human Rights Committee (2007),\textsuperscript{447} as one of the 50 leading cases as at 2006.

Further domestic challenges in relation to Parole Board cases were made (\textit{Evans, Miller}).

International interest in preventive detention also advanced and will continue.\textsuperscript{448} The 2010 results in \textit{Fardon v Australia},\textsuperscript{449} and \textit{Tillman v Australia},\textsuperscript{450} the various German cases including \textit{M v Germany} discussed further in \textit{Dean} (next chapter), seem to have added a new lease of life to challenges relating to preventive detention, building on, \textit{Rameka} and \textit{Dean} plainly illustrating the evolution of human rights. When looked at cumulatively with \textit{Leitch}, significant human rights advances occurred.

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\textsuperscript{446} Note 9, above, paragraph 186.
\textsuperscript{447} Raija Hanski, Martin Scheinin and Institutet för mänskliga rättigheter Åbo akademi, \textit{Leading cases of the Human Rights Committee} (Institute for Human Rights, Åbo Akademi University, 2003) [Martin Scheinin was a member of the Human Rights Committee 1997-2004, and in the majority on this communication].
\textsuperscript{448} \textit{Miller and Carroll v New Zealand} (awaiting a communication number).
\textsuperscript{449} Note 79, above. The dissenting views rely on \textit{Rameka, Manuel} and \textit{Dean}.
\textsuperscript{450} Note 115, above. The dissenting views rely on \textit{Rameka, Manuel} and \textit{Dean}.
\end{flushleft}
Rameka is quoted in the HRC’s Draft General Comment 35\footnote{Note 335, above.} at footnotes 73, 74, 78, 161, 162, and 168. *Fardon* also has multiple citations.
Chapter 6—Dean v New Zealand—Could Rameka be improved upon?

Introduction

Mr Dean is a 75-year-old man, with an angina condition who has served nearly 18 years in prison since his conviction in 1995 for indecent assault. That indecent assault occurred when he entered a cinema, and sat down next to a 13-year-old school student. Twenty minutes into the movie, he put his right hand across the boy’s lap and rested it on the boy’s crotch on top of his pants. The boy got up, moved away, and finished watching the movie. Mr Dean was charged with indecency with a boy between 12 and 16 and pleaded guilty in the District Court, on a possible maximum sentence of three years. He had numerous prior convictions, and had been warned twice he could get preventive detention if he appeared for sentence on similar charges.

The District Court transferred him to the High Court for sentence. He received the High Court’s maximum penalty—preventive detention. He was eligible for parole on 22 June 2005, but as of January 2012 remains detained.

Court of Appeal

I was engaged as counsel in 2003. Mr Dean’s first lawful appeal should have been heard in 1995, not 2004. This delayed appeal became possible as a result of the Taito/Smith judgments; all grounds of appeal were dismissed. A Court of five Judges was convened, meeting in June, November and December 2004 having adjourned to receive further information on Mr Dean’s historic offending. They described the NZBORA issue as ‘interesting’.

Appeal grounds included:

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452 On the appeal proper R v Dean CA172/03, Anderson P, Hammond, William Young, Chambers, and O'Regan JJ 17 December 2004 (CA) the same Court of five (R v Dean CA172/03 (CA), 23 June 2004), had met earlier and considered whether my request for the “criminal appeal sheet” the effective notes of the judges on the ex parte appeal Taito should be released, they agreed to the release of the ‘notes’.

453 Ibid, December hearing, paragraph 17.
(i) The maximum permissible sentence was 3 years’ imprisonment in the District Court, (and the maximum finite sentence was 7 years in the High Court);

(ii) That the declining of jurisdiction by Keane DCJ in the District Court was unlawful;

(iii) That the transfer from the District Court to the High Court was unlawful;

(iv) Whether a finite sentence instead of preventive detention should have been imposed;

Why the appeal was dismissed

The issue of three years maximum penalty was dismissed as wrong on statutory interpretation grounds. The ground that the District Court judge should have retained the case in the District Court (max 3 years) had several facets to it, the most interesting was that the psychiatric report had been obtained from a psychiatrist Dr Ed Rowan, who had been suspended in his home State of New Hampshire and eight Judges of the State Supreme Court had upheld the 1995 suspension. The essential argument was that he was fraudulently on the NZ Medical Registry some 10 years ago having fled his native jurisdiction to avoid being struck off, and the State (NZ), which had the resources to inquire, and had not, should have, having been put on notice. The Court of Appeal held there was no evidence he was not a psychiatrist. However, that is unsatisfactory as the evidence was clearly he had been suspended in the US, and was “relocating” to NZ. It was of course highly unlikely that a suspended New Hampshire practitioner would have been admitted to the NZ register if he told the truth. In any event the Court held it was not mandatory, only good practice to obtain a report, and relied upon his being a psychiatrist on the Register.

455 Ibid, paragraphs 26-40.
456 Appeal of Edward L Rowan, MD (New Hampshire Board of Medicine) 694 A.2d 1002 (NH 1997). Suspension for alleged sexual relationship with a patient.
457 Ibid, paragraphs 35 and 36.
Another facet of the argument that the case should have been retained in the District Court was that Mr Dean should have been permitted to replead when the potential penalty sharply rose from three years’ to preventive detention; the Court held this was his responsibility to replead not the Judge’s. This finding failed to address the Privy Council case of Commissioner of Police v Davis and Another,\footnote{Commissioner of Police v Davies and Another [1993] 4 All ER 476 (PC). This was in effect a transfer of jurisdiction and was not only unconstitutional in itself, but was also unconstitutional on the ground that under the Bahamian Constitution it would inevitably deprive the accused of his constitutional right to jury trial. The Board held the transfer was void only in so far as it related to summary convictions, not informations laid in the Supreme Court. NZBORA s 24(e) provides a right to jury trial (except for military law) for any offence carrying over three months imprisonment.} where such transfers were held to be unconstitutional. On a repleading he would have been entitled to a jury trial. Indeed there is little practical point in pleading guilty,\footnote{Reductions for remorse and early guilty pleas are encouraged for a number of reasons the main being judicial resources, saving the victim the pain of a trial is another factor seemingly negated as an incentive to an early guilty plea if you are going to get an indefinite sentence.} if you know the possible (and likely) penalty is an indefinite sentence, (with a ten year minimum non parole period) as you cannot get any credit\footnote{Currently, a 25% reduction.} to reduce your sentence for an early plea.

The third ground of appeal, the unlawful committal to the High Court was dismissed as:

[43] Mr Ellis submits that the warrant Judge Keane caused to issue was in incorrect form and contained falsities. The committal form to which Mr Ellis referred us and which, he said, was a botched attempt to comply with s 171(3) was a Form 42 under the Summary Proceedings Regulations 1958…

The Court’s answer to this was that the Court became expert typists, not subject to cross-examination, and gave evidence that corrected the District Court’s error thus:

[46] The typist who prepared the form for Judge Keane’s signature used the conventional methodology for crossing out a block of inapplicable text: the “Z” formation. The “Z” was made up of three strings of little “x”s. Obviously, the typist, in order to create the forward slash of the “Z” had to remove the sheet from the typewriter and insert it on an angle. In so doing, the typist failed to make either the top of the forward slash or the bottom of the forward slash line up exactly with the two horizontal bars of
the “Z”. It is quite clear, however, on any fair reading of the form, that everything within the two horizontal bars of the “Z” was deleted.

If that argument were a defence argument then an expert typist would have been needed it would rightly have been rejected as pure speculation. Regardless of the lack of evidence for the typist’s error, the Judge was still responsible for signing the incorrect form. That legal issue became subsumed in typist’s practice.

**Homophobic sentencing?**

In respect of whether preventive detention was correct after a lengthy analysis of *Leitch* principles, the Court concluded it was the correct sentence.\(^{461}\) The essential difference with *R v Bailey*\(^ {462}\) where a similar offender had received five years was distinguished on the basis that his prior sentences were at worse 22 months whereas Mr Dean had received a prior 9-year sentence.

My submission on that proposition was that one cannot rely on a sentence imposed 34 years ago especially where both the trial file, and/or the appeal judgment was unavailable. Richmond J, in his sentencing notes a few lines written on the back of the intitulement dated 24 July 1970 had stated:

> ‘The circumstances surrounding these particular assaults as disclosed in the depositions which I have read, I can only describe as singularly nauseating from the point of view of ordinary people not suffering from the unfortunate homosexual addiction that has plagued you all your life.’

[Emphasis added]

This find gave impetus to what I had previously suspected, that sentencing was homophobic, an interesting human rights issue. Plainly in the 1970s there was some homophobia but that was a bygone era. Did it still exist? On this issue I obtained expert evidence. Professor John Pratt of the Victoria University of Wellington opined that the differences in sentences received by male sexual offenders were influenced by homophobia.\(^ {463}\) Professor Pratt acknowledged that, subject to further investigation, sentences imposed on male sexual offenders for

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\(^{461}\) *Leitch*, paragraphs 50-86.

\(^{462}\) *R v Bailey*, CA102/03, 22 July 2003.

\(^{463}\) Professor John Pratt, ‘Gender Differences in Sentencing Sex Offenders in New Zealand Courts, Is There Evidence of Homophobia?’ (Victoria University of Wellington, October 2005). (Unpublished working papers.)
offences against males tended to be greater than the sentences received by
males who offended against females. Similar questions in this regard were raised
in respect of the imposition of preventive detention for sexual offenders. After
numerous discrimination experts, when asked, were unable to provide an opinion
to be relied upon in the Court of Appeal, Selene Mize, Senior Lecturer of Otago
University, NZ undertook an analysis of the data surrounding the imposition of
Preventive Detention on male offenders relative to the gender of their victims.  
She found that:

Summary: The data showed a marked disparity between the frequencies
of sentences of preventive detention given to offenders with young male
victims and sentences of preventive detention given to offenders with
young female victims. Preventive detention is imposed almost four times'
more frequently for homosexual offending than for heterosexual offending.
The Pearson’s chi squared statistical analysis showed that the possibility
that this is a random chance variation is vanishingly small…

The possibility of these results occurring as part of a random variation,
and not because convictions for gay offenses are being treated differently,
is less than one in 10,000. This result conclusively shows that the
difference between the rates of preventive detention for homosexual and
heterosexual offending cannot be explained by chance variation.
Convictions for male on male offending are being treated differently from
convictions for male on female offending.

[Emphasis added]

Putting this line of argument to the Court of Appeal met with the beginning of a
new ice age, and front-page news.  
It was not unexpected courts are unlikely to

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Selene Mize, ‘Statistical Analysis of Disparities in Sex Offender Sentencing Patterns Linked
with the Gender of Victimised Young Persons’ (University of Otago, 2006).

As stated in the introduction, human rights lawyers sometimes need to be courageous. See
Wendy Murdoch, ‘Allergy-prone lawyer gets up judges’ noses’, DominionPost (Wellington),
16 December 2004:
‘A grim faced president of the court, Justice Anderson said they were not impressed with the
“intemperate” tone of Mr Ellis’s submissions. The submissions do not become members of a learned profession and the argument are not enhanced thereby” … Mr Ellis brushed
aside the criticism saying it was his duty to be fearless “even in the presence of a hostile
court” Justice Anderson said the court was not questioning his courage, but its expression.
Again Mr Ellis rejected the criticism and told the judges they “should not be so sensitive.”
He did a small backpedal in saying he was sorry if he offended them, even if he did not
know what did it.’
Following later discussion with Crown Counsel I agreed that the judges felt they were being
called homophobic.
Mr Shaw, who also appeared with me, is gay. He reported that all too often he would be
ignored by judges in the street (after three of the judges sitting walked passed us at
lunchtime on the hearing day and said hello to me, but not to him) and that sometimes then
even crossed the street to avoid him. Assuming his information was accurate, it does not
warm to statistics showing them in a bad light. The possibility of exploring this matter further was not possible, as it would have in Ms Mize's opinion experienced some considerable difficulties, which required an expenditure of at least $100,000 to prove conclusively.

The Court agreed with the sentencing Judge that preventive detention was appropriate, deciding to leave the NZBORA questions for another day.

**Homophobic Judges?**

In July 2010 Justice Edwin Clark⁴⁶⁶ of the Constitutional Court of South Africa presented a lecture which I attended ‘The Constitution, Political Powers and AIDS.’⁴⁶⁷

He gave a very moving presentation on the HIV/AIDS crisis in South Africa, and his personal battle having been diagnosed with HIV/AIDS, which changed his life forever. He also detailed a case taken to the Constitutional Court of South Africa by the Treatment Action Coalition against the government to ensure adequate antiretroviral medication be government-provided. In his view without that medication he would be dead.

According to Shaun Wallis,⁴⁶⁸ this lecture ‘inspired the New Zealand audience with much fundamental food-for-constitutional-thought. How far should the judiciary extend itself in affirming fundamental human rights? How far should the judiciary go in influencing public policy? The different attitude towards the legitimacy of judicial power over such matters, driven by the different constitutional context, was striking.’

In private discussion after, we discussed the Dean Court of Appeal case, and I advised the Judge that not even one superior Court judge, had ever publicly admitted being gay, let alone come out with having HIV or Aids. The current

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⁴⁶⁶ Justice Cameron had a highly successful career in human rights law practice.
⁴⁶⁷ At the New Zealand Centre for Public Law, Victoria University of Wellington.
Attorney-General had been outed when giving up his legal practice, and running for Parliament. The Judge was surprised, and said he was shortly meeting the Court of Appeal judges, and would discuss these matters with them. There are still no openly gay superior court judges.

**Supreme Court**

Leave to appeal was sought on most of the grounds advanced in the Court of Appeal.

On the homophobic point, submissions addressed the inquisitorial nature of the court investigating, without being asked, by either the Crown or defence, a 34-year-old file showing the prior nine-year sentence.

It was alleged the Court took precisely the reverse position of what it should have taken; the real issue here was whether Dean still a danger to society, not was he 34 years ago. The Court should have should have obtained a fresh psychological report on Mr Dean (not relying solely on the report from Dr Rowan). This suggestion originally came from the President during the discussion at the first part of the hearing, and was adopted by counsel.

However, in four very short paragraphs the Supreme Court refused leave saying none of the grounds presented an issue of general or public importance and there is no danger of a substantial miscarriage of justice. Interestingly, in *R v Williams*, on the same undue delay appeal point the Supreme Court held that a delay of 15 months between trial and appeal (10 years for Dean) was undue delay, and the 18-month sentence reduction was sufficient: a stay not being appropriate.

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469 There are 7 openly gay MPs, (of 121).
470 Note 422, above.
**HRC communication**

A selective review of the more important issues in *Dean*\(^{472}\) follows, given that the communication and reply exceeded 200 pages. The prime proposition was that, despite Mr Dean having been warned previously of the possibility of preventive detention, the sentence nonetheless needed to be proportionate to the actual offending, and the particular act for which Mr Dean was now sentenced was only a 'nuisance' offence.

The communication had two parts, the first of which included a claim of undue appellate delay. Mr Dean claimed that his appeal against sentence was unlawfully delayed for 10 years, in breach of articles 14(3)(c) and 14(5) of the Covenant and of the holding in *Sextus v Trinidad and Tobago*.\(^{473}\) The issue of undue delay was also at stake in *Taito* and *Jessop*;\(^{474}\) it is dealt with only briefly here. Similarly, the claim made in the second part of the communication: or—that of denial of the opportunity to have parole considered at five years rather than 10 (because of the legislative changes introduced in the Sentencing Act 2002), and of the applicability of Article 15, is adequately dealt with in *Van der Plaat*, and not repeated here.

Because I believed Mr Dean's case had better facts than any of the *Rameka* trio,\(^ {475}\) and given the very divided views in *Rameka*, the Committee was also asked in *Dean* to reconsider those *Rameka* views with respect to preventive detention.\(^ {476}\)

Two issues were raised in *Dean* that had not been covered in *Rameka*. The first of these issues was the submission in *Dean* that the lack of an opportunity for

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\(^{473}\) *Sextus v Trinidad and Tobago* CCPR/C/72/D/818/1998 (1 August 2001).

\(^{474}\) As was the case in *Taito* and *Jessop*, Mr Dean's domestic appeal against his sentence was initially unlawfully dismissed in 1995. This dismissal was later deemed a nullity following the decision of the Privy Council in *Taito PC* and the Court of Appeal in *R v Phillip John Smith* Note 264 above. After spending nearly 10 years in prison Mr Dean was finally granted an appeal against sentence in 2004. This belated appeal was also dismissed, arguably in breach of article 14. Mr Dean's undue delay was actually the best factual case of undue delay amongst my clients, as he had spent 10 plus years in jail, and is an elderly sick man, whereas Taito and Jessop had each served their time and were released. Eight years after his 2006 he is still in jail.

\(^{475}\) All of the appellants in *Rameka* were serious rapists, not a groper as Mr Dean was.

\(^{476}\) See Note 51, above at paragraphs 3.10, 4.6, and 5.4 of the HRC’s views.
The rehabilitation offered by the sentence failed to respect the author’s right to be treated with dignity, and amounted to inhumane treatment in breach of Article 10(1) and/or was cruel, inhuman or degrading treatment contrary to Article 7.477

The second new issue raised in Dean involved a comparison of the author’s treatment with Nazi laws against habitual criminals enacted in 1933 and remaining in force until after the Second World War.478

Problems with risk prediction were at issue once again, as predictions of future dangerousness, and the lack of safeguards to prevent arbitrary detention, were claimed to breach article 9(1). Mr Dean claimed to have been victimised by such a lack of safeguards when he was detained on the basis of an incorrect ‘risk prediction’ of 48 per cent. He claimed that his true risk of re-offending over five years, if such a risk is capable of being calculated, was somewhere between zero and 9.1 per cent, had it been calculated properly.479 Accordingly—developing a point made in Mr Lallah’s Rameka dissent480—Mr Dean said that the regime also offends against the presumption of innocence in Article 14(2), and the prohibition against being punished for future acts in Article 15(1). Given the narrow majority in Rameka the Committee were invited to reconsider their views.

477 That issue was subsequently litigated in Miller Note 145, above, and is the subject of Miller v New Zealand.


479 Professor Paul Barrett, ‘Re: Allan Kendrick Dean; Application for Leave to Appeal; Report for Defence Counsel’ (University of Auckland, 2006). The Professor, an expert in psychometric reports, provided a pro bono report in which he stated at paragraph 20:

For the high-risk category Static-99 (6+ score) offender, the average rates were 37% for offenders less than 40, 25.7% for offenders in their forties, 24% for offenders in their 50s, and 9.1% for offenders 60 and above…

paragraph 21 Indeed, at the age 70+, there is no recidivism data we can use except for one individual who was released at age 72, and who was reconvicted for a sexual offence the following year (p. 1054, last sentence on page). However, no details of the type of offender or type of offence committed were given.

paragraph 22. This underlines the fact that trying to predict recidivism using actuarial methods for an offender of Mr. Dean’s age is fraught with difficulty, as there are no datasets one can easily utilise to construct the evidence base for any such prediction.

Rameka, note 51, above, p 22.

Secondly, the penalty for that offence can only relate to those past acts. It cannot extend to some future psychological condition, which might or might not exist in the offender some ten years thereafter and which might or might not lead an offender who has already purged the punitive part of his sentence to be exposed to the risk of further detention.
Mr Dean further complained that the NZ judiciary had discriminated him against on the basis of his sexual orientation in breach of Article 26. He also claimed his continued detention was not subject to regular review by a ‘Court’ for the purposes of article 9(4) of the Covenant, another point raised by the Committee in *Rameka*.

As in the Court of Appeal, the question of his lawful transfer from the District Court to the High Court and whether the failure to give him an opportunity to reconsider his guilty plea when the maximum sentence he was facing increased dramatically from three years to preventive detention was raised as being a breach of article 14(3)(a). For this submission he relied upon the Privy Council decision in *Commissioner of Police v Davis and Another*. Views of the Committee

The Committee dismissed the complaint of disproportionate treatment based on the ‘circumstances of the case’, noting in particular Mr Dean’s prior history, and that he had re-offended within three months of being released from prison.

The Committee considered the undue delay complaint and said merely that in the ‘specific circumstances of the case’ they did not consider that there had been a delay. Whatever the ‘specific circumstances of the case’ may mean, it is hardly helpful reasoning. As for the 1970s sentencing report, and the failure to obtain an updated psychiatric report, these claims were dismissed as unsubstantiated because Mr Dean could have provided his own psychiatric report, and he made no objection during the proceeding to the psychiatric report. With respect, he could not have obtained a report as to his psychiatric state 10 years previously, and the invitation for the Court of Appeal to obtain a new report was ignored. Neither could he have complained at the time of sentencing on the basis of the New Hampshire Law Report issued two years after sentencing. The Committee additionally misconstrued the facts regarding this point. Mr Dean did object to the report based upon both fraud and the suspension

\[481\] Note 51, above, paragraph 6.3, dismissed as unsubstantiated.
\[482\] Note 458, above.
\[483\] Note 51, above, paragraph 7.3.
\[484\] Ibid, paragraph 7.2.
\[485\] Ibid, paragraph 6.4.
of Dr Rowan by the New Hampshire Supreme Court. The Committee also concluded (on similar lines as Van der Plaat)\textsuperscript{486} that Mr Dean could not have been released under the new provisions of the Sentencing Act.\textsuperscript{487} As for his lack of a suitable release plan, Mr Dean’s claim in this regard was dismissed because the Committee viewed that he had contributed towards this lack of planning.\textsuperscript{488} The sexual orientation discrimination point was dismissed as not substantiated.\textsuperscript{489} The Committee did not reconsider Rameka.

\textit{Violation found}

Despite dismissing the majority of Mr Dean’s complaints, the Committee did find one violation.\textsuperscript{490} As in Rameka, the Committee found a breach of Article 9(4) of the Covenant. This finding was based on the fact that, at the time of his first parole hearing in 2005, 10 years after sentencing and with the maximum (High Court finite) sentence being seven years, he was three years overdue for a parole consideration. (The State reasoned in its reply that his eventual parole hearing was a suitable remedy).

\textit{Criticism of HRC views}

The analysis of the Committee in Dean is, to put it politely, sparse. The absence of reasons for the Committee’s dismissal of the Author’s undue delay claim is somewhat surprising, given its prior jurisprudence on undue delay. Equally troubling is the dismissal of the disproportionality claim with minimal reasoning; such short shrift on the issue does not help develop Covenant jurisprudence. As for the dismissal of the claim in respect of the single psychiatric report, the Committee plainly conflates psychological reports with psychiatric reports, which was expressly challenged by the Author. The Committee stated in paragraph 3.6 that Mr Dean ‘further submits that the psychiatrist who produced that report was being investigated for malpractice in his native state’, and then proceeds to say in

\begin{itemize}
  \item \textsuperscript{486} Next Chapter.
  \item \textsuperscript{487} Ibid, paragraph 6.7.
  \item \textsuperscript{488} Ibid, paragraph 7.5. Long-term prisoners may of course lack the skills to ably contribute to release plans. Professor Taylor, a retired psychologist, gave a pro bono opinion on the long term effects of imprisonment which inspired his book: Professor Tony Taylor, \textit{The Prison System and Its Effects: Wherefrom, Whereto, and Why?} (Nova Science Publishers, 2008).
  \item \textsuperscript{489} Ibid, paragraph 6.3.
  \item \textsuperscript{490} Ibid, paragraph 7.4.
\end{itemize}
paragraph 6.7 that '[a]s to the court’s reliance on a two year old psychological report, the State party notes that the author did not challenge the reliance on these documents in his appeal and that this part of the communication is thus inadmissible for failure to exhaust domestic remedies.'

Whether an author wins or loses, poor analysis and simple factual mistakes do not encourage further communications or development of the Committee’s jurisprudence. Perhaps fortunately, Dean attracted little, if any, publicity.

**Post-Dean events and cases—M v Germany & Fardon v Australia**

During the March 2010 HRC meeting, in New York I passed a note to Mdm Chanet, following a comment she made about *M v Germany*, where the ECHR had found the German system of preventive detention was a breach of Article 5 (arbitrary detention). The Court in *M* reached this conclusion after saying:

134. The Court further reiterates that it has drawn a distinction in its case-law between a measure that constitutes in substance a ‘penalty’ – and to which the absolute ban on retrospective criminal laws applies – and a measure that concerns the ‘execution’ or ‘enforcement’ of the ‘penalty’ (see para 121 above). It therefore has to determine whether a measure which turned a detention of limited duration into a detention of unlimited duration constituted in substance an additional penalty, or merely concerned the execution or enforcement of the penalty applicable at the time of the offence of which the applicant was convicted.

The Court awarded compensation for the breach.

I then asked Mr Lallah during the lunch break why the Committee, when considering *Dean*, had not taken the opportunity to reconsider *Rameka*. Mr Lallah

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491 HRC member nominated by France, who was taking a short break, and leaving the room and I discussed progress since *Dean* with her when she returned shortly later. Plainly there are advantages to being present, as became even clearer during questioning of the NZ Minister of Justice. The ability of those present from NGOs to influence the member’s supplementary questions became clear. (Discussed further in Chapter 12 below)

492 The member elected from France and Counsellor to the Court of Cassation—Section President, and Dean at the criminal division.


494 Surprisingly, the complainant was awarded compensation of 50,000 Euros, far in excess of a more normal 3,000 Euros, or even, commonly, none, as the vindication of finding a breach is often held to be sufficient.
said he had not been present during Dean, but that the Committee likely would be reconsidering the issue in two Australian cases that session.

True to his prediction, the Committee’s views in Fardon v Australia497 and Tillman v Australia498 were released in April 2010, effectively revisiting Rameka. The ratio in both cases499 is if the State can achieve its purpose through less invasive means than detention, detention may be considered arbitrary".500 To avoid arbitrariness 'it was incumbent upon a state to demonstrate that rehabilitation could not have been by means less intrusive than continued imprisonment or detention'. 501 Arbitrary detentions in breach of Article 9(1) occurred at the end of the 14-year detention of Mr Fardon and the 10-year sentence of Mr Tillman, as the Court-imposed continued detention in each case was under the same conditions as the original sentence. The Committee's analysis was under Article 9(1) not Article 15. This meant a 'fresh imprisonment' for an offence not committed (unlike the process followed for NZ Extended Supervision Orders).

A majority of 11 in each case, with two dissenters, found the continued detentions were imposed because the prisoners were feared to be dangerous, essentially based on psychiatric opinion, not fact. As discussed, the concept of feared or predictable dangerousness is inherently problematic. To avoid arbitrariness, the Committee concluded that the State Party must show that the author’s rehabilitation could not have been achieved by means less than continued imprisonment, or even detention, and that there is a continuing Article 10(3) obligation to provide meaningful reformation throughout the period of imprisonment. An effective remedy including release was required.502 As is clear

495 It will be recalled his was the most substantial dissent in Rameka.
496 One of the advantages of being present at the open committee meetings where the Committee receives country reports, unlike closed meetings considering their views on individual communications.
497 Note 79, above.
498 Note 115, above.
499 In paragraph 7 of both judgments are essentially the same, differing only in the references to the Australian state legislation to which each applies.
500 Professor Bernadette McSherry, ‘Preventive Detention of Sex Offenders: Recent Trends’ (Paper presented at the Rethinking Mental Health Laws, Professional Legal Education Seminar, Melbourne, 14 July 2010).
501 See Keyzer and Freckelton, note 493, above.
502 Fardon and Tillman paragraphs 7.4. Notes 79 and 115, above.
from the dissenting opinions, the 11-2 majority views effectively adopted and built upon the minority views (7-6) in Rameka.

Conclusion and human rights advances

_M v Germany_ has been followed by further ECHR judgments in _Kallweit v Germany_ (17792/07) 13 January 2011, _Mautes v Germany_ (20008/07) 13 January 2011, _Schummer v Germany_ (27360/04, 42225/07) 13 January 2011, all to similar effect. Following the jurisprudence of the Court, the _Bundesverfassungsgericht_, (German Constitutional Court “BVG”) declared that the provisions of the German Criminal Code regarding preventive detention were unconstitutional.503

The Court recalled that preventive detention is not per se excluded by the European Convention on Human Rights.504 However, the Court insisted that there must be a causal link between the first condemnation of the individual and the prolongation of his sentence into preventive detention. In _M v Germany_ the Court did not find that there was causal link between the offence for which the applicant was sentenced to imprisonment, and the prolongation of the sentence after 10 years.505

The Court also examined whether preventive detention beyond the ten-year point was justified under any of the other sub-paragraphs of Article 5(1).506 The Court was very clear that such offences must be specific and concrete. Potential offences that may or may not happen in the future do not reach these standards of specificity and are certainly not concrete. In the same paragraph the Court noted that people detained in preventive detention are not promptly brought before a judge, which breaches Article 5(3), (in NZ, the Parole Board). This may be helpful for the _Miller v New Zealand_ argument that the NZ Parole Board is not independent.


504 _M v Germany_, note 114 above paragraph 93.

505 Ibid, paragraph 100.

506 Ibid, paragraph 102.
The European jurisprudence is a step forward in the development of jurisprudence on preventive detention. Christopher Michaelson noted that the BVG called for legislative change to ensure a liberty-oriented overall concept of preventive detention aimed at therapy, which did not leave decisive issues to the executive's and judiciary's decision making powers, but determined their actions in all relevant areas. He further notes that this may affect another nine other European states with similar legislative provisions.

Whilst the finding of the ECHR in the 5 German cases and the HRC in Fardon v Australia, and Tillman v Australia, relate to changes made to post-sentencing regimes, the observations on penalty and psychiatric opinion give room for a welcome development in NZ for further domestic and international challenge.

This case demonstrated that human rights advances evolve with the passage of time, and that not just domestic change can be made, but international ones as well. Jurisprudence from Germany and Australia, built on HRC jurisprudence from NZ, and vice versa can be expected. The Dean case appears in the HRC’s Draft General Comment 35 at footnotes 76, 78 and 79 to the effective that States must take care with predictions of future behaviour and create detention conditions that are distinct from the treatment of convicted prisoners serving a punitive sentence and are aimed at the detainees’ rehabilitation and reintegration into society. This is an area ripe for further domestic advancement, and I await the final General Comment with interest.

What advances (if any) regarding homophobia were made remain unknown.

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507 M v Germany has become an important case for arbitrary detention and is now cited well beyond prison preventive detainment cases.
509 Ibid, p 166.
510 Note 335, above.
Chapter 7—Van der Plaat v New Zealand—Is parole a penalty?

Introduction and Domestic Events

The Chief Justice, dismissing Mr Van der Plaat’s domestic sentence appeal, described the conviction and sentence of this client in the 2001 judgment of the Court of Appeal.\(^{511}\) Mr Van der Platt was convicted by a jury of various offences against his daughter over a span of nearly 10 years, including two representative charges of rape, one representative charge of indecent assault, and three representative counts of unlawful sexual connection. He was sentenced to nine years concurrently for the rapes, and a total of five years on the other offences to be served cumulatively with the rape sentences, a total sentence of 14 years imprisonment.

His appeal against conviction was not pursued. Mr Ryan QC, his counsel at the appeal hearing, tendered notice of abandonment signed by the appellant. The Chief Justice considered the abandonment of the conviction appeal proper, as the evidence against the appellant was ‘overwhelming’.\(^{512}\)

In 2001, the appellant was 66 years old. The offences for which he was charged and convicted took place between August 1983 and October 1992, while his daughter was between 22 and 32 years of age. Similar abuse had, however, allegedly had been perpetrated against the complainant from the time she was age 9.

I was instructed that Mr Van der Plaat was innocent, and that the prime evidence provided by the testimony of his daughter was a drug-induced invention, precipitated by her psychotic breakdown after taking opiates in Germany. Mr Van der Plaat’s ex-wife (and mother of the complainant) fully believed he was innocent, and funded most of the communication. To this day I have serious doubts as to whether he should have been convicted; however, I received no instructions for a further attempt at a domestic appeal.

\(^{511}\) Van der Plaat v The Queen CA463/00, Court of Appeal, Auckland, 1 August 2001.

\(^{512}\) Ibid, paragraph 2.
Any further appeal was fraught with difficulties. There was some evidence (probably not lawfully admissible) of the daughter’s psychiatric condition from a German medical clinic, and a qualified engineer would have been necessary to successfully demonstrate that the daughter’s claim of being chained to a ceiling in an Auckland house and sexually violated (evidence that apparently was a major influence on the jury) was impossible. A further appeal would also have to overcome the ‘overwhelming evidence’ comment of the Chief Justice, and the fact that the appellant previously had withdrawn his appeal. Apparently the withdrawal was made against the appellant’s instructions, but the appellate lawyer—a well-respected QC—had since died, complicating any attempt to prove that the withdrawal was not authorised. There was also the tricky question of similar fact evidence (and whether its use should have been appealed pre-trial, or post-trial) relating to the daughter’s allegation of having been chained up. A maid employed by the appellant in Vanuatu, where the family lived during the complainant’s early years, provided similar evidence regarding consensual sexual activity between the appellant and the maid while the maid was chained, although the maid later retracted her statement by affidavit.

With that background, one might consider any further steps were going to be an uphill battle. Indeed they were, but so was Sir Edmund Hillary’s conquest of Everest.

I received instructions from Mr Van der Platt to file a communication to the HRC rather than seek a domestic appeal to the Privy Council or with Crown consent, the Supreme Court. Given his advancing years, and the difficulty of any further possible domestic appeal, that approach seemed prudent despite the fact he maintained he was innocent, which would not be canvassed on an HRC communication. If he could obtain parole at one-third of his sentence of 14 years under the post-2002 sentencing regime, rather than two-thirds for the pre-2002 regime, which would to him be a satisfactory result.

**Domestic Legal Issues**

Section 84 of the Parole Act 2002 became law subsequent to the alleged commission of the offences for which Mr Van der Plaat was convicted. The
provisions appeared on their face to provide for a lighter penalty being paroled at one-third of sentence, rather than two-thirds. For that argument to work parole at an earlier stage need to be a ‘penalty’.

Section 84 of the Parole Act 2002 reads in part:

84 Non-parole periods

(1) The non-parole period of a long-term determinate sentence is one-third of the length of the sentence, unless the sentence is one to which subsection (2) or subsection (4) applies.

(2) The non-parole period of a sentence in respect of which the court has imposed a minimum term of imprisonment (whether under section 86, section 89, or section 103 of the Sentencing Act 2002) is the minimum term imposed.

(3) The non-parole period of a sentence of imprisonment for life (other than one in respect of which the court has imposed a minimum term of imprisonment) is 10 years.

This meant persons sentenced under the Sentencing Act 2002 could be released at one-third, but those sentenced under the old Criminal Justice Act had to wait until two-thirds. A communication was lodged claiming a breach of Article 15(1) of the Covenant, the third sentence of which states:

If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

This same right to a lesser sentence is reflected in s 25(g) of the NZBORA:

25 Minimum standards of criminal procedure

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

The Sentencing Act 2002 provides:

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513 The Parole and Sentencing Reform Bill 2001 was introduced as a package and split at the committee stage into two constituent parts that became the Parole Act 2002, and the Sentencing Act 2002.

514 Section 90(1)(d) Where the sentence is in respect of a serious violent offence,—(i) If no minimum period of imprisonment has been imposed under section 80(4) of this Act, after the expiry of two-thirds of the sentence.

515 For full text see Appendix Two.
6 Penal enactments not to have retrospective effect to disadvantage of offender

(1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

(2) Subsection (1) applies despite any other enactment or rule of law.

No such arguments had been raised at his Court of Appeal hearing because his appeal pre-dated the 2002 Sentencing and Parole Acts, but other domestic cases are relevant and discussed below, including the Court of Appeal judgment in Belcher v Department of Corrections,\textsuperscript{516} and the Supreme Court judgments in Morgan v Superintendent, Rimutaka Prison\textsuperscript{517} and Mist v The Queen.\textsuperscript{518}

State Actions following conviction for a Criminal Offence: Are they penalties?

Parole is the second part of a continuum of State interaction with individuals that is triggered upon conviction for a criminal offence. Simply put, a person cannot receive parole without first being sentenced, which follows being convicted. The changing context of a prison sentence, and interaction with the State through new parole-like mechanisms, also need consideration in order to understand fully the state actions that follow from a criminal conviction. Under an Extended Supervision Order ("ESO"), State control for up to another 10 years applies, as the order commences after the sentence expiration date.\textsuperscript{519} This means that the offender could, on a 14-year sentence, be subject to criminal sanctions for 24 years. This trend of new post-sentence supervision by the State is a worldwide phenomenon.\textsuperscript{520}

\begin{itemize}
\item \textsuperscript{516} Note 110, above.
\item \textsuperscript{517} Morgan v Superintendent, Rimutaka Prison [2005] 3 NZLR 1.
\item \textsuperscript{518} Mist v R [2006] 3 NZLR 145 (SC).
\item \textsuperscript{519} Parole Act 2002, s 107(1).
\item \textsuperscript{520} At least in the common law countries such as Australia, UK, Canada, and the US. See for example 'Breaking the Cycle Discussion Paper, Tasmanian Correction Plan 2010-2020. Best Practice in Offender Rehabilitation' (Tasmanian Corrective Services, 2010) accessed 16 May 2013, discussing post-sentence care and also a greater focus on the rehabilitation and reintegration of offenders in line with world's best practice.
\end{itemize}
Belcher v Department of Corrections

I was counsel in Belcher,\textsuperscript{521} where a Court of Appeal of five Judges found an ESO order to be criminal rather than civil, such that the criminal protections of the NZBORA applied. This \textit{should} have had significant implications as to how the term ‘penalty’ was interpreted in the current case. It did not. The case involved Part 1A of the Parole Act (“the ESO legislation”), as inserted by the Parole (Extended Supervision) Amendment Act 2004 which came into effect on 7 July 2004. Section 107A of the Parole Act provides an overview of the ESO legislation:

This Part—

(a) provides that offenders who have been convicted of certain sexual offences may, after assessment by a health assessor, be made subject to an extended supervision order by a court; and

(b) provides that an extended supervision order may last for up to 10 years; and

(c) provides that the conditions of an extended supervision order are the standard release conditions and any special conditions imposed by the Board; and

(d) provides rights of appeal and review relating to extended supervision orders.

The purpose of the legislation is to limit the risk that offenders released from prison will re-offend in a sexual manner against children and young persons after release.\textsuperscript{522}

The Court of Appeal decided that, although Mr Belcher had already served his penalty, the \textit{retrospective} ESO imposed was also a penalty, on grounds that the imposition through the criminal justice system of significant restrictions (including

\textsuperscript{521} Note 110, above.

\textsuperscript{522} The other key sections are:

107F Chief Executive may apply for extended supervision order

...  
107H Hearings relating to extended supervision orders

...  
107I Sentencing court may make extended supervision order

...  
(4) Every extended supervision order must state the term of the order, which may not exceed 10 years.
... we have concluded that the imposition through the criminal justice system of significant restrictions (including detention) on offenders in response to criminal behaviour amounts to punishment and thus engages ss 25 and 26 of the NZBORA. We see this approach as more properly representative of our legal tradition. If the imposition of such sanctions is truly in the public interest, then justification under s 5 is available and, in any event, there is the ability of the legislature to override ss 25 and 26.

[Emphasis added]
Parole, remission and early release historically have been considered matters of administration or management—how the sentence imposed by the Court is, within its limits, to be served.

Mr Morgan was self-represented and sought habeas corpus. If his argument had been accepted, it would have necessitated his release. He invoked domestic provisions—s 6 Sentencing Act 2002 and s 25(g) NZBORA—contending that the term ‘penalty’ in both provisions had a meaning consistent with his claim that as a consequence of the new legislative regime introduced by the Parole Act, the penalty imposed upon him was harsher than that which he would have suffered under the old regime.

The Supreme Court majority did not consider that the provisions in the Parole Act offended the principle against retroactivity, inherent in s 6 Sentencing Act and in s 25(g) NZBORA:

In view of the majority, s 25(g) is addressed only to judicial acts of sentencing and not to the administrative regime for early release.

That domestic judicial interpretation of the term ‘penalty’ was in my opinion manifestly inconsistent with the spirit and purpose of Article 15(1) of the Covenant, a Covenant provision that was considered by the Court despite not being raised by Mr Morgan. The Court held that entitlement to the lighter penalty as prescribed by Article 15 was not applicable in Mr Morgan’s case because the term ‘penalty’ does not include parole eligibility. This conclusion by the Court is misguided; in any event, Covenant terms such as ‘penalty’ should have an

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526 He did present his submissions with admirable ability according to the Court. See Morgan, paragraph 51.

527 See Blanchard and Tipping JJ in Mist, Note above para 518, paragraph 110: Section 6(1) of the Sentencing Act, which is the current statutory equivalent of s 4, [Criminal Justice Act repealed] refers to offenders who are convicted of 'an offence in respect of which the penalty has been varied' between the date of commission and sentencing. The concept of a penalty having been ‘varied’ is similar to the concept of a maximum having been ‘altered’. Furthermore, as this Court held in Morgan v Superintendent, Rimutaka Prison, the concept of penalty for the purposes of s 6 relates to the maximum penalty available for the kind of offence with which the Court is concerned. In that respect s 6 mirrors s 4(1). Section 4(2), with its sharper focus on the particular offender as opposed to the type of offence, was not reproduced as part of s 6 of the Sentencing Act or elsewhere.

528 Blanchard J, at paragraph 42: ‘Parliament appeared not to have seen it necessary to apply the principle against retrospectively to the area of administration of sentences including early release… article 7 of the European Convention … does not prevent any retroactive alteration in the law or practice concerning parole or conditional release.’
autonomous meaning and should be contextualised in reference to their object and purpose.\textsuperscript{529}

The Chief Justice’s powerful dissent in \textit{Morgan} says that release is characterised as an aspect of ‘parole’ rather than ‘sentence’, and cannot be determinative of its character as a penalty.\textsuperscript{530} The main contentions made in the dissent canvass whether release entitlements are integral to the penalty imposed upon an offender.\textsuperscript{531} Her Honour draws from US, Canadian and English cases also relied upon by the majority decision, and lays bare the proper compass of the sentence/penalty distinction, as being determined both by the actual sentence, and the statutory release provision.\textsuperscript{532} The Chief Justice’s dissent was a solid foundation to bring an Article 15 communication, if one had arisen.\textsuperscript{533}

\textbf{Absence of HRC jurisprudence on Article 15}

Whilst Mr Van der Plaat claimed breaches of Article 9, paragraphs 1 and 4, Article 26, and Article 15 of the Covenant, all alleged breaches pivoted on the interpretation and application of Article 15. Covenant jurisprudence on Article 15 is barely existent, and has been subject to a jurisprudential drought in the previous 20 years. \textit{Joseph}\textsuperscript{534} had observed the absence of case law and commentary on the meaning of Article 15, as did the Chief Justice in her dissent

\begin{flushleft}
\textsuperscript{529} See Elias CJ, dissenting, paragraph 9: The European Court of Human Rights, in application of art 7(1) of the European Convention (itself based on art 15 of the International Covenant on Civil and Political Rights from which s 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act are derived), has stressed that how it is characterised in domestic law cannot be determinative of whether a measure is a “penalty”. That approach seems to me to be equally valid in interpretation and application of ss 6 and 25(g), given their international derivation and human rights content. Whether release is characterised in legislation as an aspect of “parole” rather than sentence” is not therefore determinative of its character as a penalty.

\textsuperscript{530} The head note reads: \textbf{Held:} (Elias CJ dissenting) Section 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act were concerned with variations in the maximum applicable penalty prescribed by law for the generic offence. They were not directed at the particular penalty imposed on an individual offender for the particular offending as that was not something that could be varied between the commission of the offence and sentencing. A penalty within the prescribed limit for the offence did not therefore offend the principle expounded by s 6 of the Sentencing Act…

\textsuperscript{531} Note 530, paragraphs 12-21.

\textsuperscript{532} Ibid, paragraph 22: ‘(Release entitlements)...are not properly to be characterised as matters of administration of penalty. Nor can “penalty” be treated as coextensive with “sentence” where release regimes modify the penal consequences of sentence…’

\textsuperscript{533} Morgan was uninterested in bringing a communication.

\textsuperscript{534} Note 64 above paragraph 15.04.
\end{flushleft}

A member of the Secretariat subsequently brought to my attention the latest Article 15 case, Nicholas v Australia—one of then only four cases in total on Article 15. It provided no assistance to Mr Van der Plaat. The three other cases were about 30 years old, and came to no meaningful conclusions that were of assistance in interpreting Article 15(1). In Van Duzen v Canada (50/79), the author was released on mandatory supervision instead of serving his full term. Joseph notes that the HRC implicitly found that parole conditions could be relevant ‘penalties’ for the purpose of Article 15. Nevertheless, the HRC ultimately decided it was not necessary to determine the issue. MacIsaac v Canada (55/79) concerned the question as to whether the liberalisation of parole laws under the Canadian criminal law should be applied retroactively. The author failed to prove that the retroactive application of the more liberal parole laws would have resulted in him being released earlier. In A.R.S. v Canada (91/81), the alleged application of a retroactive heavier penalty was in issue, but the HRC...
found the case inadmissible as the author was not a relevant ‘victim’ of any abuse of his Covenant rights.

Joseph\textsuperscript{538} rightly notes from the case law that a number of important issues remain unanswered. In the absence of any meaningful jurisprudence, or General Comment on Article 15, the HRC was invited by Mr Van der Plaat to give authoritative guidance. It did not. With respect, the HRC needed to recognise the dynamics of new sentencing techniques that are opening up, which again it did not.

As the Committee observes at para’s 3.1 and 3.2 of their views in Van der Plaat, the principal claim made by the author is in respect of the Article 15 right to the application of ‘lighter penalties’. As I previously had put it in a paper:\textsuperscript{539}

The pivotal issue is whether parole can form part of the penalty for Covenant purposes or whether parole can be correctly relegated to being ‘administration of sentence’.

Whilst my views recognise the liberalisation of parole this commentary raised “big questions” in the eyes of other scholars:\textsuperscript{540}

Yet Ellis’s critique of parole in New Zealand (Chapter 6) rang familiar bells with his largely English audience. Thus Ellis analyses the major changes introduced in New Zealand in 2002 and regretted another major review only 4 years later. As he says, ‘trendy political amendments are no substitute for a principled approach’ (p.74). He raises some big questions: the impact of both the prison population and the public perception of increasing crime on parole.

\textbf{European Jurisprudence}

Whilst little Covenant jurisprudence existed on Article 15, there was European case law on the equivalent Article 7 of the European Convention, most notably \textit{R}
In Uttley, the issue was whether more onerous conditions of release constituted an increase in penalty, contrary to Article 7. Uttley had committed rape before 1983, when the maximum sentence for rape was life imprisonment, but he was not convicted and sentenced for the offence until 1995. He was sentenced after a legislative change in the parole regime, and received 12 years imprisonment where release on licence was possible but included the possibility of recall, whilst the prior sentencing regime was release simpliciter. If Mr Uttley had been sentenced to 12 years’ imprisonment under the old regime he would, subject to good behaviour, have been released on remission after serving two-thirds of his sentence, which would then have expired. Under the new regime he was released at the same time, but he was subject to a number of restrictions on his freedom. The issue was whether more onerous conditions of release constituted an increase in penalty, contrary to Article 7(1) of the European Convention. Their Lordships considered that Article 7(1) would only be infringed if a sentence were imposed on a defendant that constituted a heavier penalty than that which could have been imposed on the defendant under the law in force at the time that his offence was committed. Mr Van der Plaat submitted to the HRC that the Uttley decision should not be followed, and that to follow it would have profound negative implications for the progress made thus far regarding the scope of retrospective penalties and protections available to prisoners when alterations in parole arrangements are made. That challenge has academic support, from Rishworth and Atrill and Emmerson.

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541 R v Secretary of State for the Home Department ex p Uttley [2004] 4 All ER 1 (HL).
542 Ibid, Lord Carswell’s view, p 65, was that the maximum sentence for rape was imprisonment for life both before and after 1983; a Court sentencing before 1983 could have imposed imprisonment for life or for a term longer than 12 years. It is therefore impossible, in his view, to regard a sentence of 12 years, even with the new element of a licence, as a heavier penalty. This view was supported by their Lordships.
543 See Chief Justice’s dissent in Morgan, paragraph 27: [27] The approach of the Courts is criticised by Professor Paul Rishworth, The New Zealand Bill of Rights (Oxford University Press, 2003) pp 708–712, but as the author acknowledges it represents a uniform judicial response to the contention that changed parole provisions which have the effect of increasing a period of imprisonment are a retroactive increase in penalty under the protected right.
Changes made to parole eligibility dates through legislation strike at the very core of the ‘essential quality or character of the sentence.’ Lord Philips’ comments in *Uttley* on the Lord Chief Justice’s Practice Note, issued when release on licence was first introduced in 1991, are instructive here. This Note had advised sentencing judges that if the changes introduced could lead to prisoners actually serving longer in custody than hitherto, it would be necessary for the sentencing judge to adjust the sentence to have regard to the actual period likely to be served. This clear acknowledgment made by the Lord Chief Justice is evidence that legislative changes regarding release entitlements can result in a protracted period spent in detention, signalling that parole eligibility must be construed as a penalty. Likewise, the Chief Justice made clear in her dissent in *Morgan* that, in NZ, the imposition of sentences is made without consideration of remission or parole. Such a view is not conducive to a broad interpretation of Covenant terms, or to ensuring that rights are ‘practical and effective’ but does necessitate retrospectiveness.

*Uttley* was canvassed in *Morgan*, and also by the State before the HRC in *Van der Plaat*, and heavily criticised by the Author. Whilst, in the end, *Uttley* did not rate a mention in the views of the Committee, some analysis is still useful.

The State Party asserted in its response that the distinction between imposition of the penalty by the Court, and the administration of that penalty through the parole regime, has been recognised by the House of Lords in *Uttley* and by the NZ Supreme Court in *Morgan* in which the majority endorsed the *Uttley* approach. The State Party also cited the British case *Flynn*. Neither British case deals with non-discretionary entitlement to release. *Flynn* concerned changes to the mechanism by which prisoners sentenced to mandatory life imprisonment were considered for parole. Such changes had been made because the previous system was deemed incompatible with Article 6(1) of the European Convention on Human Rights. Contrary academic views are set out in the Chief Justice’s paragraph 26 in *Flynn*:

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546 Note 541, above, Baroness Hale at paragraph 46.
547 Ibid, paragraphs 15 and 16.
548 Note 517, above paragraph 21.
Harris, O'Boyle, and Warbrick in Law of the European Convention on
uman Rights (Butterworths (1995) at p 281) quoting Professor Nowak in
UN Covenant on Civil and Political Rights: CCPR Commentary (Engel
(1993)) p 278 that art 15(1) of the Covenant:

"Article 7 applies only to the 'penalty' imposed, not to the manner of
its enforcement. Hence it does not prevent any retroactive alteration
in the law or practice concerning the parole or conditional release of
a prisoner."

In contrast, Atrill says that the upshot of the Uttley approach is startling, and
severely curtails the protections afforded by Article 7 ECHR. He points to the
defective reasoning inherent in the Uttley approach, and states that, if correct, it
means that the vast majority of ECHR jurisprudence has been missing the point
for the past two decades. (It might now be said that the HRC has missed the
point as well). Atrill says: 550

For some, the startling consequences outlined above will be enough to
suggest that the reasoning in Uttley must also be suspect. This suspicion
seems to be well-founded to this writer. If this view of the appropriate
comparators were correct (i.e. actual penalty applied compared with
maximum sentence available, rather than probable sentence that would
have been applied), it seems that the vast majority of Strasbourg
jurisprudence has been missing the point for the past two decades...

This narrow construction of Article 7 of the ECHR inherent in Uttley is not just
regrettable according to Emmerson, 551 but also produces some very strange
results. If Uttley is followed, then Article 7 would protect an offender from being
subjected to a sentence that was unavailable at the time the offence was
committed, however minor the penalty might be. There also would be a violation
of Article 7 if, in addition to a term of imprisonment, the new sentencing powers
enabled a court to impose a small confiscation order, or a single day's community
order. On the other hand, if the parole arrangements applicable to Mr Uttley's
sentence had been altered to his detriment the day before he was due for
release, Article 7 would not be engaged.

550 Note 544, p 219, above.
551 Note 545, p 707, above.
Substance or form?

What ‘penalty’ means has received scant attention from the HRC, but the issue needs consideration. The starting point must be to look at the true meaning of the key words in article 15—‘lesser penalty’. Substance—rather than form—is all-important. What is administration of penalty? What is the proper relationship between penalty and parole? On its dictionary definition, ‘administration’ is the ‘management of the affairs of an organization’. Within this context, on plain interpretation of the word; administration of sentence would pertain to the management of the corrections facilities in which prisoners are detained, rather than the parole regime itself. Indeed, under the Corrections Act 2004, one of the central purposes of the corrections system is to ensure that custodial sentences are administered in a safe, secure, humane and effective manner. The Corrections Act states:

5 Purpose of corrections system

(1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—

(a) ensuring that the community-based and custodial sentences and related orders that are imposed by the courts and the New Zealand Parole Board are administered in a safe, secure, humane, and effective manner; and …

[Emphasis added]

I suspect that, given the fact that Mr Van der Plaat was a serious sex offender, his communication received less attention than it deserved.

The HRC’s views

The HRC’s formulation of the issues was as follows. The principal claim was that the sentencing regime applied breached articles 15 and 26, and that consequently Mr Van der Plaat’s detention was arbitrary in breach of article 9, paragraphs (1) and (4). The Article 15 claim was that the author argues that the lighter penalty provided by the 2002 Act subsequent to the commission of the

offence should have been applied to him. He asserted that minimum non-parole periods are ‘sentences’, confirmed by the wording in the Sentencing Act 2002. He acknowledged that there is relevant jurisprudence by the Committee, but invited it to adopt a ‘purposive approach’ to the application of article 15(1) and to apply in particular a broad interpretation of the term ‘penalty’. The HRC observed:

2.2 At the time of the author’s conviction and sentence, the applicable terms of the Criminal Justice Act 1985 entitled the author to release on conditions after serving two-thirds of his sentence, that is, on 18 February 2009 after having served nine years and four months of the 14 year sentence.

2.4 Under the old provisions, prior to 30 June 2002, which remained applicable to the author, an offender was entitled to be released after serving two-thirds of a determinate sentence (unless release was postponed due to prison disciplinary offences, or an order was sought that a full term of imprisonment be served). Under the new provisions, after 30 June 2002, there would be eligibility for parole, where a minimum term of imprisonment had been imposed, after two-thirds of that term had been served; if no minimum term was imposed, eligibility for parole would accrue after one-third of the sentence had been served.

2.5 Were that latter rule applied to the author, he contends that he would have been eligible for parole four years and eight months earlier than under the previous legislation, that is, on 18 June 2007. The Sentencing Act and the New Zealand Bill of Rights Act both contain the right to a lesser penalty if the penalty for an offence is reduced between the time of commission of the offence and sentencing.

[Emphasis added]

The HRC first considered that the provisions raised by the Author remained materially unchanged throughout the relevant period from the offending conduct through to the trial and conviction. Secondly, while the HRC considered that changes in rules of procedure and evidence after an alleged criminal act has been committed ‘may under certain circumstances be relevant for determining the applicability of article 15’, it noted that no such circumstances were presented in the Author’s case. Accordingly, the Committee was of the view that the facts before it did not disclose a violation of Article 15 (1).

The communication failed with just one saving grace—a theoretical concession that parole may be a penalty. The Committee expressed its view as:

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554 Ibid, paragraph 7.4, line 2.
555 Ibid, paragraph 7.7.
6.4 Applying those principles in the present case, the Committee is of the view that even assuming for the purposes of argument that changes in parole entitlements amount to a penalty within the meaning of article 15, para 1, of the Covenant, the author has not shown that sentencing under the new regime would have led to him serving a shorter time in prison. The contention that the author would have been released earlier under the new regime speculates on number of hypothetical actions of the sentencing judge, acting under a new sentencing regime, and of the author himself. The Committee notes in this respect that the Sentencing Act 2002 significantly expanded the power of the courts to impose minimum periods of imprisonment (non-parole periods) for long-term sentences, and parole conditions varied significantly depending whether a minimum period of imprisonment was stipulated or not. The Committee also notes in this respect that release on parole in the State party’s criminal justice scheme is neither an entitlement nor automatic, and is in part dependent on the author’s own behaviour.

[Emphasis added.]

With respect, that analysis cannot be right. I agree there is speculation as to what a sentencing judge might have done in terms of non-parole periods, post-2002, and that parole is not an entitlement; however, as in *Rameka* (chapter five), the sentence must be in two parts: punitive and protective. Once the punitive part of the sentence is served, the remainder is protective.\(^{556}\) When the new law applied in 2002, it required either resentencing with a new minimum non-parole period, or that those pre-2002 prisoners took the windfall of Article 15(1). As no resentencing occurred, a windfall applies. (Albeit, this ‘windfall’ is only the opportunity to be treated in the same way as persons sentenced after 2002—an unusual feature in this case, as maximum sentencing for sex crimes has invariably got heavier, not lighter.)

Just to speculate, let’s assume that under the new regime the 14-year sentence had a non-parole period set at nine years four months or more; it is only under those circumstances that the penalty would be worse than under the prior system. If that were the case, the author could have brought a claim that his sentence was disproportionately severe. Any non-parole period less than nine years four months permits the argument that was raised.

The proposition can be seen in the following table put to the Committee:

\(^{556}\) Note 119, above, paragraph 87.
### Comparative Domestic Position

<table>
<thead>
<tr>
<th>Individual</th>
<th>Time Period</th>
<th>Statutory Scheme</th>
<th>Date Convicted</th>
<th>Sentence Received</th>
<th>Minimum Period Spent in Detention</th>
<th>Release Entitlement/Parole Eligibility Date</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Your Author</strong></td>
<td>Pre-2002</td>
<td>Criminal Justice Act 1985</td>
<td>18 October 2000</td>
<td>14 years</td>
<td>9 years 4 months</td>
<td>18 February 2009*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>&quot;Entitlement to release on conditions after serving <strong>two-thirds</strong> of his sentence&quot;</td>
<td></td>
<td></td>
<td>(Two-thirds)</td>
<td></td>
</tr>
<tr>
<td><strong>Imaginary Offender</strong></td>
<td>Post-2002</td>
<td>Parole Act 2002</td>
<td>18 October 2002</td>
<td>14 years</td>
<td>4 years 8 months</td>
<td>18 June 2007</td>
</tr>
<tr>
<td></td>
<td></td>
<td>&quot;Non-parole period of a long-term determinate sentence is one-third of the sentence.&quot;</td>
<td></td>
<td></td>
<td>(One-third)</td>
<td></td>
</tr>
</tbody>
</table>

*i.e. Your Author is required to serve a further one-third of his sentence: 4 years and 8 months*
Your Author's Claimed Position in accordance with Articles 15 and 26:

<table>
<thead>
<tr>
<th>Your Author's Claimed Position</th>
<th>Parole Act 2002</th>
<th>Act 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convicted in 2000, but awarded the lighter penalty under 2002 statutory scheme</td>
<td>&quot;Non-parole period of a long-term determinate sentence is one-third of the sentence for post and pre-2002 offenders.&quot;</td>
<td>18 October 2000, 14 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4 years 8 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td>18 June 2005</td>
</tr>
</tbody>
</table>

It does seem unprincipled that one does not know what his or her punitive period should be under the new legislative scheme.

As for the non-automatic nature of parole, it is impossible to show that one might get parole, but that is not the issue. All a prisoner is getting is an *entitlement* to be *considered* for parole on a post—2002 sentence. Not to receive that entitlement plainly discriminates between classes of prisoners, and breaches Article 26. It also seems to be the very antithesis of the intent of Article 15. Beyond that, no analysis is made of what the Parole Board is actually doing (or what the punitive period really is), as was articulated by Mr Lallah in his dissent in *Rameka*.

I note that the material before the Committee indicates that the detention following the so-called punitive period continues in prison. In these circumstances, the ‘punitive’ and ‘preventive’ parts of the sentence become, in reality, a distinction without a difference. When stripped of the colourable statutory device which purportedly confers power to sentence on the trial Court, the reality is that, in substance and in practice, it is only

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557 *Rameka*, note 51, above.
part of the sentence which is left to the trial Court (and that too at a legislatively fixed minimum over which the trial Court has no control or discretion). The rest of the sentence is left in the hands of an administrative body, without the due process guarantees of article 14. There is of course nothing wrong in legal measures enabling early release, but enabling an administrative body to determine in effect the duration of the sentence beyond the statutory minimum is another matter.

However, what the Parole Board is doing, and can lawfully do, in arbitrary detention terms must await the HRC views in *Miller v New Zealand*558 and further communications.

The discrimination claim under Article 26 as well as the arbitrary detention claim failed in consequence of the Article 15 failure. The Committee said:

6.5 In terms of the claim under article 26, the author has not shown how he is victim, beyond the analysis under article 15, of any further distinction amounting to “other status” within the meaning of article 26. The author’s claim under article 9 resting entirely on breaches of articles 15 and 26, that claim must fail under article 1 of the Optional Protocol for the same reasons.

The NZ Supreme Court judgment in *Morgan* gives pre-eminence to the meaning of the term ‘penalty’ as contained in domestic legislation, and whether such a term can apply to early release dates under legislation.

**Conclusion**

I was perhaps too ambitious trying to advance the arguments in *Van der Plaat* without any international support, or any academic opinion to support the argument. Equally, if I had a case of post-release increase like *Fardon* I might have fared better, but it is hard to choose your clients.559 I also have reservations regarding whether trying to advance such an argument on behalf of a client accused of being a serious sexual abuser received as much consideration as perhaps would have been given to a more ‘deserving’ client. This is the old problem that bad facts don’t make good law. Nonetheless, the fact that the right of lighter penalty in Article 15 does not have a domestic equivalent in NZ needed to be addressed by the HRC. Given the academic divergence of opinion outlined

558 A work in progress expected to be filed in 2013.
559 Perhaps Belcher note 199, above, with an Extended Supervision Order imposed retrospectively would have been better; I need to look out for another similar case.
above, it would seem that European Article 7 and/or Article 15 of the Covenant might in future arise like a phoenix from the ashes for the next author bringing such a case. Until the European Court of Human Rights or the Committee does give authoritative guidance, the interpretation of penalty will remain a contentious issue.

Only Draft General Comment 35\textsuperscript{560} refers to the case in footnote 76 sharing with Dean the observation that \textit{a prediction of the prisoner’s future behavior may be a relevant factor in deciding whether to continue detention}.

I can make no claim that rights were advanced here, as even the academic texts written post this case have failed to recognise that this HRC communication existed.

Mr Van der Platt was recalled to prison to 2012 for having contact with a 4-year-old girl.\textsuperscript{561}

\textsuperscript{560} Note 335, above.
\textsuperscript{561} Ian Steward, 'Sadistic sex offender back in jail', \textit{DominionPost} (Wellington), 9 October 2012.
Chapter 8—Manuel v New Zealand—Recall on parole for murder

Introduction

This case also arose from an alleged arbitrary detention. Mr Manuel, a 15-year-old, committed murder for which he was convicted and sentenced to life imprisonment on 20 July 1984. He was released on Parole on 18 January 1993. In 1995 he committed minor offences related to dangerous driving (reversing his car, in a drunken state, over his sister after a dispute, knocking her unconscious), for which he received four-months’ imprisonment. He was also charged with assault on his mother, but later acquitted of that crime. He was again released on 31 January 1996, having served the then statutory minimum of half of his four-month sentence. On 1 February 1996, the next day, he was yet again detained on an interim recall warrant issued by the Chairperson of the Parole Board, who ticked a box on the form for the recall warrant and provided no other reasons.\footnote{562} He was unable to challenge that detention for well over a month,\footnote{563} and was not informed of his right to a lawyer. A final recall order was made on 19 March 1996. He remained detained for a further 10 years until November 2006.

In 2004, I was engaged as counsel. I sought habeas corpus on his behalf. The law until then had been that a recall application could be made for broad reasons, no connection with the index offence (murder) was required. His primary challenge was that, having served the punitive part of his sentence, he should not be recalled except for an offence causally connected with the original offence, relying on Stafford v UK.\footnote{564}

He also appeared to be suffering double jeopardy, having been released after serving prison time for his minor offences, but being recalled the next day to serve time again. The prohibition on double jeopardy includes not being punished twice for the same offence.\footnote{565} Influential in the recall was the outstanding charge

\footnote{562} Such a recall warrant is permitted under Criminal Justice Act 1985, s 107J. See later discussion.
\footnote{563} The Criminal Justice Act 1985, Section 107J has a minimum period prior to the Parole Board Final Recall Hearing of 14 days, and a maximum of one month extendable without consent for another 8 days. Mr Manuel waited 48 days.
\footnote{564} See note 119, above.
\footnote{565} NZBORA Section 26, and Article 14(7) ICCPR.
of assault (of which he was later acquitted), as this was the only offence with which he was then charged that could by domestic legislation be considered ‘serious’,\(^{566}\) and therefore dangerous.

From 9 December 1996 to November 2006, the Parole Board reviewed Mr Manuel’s case every six-to-twelve months, declining to release, but making a variety of remedial recommendations at various stages (such as temporary release to attend a residential programme, three days leave to undertake an alcohol abuse programme, temporary leave to undertake a violence prevention programme, placement in an anti-violence unit, placement in a Maori focus unit, placement in a self-care unit and work parole). Whilst in custody and on remedial programmes, Mr Manuel engaged in inappropriate conduct (smoking cannabis) but not violence. He never applied for judicial review, nor did he utilise the post-2002 statutory right to request reconsideration by a differently constituted Parole Board\(^{567}\) of any of the post-recall Parole Board decisions.

**Domestic Cases.**

**First High Court Hearing**

On 30 March 2004, Mr Manuel applied for Habeas Corpus, arguing first that the recall was unlawful, being in breach of the Criminal Justice Act 1985 and the prohibition of disproportionately severe punishment in s 9 NZBORA, and that it

\(^{566}\) s 398 Crimes Act 1961 s 312A provides:

A serious violent offence means an offence against any of the following provisions of the Crimes Act 1961 in respect of which a determinate sentence of more than 2 years imprisonment is imposed on the offender:

(a) Section 128 (sexual violation):
(b) Section 171 (manslaughter):
(c) Section 173 (attempt to murder):
(d) Section 188(1) (wounding with intent to cause grievous bodily harm):
(e) Section 188(2) (wounding with intent to injure):
(f) Section 189(1) (injuring with intent to cause grievous bodily harm):
(g) Section 189(2) (injuring with intent to injure):
(h) Section 198A (using a firearm against law enforcement officer, etc.):
(i) Section 198B (commission of crime with firearm):
(j) Section 234 (robbery):
(k) Section 235 (aggravated robbery).

\(^{567}\) The reconstituted parole board for a review consists of a single member. See also *Taito PC*, paragraph 15, providing a process by which three Judges are reviewed by one. How this process of a single member board reviewing 3 or 5 members would be any better is unknown.
was double jeopardy. Secondly, he argued that the Parole Board had no jurisdiction to hold a hearing for final recall, as the interim recall order was unlawful. Specifically, there was no record of the order itself, except a reference to an order in the warrant. He further argued that the application for an interim order could not be made ex parte, and that he had not validly consented to the short adjournment of the final hearing, which was accordingly unlawful. He also argued the Chairman, having issued the interim order for detention, should not have sat to consider the final recall order.\textsuperscript{568} Finally, he argued that the interim and final recall orders were unlawful because the Parole Board, the Department of Corrections and the Police all failed to ensure that he was advised of his rights to legal advice, and to habeas corpus, and he was not brought speedily before a court, all further NZBORA breaches.

On 2 April 2004, the High Court denied Mr Manuel’s application.\textsuperscript{569} On the disproportionality argument, the Court held first that the statutory scheme did not limit recall to circumstances where the likely future offending involved serious violence or risk to life and limb, and further that given (1) the nature of Mr Manuel’s conduct (dangerous driving and his alleged assault on his mother), (2) his problems with anger management and alcohol, and (3) the apparently escalating risk of offending, it was open to the Parole Board to conclude that he posed a serious risk of harm to others, but Miller J hoped they would reconsider.\textsuperscript{570}

In respect of the unlawfulness of the interim order,\textsuperscript{571} voiding the final order pursuant to which he remained detained, the Court noted that if the interim order was unlawful he could be entitled to damages for the short period from 1 February 1996 to 19 March 1996 that imprisonment occurred pursuant to it; under the statutory scheme, however, there was no link between the interim order and the final order other than one of timing. On the argument of apparent bias arising from the Chairperson who made the interim order also being on the

\begin{footnotesize}
\textsuperscript{568} See Antoun v The Queen [2006] HCA 2.
\textsuperscript{570} Ibid, paragraphs 31-41.
\textsuperscript{571} Ibid, paragraphs 42-45.
\end{footnotesize}
Board making the final order, the High Court found the statutory scheme allowed this makeup of the Board.

Mr Manuel claimed that, when arrested pursuant to the interim recall, he was not advised (at the point of detention) of the reason for his detention, or given his right to counsel, in breach of sections 23(1)(a) and (b) NZBORA. The Court found that there was no evidence that he had been given a copy of the required s 107J(4) notice, and that notice alone, even had it been provided, did not address the right to legal advice in respect of the interim detention but only with respect to the right of counsel for the Board hearing. 572 The Court went on to say that, while this breach of the rights in section 23 could give rise to an application for damages, 573 or exclusion of evidence in the habeas corpus proceedings before the Court, it did not make the detention unlawful. In any event, the delay in advice of his right resulted in no unlawfully obtained evidence (admission or confession).

On the issue of the ex parte nature of the interim order, the Court found this procedure was clearly contemplated by the statutory scheme. 574 Finally, on the technical point that the interim warrant was not accompanied by an interim order in a separate document, the Court found the warrant, in the prescribed form, to be sufficient evidence of an order. 575

Court of Appeal Hearing

On 15 June 2005, the Court of Appeal refused the appellant’s appeal. 576 The Court held that in the habeas corpus urgent statutory summary procedure, in general, presentation of a regular warrant such as was offered here would be a decisive answer; attacks on administrative law grounds to decisions should be challenged in the more appropriate forum of judicial review proceedings. Nevertheless, the Court addressed the merits of the arguments presented, and upheld the High Court’s dismissal of writ.

572 Ibid, paragraph 56.
573 Ibid, paragraph 45.
574 Ibid, paragraphs 60-61.
575 Ibid, paragraph 44.
Supreme Court Hearing

On 3 August 2005, the Supreme Court refused leave to further appeal.\textsuperscript{577} A Supreme Court Judge commented extra-judicially\textsuperscript{578} that whether the appellant’s intended arguments were properly the subject of an application for habeas corpus, raised an interesting and important point, however the interests of justice did not require leave for a doomed appeal. Leave was therefore refused.

Second High Court Hearing

At the forefront of the Supreme Court judgment\textsuperscript{579} was a proposed argument not previously brought. The issue was whether the Parole Board met to adjourn the hearing of the application for recall. The Supreme Court concluded it was not an appropriate point to be taken for the first time on a final appeal.

Accordingly, the following day Mr Manuel filed a new application for habeas corpus, which challenged the Parole Board’s jurisdiction to determine the recall application. That second application was withdrawn two days later. That challenge had been based on an assertion that the Parole Board had failed to comply with a mandatory requirement in section 107L(1)(a) Criminal Justice Act, to determine the recall application ‘not earlier than 14 days, nor later than 1 month, after the date on which the offender is taken into custody pursuant to this section’. On the morning of the hearing, Crown Counsel was able to place before the Court affidavit evidence (contrary to two prior affidavits which were unable to show any such evidence) that Mr Manuel had consented in writing to the contested adjournment. I considered the evidence, and accepted that the adjournment apparently complied with the requirements of the Criminal Justice Act. As Miller J noted in a Minute dated 6 August 2004 at paragraph 3, on ‘that basis, he properly withdrew the application.’ On the basis of written submissions, costs of $1,500 were ordered against the applicant (payable by the Legal

\textsuperscript{577} Manuel v Superintendent of Hawkes Bay Regional Prison [2005] 2 NZLR 721 (SC).
\textsuperscript{579} Manuel No 2, note 576, above paragraph 5.
Services Agency). This decision was reversed on appeal as against principle, and costs of $3,000 were awarded to the appellant for that costs appeal.

Final Release

On 27 November 2006, the Parole Board granted release on standard conditions, and special conditions lasting two years. He is of course still subject to the lifetime possibility of recall.

HRC Communication

In October 2007, the April 2005 Manuel communication was determined by the HRC. The communication alleged four broad sets of complaints: the interim recall order, the final recall order, his continued detention, and whether habeas corpus was a sufficient remedy to challenge his detention. He claimed breaches of article 7; article 9(1), (2), (3) and (4); article 10(1) and (3); article 14(1), (2), 3(a) and (b), and (7); article 15; and article 26 of the Covenant. The challenges, facts and law not articulated in the domestic court section above, are set forth here.

The Chief Executive of Corrections sought a recall under s107J Criminal Justice Act, on the basis that the Author posed an immediate risk to the safety of the public. Sections 107I and 107J (as in effect during the material period) provided in relevant part:

107 I (1) … [T]he Secretary may apply to the Parole Board for an order that any offender who is subject to an indeterminate sentence and has been released under this Part of this Act be recalled to a penal institution to continue serving his or her sentence…

(6) An application may be made under this section where the applicant believes on reasonable grounds that

a) The offender has breached the conditions of his or her release; or

b) The offender has committed an offence; or

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c) Because of the offender’s conduct, or a change in his or her circumstances since release, further offending is likely;…

(7) An application made under this section shall specify the grounds in subsection (6) of this section on which the applicant relies and the reasons for believing that the grounds apply.

107 J…

(2) Where an application [for recall] is made under … section 107I(6) of this Act, the Chairperson of the appropriate Board shall, on behalf of the Board, make an interim order for the recall of the offender where

a) The offender is subject to a sentence for a serious violent offence…; or

aa) The offender is subject to a sentence of life imprisonment for murder or manslaughter …; or

b) The Chairperson believes on reasonable grounds that

i) The offender poses an immediate risk to the safety of the public or of any person or any class of persons; or

ii) The offender is likely to abscond before the determination of the application for recall.

…

(4) Where an order is made under this section and a warrant is issued, the offender shall on, or as soon as practicable after, being taken into custody be given

a) A copy of the application [for recall] made under section 107I of this Act; and

b) A notice

i) Specifying the date on which the application is to be determined, being a date not early than 14 days, nor later than 1 month, after the date on which the offender is taken into custody pursuant to this section;

ii) Advising the offender that he or she is entitled to be heard and to state his or her case in person or by counsel; and

iii) Requiring the offender to notify the Board, not later than 7 days before the date on which the application is to be determined, whether he or she wishes to make written submissions or to appear in person or be represented by counsel.

On 31 January 1996, the Chairperson of the Parole Board, Thorp J (a High Court Judge), ordered Mr Manuel’s interim recall under s 107J of the Act, pending a
Board hearing scheduled for 29 February 1996. On 1 February 2006, Mr Manuel voluntarily surrendered to police and was arrested under the interim warrant. On 13 February 1996, he consented in writing to adjournment of the Board hearing of the final recall application until 19 March 1996. His then-counsel, whom he had consulted very briefly by telephone before the hearing date, represented Mr Manuel at the hearing on 19 March 1996. They met in person only twenty minutes prior to the hearing.

The Parole Board (comprised of Thorp J and four other members) issued a written final recall order, finding that Mr Manuel had breached parole conditions, had committed further offences whilst on parole, and that his conduct indicated likely further offending on the balance of probabilities. More widely, the Board found that there were reasonable grounds to conclude that he posed a risk to the safety of the public. The Board supported consideration by the Department of Corrections of a temporary release from custody to undertake a residential alcohol treatment programme. A warrant was issued under s 107L of the Parole Act for Mr Manuel’s’ return to prison, where he remained for a further ten years.

Importantly, as the Committee noted, he did not appeal the final recall order to the High Court – a right to which he was entitled under s 107M of the Parole Act.

Exhaustion of domestic remedies

The Committee noted that the domestic courts addressed at first instance and on appeal arguments as to:

(i) The interim and final orders for recall;

(ii) The fact that the author’s recall was disproportionate to his actual conduct;

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583 That was the full extent of his legal assistance.
584 Manuel v New Zealand paragraph 2.2.
585 Ibid, paragraph 2.3.
586 Ibid, paragraph 6.2.
The unlawfulness of the interim order, and the argument that such unlawfulness voided the final order, which was the ongoing detention order;

The bias of the Chairperson who made the interim order also being on the Board making the final order;

The fact that when detained pursuant to the interim recall, the author was not advised the reasons or of his right to counsel;

The fact that the interim recall order was of ex parte nature;

The fact that the interim warrant was not accompanied by an interim order in a separate document; and

The fact that he had not consented to a short adjournment of the final hearing.

Numerous issues advanced to the Committee were rejected either for failure to exhaust domestic remedies, for lack of substantiation, or on the basis of domestic law or fact-findings. In the Committee's view, issues could have brought under either habeas, judicial review, or statutory appeal and the Author had not sufficiently demonstrated why this was not so.\(^{587}\)

In hindsight, the essence of that is correct. A domestic judicial review, ten years out of time had a very low chance of success. Even if such a review would have been fruitless on its own, the failure to undertake it does demonstrate the need to be extraordinarily careful about exhaustion of remedies, or to provide a satisfactory explanation of why one was not sought, before bringing a communication to the Committee.

The Committee noted the findings of the domestic courts and the rejection of the arbitrariness proposition in the absence of a separate order.\(^{588}\) As to (apparent) bias arising from the Chairperson who made the interim order also being on the

\(^{587}\) Ibid, paragraphs 2.5, 4.5, 4.8, 4.17, 4.20, 4.24, 4.25, 6.3, and 7.3.

\(^{588}\) Ibid, paragraph 6.3.
Board making the final order, the Committee noted that, in principle, it was unobjectionable, and the Author had not shown any elements to displace this presumption in the present case. Similarly, ex parte proceedings could, in principle, be necessary in order to act sufficiently promptly and avoid risk of serious harm, provided that the affected party has opportunity to state his or her case at an early opportunity, which opportunity Mr Manuel had at the final recall hearing.\(^{589}\) On the consent to adjournment issue, the Committee noted that the domestic courts found, as a matter of fact, that the author had consented – a finding that, absent manifest arbitrariness or a denial of justice, the Committee would not disturb. In this light, the Committee considered that the Author had not sufficiently substantiated a claim in respect of these issues under articles 9, 14 or 26 of the Covenant. In respect of the first of those issues (the absence of a separate order), the Committee merely noted the domestic court’s finding, and did not articulate further.\(^{590}\) The point that he was not notified of his right to counsel or arrest was inadmissible for failure to substantiate.\(^{591}\) As to the additional claim under article 9(2), that he was not informed at the point of his arrest under the initial warrant of the reasons for his arrest, the Committee noted that the High Court accepted this argument, and that Mr Manuel had an appropriate remedy in the form of a domestic damages claim, and therefore the claim before the Committee was inadmissible.\(^{592}\)

**The sole admissible claim**

As to the claims that the Author’s recall was disproportionate and amounted to arbitrary detention, the Committee considered this issue had been sufficiently

\(^{589}\) An opportunity to state one’s case that becomes available one month after the ex parte order does not square with the need to be brought before a Court promptly, which is usually hours, if not days, in the jurisprudence see Human Rights Committee, General Comment No 8, Right to liberty and security of persons HRI/GEN/1/Rev.9 (Vol. I), 1984; (General Comment 35 replacing GC 8 is in draft form see CCPR/C/107/R.3 (January 2013), and see e.g. Vuolanne v Finland No. 265/1987, Supp. No. 40 (A/44/40), 311 (1989).

\(^{590}\) Manuel v New Zealand, paragraph 6.4.

\(^{591}\) Ibid, paragraph 6.5. The Committee’s views are difficult to reconcile with the following finding of the High Court in Miller v Superintendent Hawkes Bay Regional Prison (2006) HC Wellington, Miller J, Civ 2004-485-566, 2 April 2004, paragraph 56: ‘Mr Manuel’s evidence was that he was not advised of his rights at the time he was taken into custody.’ (Undisputed evidence).

\(^{592}\) Manuel v New Zealand, paragraph 6.6.
substantiated, for purposes of admissibility, under Article 9(1) of the Covenant. The Committee observed:

7.2 ... Assuming arguendo that his arrest on the initial warrant while on parole deprived him of liberty, within the meaning of article 9, paragraph 1, such deprivation must be both lawful and not arbitrary. In contrast to the purely preventive detention at issue in Rameka, the author's recall meant that he resumed a pre-existing sentence. The State party concedes that the recall decision was taken for protective/preventive purposes given the risk he posed to the public in the future...

[Emphasis added]

The Committee considered that to recall an individual convicted of a violent offence from parole to continue sentence after commission of non-violent acts while on parole might in certain circumstances be arbitrary under the Covenant. But it elected not to decide whether the recall was arbitrary in this instance as the Author, a murderer, had engaged in violent or dangerous conduct after his release on parole. This conduct was of sufficient nexus to the underlying conviction that his recall to continue serving that term was justified in the interests of public safety, and the Author did not show otherwise. The Committee also noted that the Parole Board, a body subject to judicial review, reviewed the Author's ongoing detention at least once a year and was an independent body as held in Rameka. Accordingly, the Committee found that the Author's recall was not arbitrary in breach of Article 9(1).

It was of course perfectly plausible that the communication would fail on that primary Stafford v UK issue, if the offences Mr Manuel was recalled for were insufficiently connected with his prior murder; equally, it was perfectly plausible he would succeed if they were not. However, no reasoning was applied as to whether the offences were 'serious' or non-violent.

593 Ibid, paragraphs 7.2-7.3.
594 See Chapter 8.
595 Manuel v New Zealand, paragraph 7.2.
596 See Note 119, above.
The Committee in Draft General Comment 35 confirm that: *If parole or conditional release is granted, and then revoked for breach of conditions, the return to prison is a deprivation of liberty subject to article 9.*

**Critique of the HRC's views**

There are many unresolved problems, including, for example, whether representation that began only 20 minutes before his recall was satisfactory; regardless of the result being a further 10 years’ imprisonment, 20 minutes representation is inadequate when an indefinite detention is possible. However, space only permits a limited analysis.

I had considered the argument that habeas and judicial review were not equivalent remedies to be a strong contention. That judicial review was not an adequate remedy was dismissed by the Committee, which merely said: ‘The Committee is not satisfied that variations of procedure or timing under the latter procedures are such as to disqualify these avenues as appropriate.'

Why this differs from the same type of procedure found inadequate by the European Court of Human Rights in *Weeks v UK* (1987) under the European Convention equivalent of the Covenant’s Article 9(4) escapes explanation. Joseph’s commentary on *Rameka* provides further support for the notion that judicial review does not provide an adequate remedy:

> Mr Lallah’s point (ii) seems fair, excepting the fact that Parole Board decisions were subject to judicial review. Judicial review however does not entail a full hearing, and so did not, in Mr Lallah’s view, provide an adequate substitute for the due process requirements of Article 14.

The standard test in Covenant jurisprudence is that futile remedies do not need to be followed. The prime difference with judicial review is that habeas is a writ of

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597 Note 335, above paragraph 21 and footnote 75.
598 Ibid, 6.3.
600 Joseph, note 400, above.
the old prerogative writs of mandamus, certiorari and prohibition (effectively now all available as judicial review) were discretionary remedies only, and in the circumstances an eight year delay would require serious explanation. The Committee rightly observed the Author did not seek to appeal his recall in 1996. He was hardly likely to have known he could on the basis of a phone call and 20 minutes legal advice. As s 68 Parole Act provides only 28 days to appeal and with no provision for an extension, judicial review was the only remedy available. Given the Committee's observation that '[f]rom 9 December 1996 until the present [Nov 2007], the Board reviewed the case every six to twelve months', what was the point of review eleven years after the recall?

In respect of the interim order, the communication argued that no order had ever been made; there was merely a warrant. The failure to issue an order was fundamental as, in its absence, the Chairperson could not have been satisfied to the requisite standard of 'immediate risk', particularly in light of the fact that only the day before the warrant the Author had been released from prison. The warrant, without an underlying order, had the appearance of a rubber stamp process. An order and a warrant are two distinct statutory processes. I cited State of Punjab v Sukhpal Singh, where the Supreme Court of India, in a preventive detention terrorist case under the National Security Act, limited its role to ascertaining compliance with procedural requirements under the Constitution of India, stating:

(2) Articles ... 22(5) of the Constitution required any authority detaining a person under preventive detention to communicate as soon as may be to the detainee the grounds for the order and to afford the detainee the earliest opportunity to make a representation against the order. Failure by authorities to deal with the representation expeditiously would vitiate the detention order...

(3) State security was the most important goal of the state but there were other important values. It could not subvert personal liberty which was a fundamental right guaranteed by the Constitution. Libertas inestimabils res

requirement, in article 5, paragraph 2 (b), of the Optional Protocol, to exhaust 'all available domestic remedies' not only refers to judicial but also to administrative remedies, unless the use of such remedies would be manifestly futile or cannot reasonably be expected from the complainant.'

602 Manuel v New Zealand, paragraphs 3.6, 4.24.
603 State of Punjab v Sukhpal Singh 1990 AIR 231 1989; SCR Suppl. (1) 420; 1990 SCC (1); 35 JT 1989 (4) 95; 1989 SCALE (2) 731.
est (liberty was an inestimable thing above price) and Libertus omnibus rebus favorablier est (liberty was more favoured than all things). Where a procedure was prescribed for depriving a person of his liberty it was the court’s duty to ensure that the safeguards of the law had been scrupulously observed.

[emphasis added]

Such stirring words obviously did not impress the former Chief Justice of India, Mr Bhagwati, or any other Committee member. I also cited Clark and McCoy to the effect that a magistrate is expected to follow established legal procedures, and a failure to follow mandatory procedures will indicate a lack of jurisdiction – in particular, where relevant documents from the proper persons are a foundation for detention, these must be produced in their correct form. Similarly, where the jurisdiction to act must be exercised within a specific time frame, if the decision is made outside of that time frame it will be regarded as having been made without jurisdiction. On an application for a writ of right rather than discretionary judicial review this should have been a winning point. This principle also is set forth in Re Frazer: Ex p McCarroll, which held that where there is authority to issue a warrant it must be current and, if based on a previous order or decision, that underlying order must also either be current, or be in existence when the warrant is issued. In the case of Mr Manuel, only Justice Thorp, the Board Chairperson, knew of the interim order (if there was one). Thorp J neither issued nor delivered an order, which ought to have been interpreted as a failure to comply with mandatory requirements.

In respect of the arbitrary detention admissible issue, my submissions had also relied on the Court of Appeal’s holding in Stafford, in which Bingham LCJ and Buxton LJ, referring not only to the initial stage of recall but also to the substantive imprisonment of the appellant, said:

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604 Correct spelling different usage.
605 David Clark and Gerard McCoy, Habeas Corpus: Australia, New Zealand, the South Pacific (Federation Press, 2000), 165.
606 Ibid, p 152.
607 Re Frazer: Ex p McCarroll (1951) 51 SR (NSW) 234 (FC).
608 In Frazer, Street CJ (Owen and Herron JJ concurring), quoting from Dixon J and Williams J, said that a certificate is not issued until delivered, and that issue included delivery, p 238. Cited by the ECHR at paragraph 22 of Stafford note 119, above.
The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law. I hope that the Secretary of State may, even now, think it right to give further consideration to the case.

Miller J echoed these sentiments at the first habeas hearing, stating: ‘I hope that the Parole Board will take a fresh look at the justification for his continued detention.’ Why the HRC failed to articulate reasons for its dismissal of this argument is concerning. The dismissal effectively gives a right to the Parole Board that no other administrative tribunal possesses: a draconian power to imprison without trial, and deny rights merely because an individual was previously convicted. This is hardly Covenant jurisprudence at its best.

As for the apparent bias of the Chairperson sitting on both the interim and the final order, regrettably I could not cite the Australian High Court judgment in Antoun v The Queen, where a similar point was successful, because that judgment issued well after submissions in Manuel were closed.

What I found most disturbing about the treatment of Mr Manuel was the nexus found between the minor offences and murder. I had argued that a nexus to murder required a ‘serious offence’, which under the statutory definition means an offence with a minimum of two years’ imprisonment as the penalty. None of Mr Manuel’s offences upon which the recall was based reached that threshold. Again, no articulation as to why the Committee did not accept this argument was forthcoming. Indeed, the Committee seems to have been influenced by Mr Manuel’s post-recall behaviours, primarily his having consumed cannabis, a very common problem with bored long-term prisoners. Contrast Kurariki v Manager of Mt Eden Prison, with Mr Manuel’s cannabis use. Mr Kurariki was convicted of manslaughter when he was 12 years of age. He was sentenced to seven years' imprisonment. He was released on parole and then recalled, essentially for

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610 Note 433, above. paragraph 41.
612 Antoun, note 568, above Gleeson CJ [1]: … The sole ground of their further appeal to this Court is that the trial judge conducted himself in such a way that a fair-minded observer might reasonably apprehend that he might not bring an impartial and unprejudiced mind to the resolution of the question whether the appellants ought to be convicted…
613 Note 566, above.
consuming cannabis. Unlike Mr Manuel, however, Mr Kurariki’s cannabis consumption was linked with his manslaughter conviction directly (according to the Probation Officer’s affidavit supporting the recall).615 The Court in Kurariki suggests that, assuming the Probation Officer’s suspicions are correct, the threshold issue is whether there is a sufficient evidential foundation for concluding that Mr Kurariki’s cannabis consumption posed an undue risk to the safety of the community.616 The Court issued a writ of habeas corpus on the conclusion there was no rational basis for the Panel Convenor to link evidence of consumption of cannabis with presentation of an unjustifiable, excessive or unacceptable risk to the community’s safety.617

Recalling Bhagwati, Chanet, Ahanhanzo and Yrigoyen’s concern with a 20 per cent risk in their dissent in Rameka, I asked myself, what happened to those dissenters when confronted with the facts of Manuel?

Additionally, as the recall was arguably for offences Mr Manuel might commit in the future, (and especially since he served his time for the offences he had committed and had been released—reversing his car, in drunken state, over his sister after a dispute, knocking her unconscious, and his alleged assault on his mother) for which arguably a mere eight per cent risk of re-offending was the correct figure for the members of the group Mr Manuel belonged to.618 The Parole Board had found that his conduct indicated likely further offending on the balance of probabilities. The High Court in its first decision had said that on the apparently escalating risk of offending, it was open to the Parole Board to conclude that he posed a serious risk of harm to others, but Miller J hoped it would reconsider. That analysis still needed to satisfy the balance of probabilities in domestic law and on actuarial analysis 8% does not satisfy that test, however low it may be. In hindsight, I should have laid more emphasis on that point. Similarly, relying on Rameka dissenting views it is also a breach of the presumption of innocence, as well as a double jeopardy, to issue a recall on the basis of a risk of future

615 Ibid, paragraph 13.
616 Ibid, paragraph 20.
617 Ibid, paragraph 27.
618 Manuel v New Zealand, paragraph 3.5.
offences. A real risk of re-offending for an offence sufficiently connected with murder was not present to permit recall.

**Conclusion**

The questions of whether a minimum 14-28 day detention without access to a court is arbitrary, and also discriminatory, remain unanswered for another communication another day.

Whilst Mr Manuel had an eight per cent risk of re-offending at the time, (and was the one in twelve that did re-offend for minor, but not serious offences i.e. with 2 years plus maximum prison sentences) plus the pivotal issue for the Committee was had he committed nexus offences, the absence of reasons as to why there was such a nexus makes the views hard to understand. A crumb of comfort exists in that, in principle, based on the *Stafford* argument, a recall may be considered an arbitrary detention. This fact does imply that a ‘clean skin’ with no further offences would have a better chance with this argument than did Mr Manuel. Whilst I learnt to be more careful with exhaustion of domestic remedies, and structure of argument, it is difficult in any forum to necessarily get that right, except in hindsight. The Committee’s brief views, and lack of analytical reasoning, do not assist in writing better communications.

Ironically, Mr Manuel will find his next parole application extremely difficult. Mr Manuel was responsible for a second death, this time by vehicular manslaughter whilst drunk in 2009; he received 8 years with a minimum non-parole period of 4 years. Ten years inside on recall for much lesser offences than manslaughter still seems wrong. If he had been released earlier whether he would have still gotten drunk years later and committed vehicular manslaughter is of course pure speculation, as is whether he will ever be released again.

In suggesting an advance of human rights at least in *Kurariki v Manager of Mt Eden Prison*, the consumption of cannabis was not causally linked with the prisoner manslaughter offence and Mr Kurariki was released on a writ of habeas

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619 Note 614, above.
corpus. In the Supreme Court in December 2012 in *Kim v Prison Manager*, habes was refused for an extradition client sought for murder in China, but on the narrow domestic view of *Manuel*, leave to appeal was given on the basis that the correctness of the *Manuel* Court of Appeal judgment was in issue, but in *Kim* for reasons other than I argued, the Court considered that the challenge to the extradition provisional arrest warrant was capable of fair determination on the basis accepted in *Manuel*. The Supreme Court therefore did not need to consider whether *Manuel* was correctly decided, albeit it considered it had given leave on that basis.

Chambers J in his dissent puts the current *Manuel* dilemma wrongly but clearly shows the dilemma has not ended:

> [75] I regret that I cannot agree with the majority's approach. As I understand it, they consider it necessary for a judge on a habeas corpus application to enquire into the validity of decisions that lie upstream of apparently regular warrants (such as Judge Cunningham's warrant of detention in this case) the very thing which *Manuel* said would be "rare". The majority have in effect now determined two of Mr Ellis's grounds for judicial reviews in Mr Kim's as yet unheard application for judicial review and decided against Mr Kim on those. Had

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**Note 170, above.**

The leave question is set out at paragraph 62 in the dissenting judgment of Chambers J:

> "Whether the Courts below were correct to dismiss the proceeding because the alleged deficiencies in the request to surrender and the application for a provisional warrant were not suitable for determination on a habeas corpus application."

That was a surprise to me I thought we had leave to argue that the threat of the death penalty and torture in China following a recent judgment of should have been considered by the District Court.

My submissions included:

In *Israel v Kazakhstan CCPR/C/103/D/2024/2011* (2012) the United Human Rights Committee said: (Article 6 relates to the Right to Life, cf s 8 NZBORA, and Article 7 relates to the Prohibition of Torture and other Ill Treatment, cf s 9 NZBORA):

> The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the author's extradition that there were widely noted and credible public reports that China resorted to use of torture against detainees and that the risk of such treatment was usually high in the case of detainees belonging to national minorities, including Uighurs, held for political and security reasons. In the Committee's view, these elements in their combination show that the author faced a real risk of torture in China if extradited. Moreover, it is clear that the author was sought in China for serious crimes, and could face a death sentence there. While a statement was made by the Chinese authorities in their request of extradition that the author would not be sentenced to death (see para. 2.2 above) and the State party did not address this issue, the Committee considers that a risk of conviction and death sentence being procured through treatment incompatible with article 7 of the Covenant is not removed. In the circumstances, the Committee is of the view that there is also a risk of a violation of article 6 of the Covenant.

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**Paragraph 29.**

**Note 170, above.**
Mr Ellis chosen to rely on more of his judicial review grounds on the habeas corpus application, the Court would, on the majority’s approach, have to inquire into those as well. Habeas Corpus becomes as broad as the applicant wants to make it and becomes in effect indistinct from judicial review – the very antithesis of what Manuel held. The sheer depth of the analysis the majority’s approach has entailed is, to my mind, inconsistent with the nature of habeas corpus as explained in Manuel – its tight time limits, the fact that the jailer is the only contradictor and the inability of anyone save the applicant to appeal. But since mine is a minority position, I see no point explaining further my points of difference from the majority’s reasoning.

It does beg the question of why leave to appeal the original Court of Appeal judgment in Manuel was refused. But in December 2012 in Kim v Prison Manager, leave was granted by the Supreme Court on that very issue. Human rights do indeed seem to evolve. Obviously the domestic meaning of Manuel has now changed, and could now be challenged in the Supreme Court in a suitable case.

Note 170, above.
Chapter 9—EB v New Zealand—Delay in investigating alleged child sexual abuse

Introduction

This family law case—a very unusual legal area for me—was the second case where the HRC found a breach of the Covenant from NZ, and my second win. I became involved when the case first reached the Court of Appeal. Unlike Rameka, which garnered four domestic academic articles,625 EB has received some comment in international literature only, including attention as an undue delay case,626 and appears in the International Human Rights Reports.627 Andrew Legg628 noted the HRC was not very deferential to NZ, regarding itself as best able to determine the proper length of proceedings, unusual in the context of respect for the State party’s margin of appreciation.629 Also interesting are the HRC views, and what happened after.

Factual background

As is customary with NZ cases involving children, all names were suppressed in this case. Accordingly, my client, the father of the children involved, was known as ‘ER’ in the domestic proceedings, and ‘EB’ before the HRC.

Mallon J, effectively the last Judge considering the case, in paragraph 2 of her judgment ER v FR630 says, there is some considerable history to this case, then

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625 See Chapter five above.
629 See the criticism of the analysis of the mostly European approach to the margin and the comparison with the HRC and the Inter American Court of Human Rights in Kanstantsin Dzehtsiarou, Book review of Andrew Legg’s The Margin of Appreciation in International Human Rights Law, Deference and Proportionality (Oxford University Press, 2012).
spends the first 57 paragraphs of her written judgment relating to March 2009. Therefore only a brief synopsis is required here. Two prime issues are of importance: allegations of sexual abuse made against ER, especially by his son many years after ER had made applications for access to his children, and the length of time it took the NZ Police and the Family Court to conclude that he did not commit sexual abuse.

In 2000, ER and his wife, “FR”, separated. They had two daughters (born in 1990 and 1994), “C” and “S”, and one son, “E” (born in 1997 and the subject of the communication). From November 2000, FR refused ER access to the children. The same month that FR began to refuse him access, ER applied to the Family Court for access to his children. In May 2001, FR made an initial statement to the police, alleging that ER had sexually abused his two daughters. In June 2001, she began making a further statement to the police, eventually completing it in October 2001 after several interviews were held.

The police investigation ran from June 2001 to October 2002. Four evidential video interviews with the two daughters were undertaken between June 2002 and October 2002. In June 2002 and in March 2003, a clinical psychologist prepared a report as directed under section 29A of the Guardianship Act. The medical evidence firmly concluded the daughters were virgins. On 30 January 2003, the police determined that no charges would be pressed against the author.

From 24 to 28 March 2003, the Family Court heard the original access application filed by ER in November 2000. Before ER’s evidence, FR and the clinical psychologist gave oral evidence and the evidential videos were played, as were the videos of interviews of the author by the police in the presence of the parties and counsel.

631 Under the Guardianship Act 1968, s16B provided, at material times, as follows:
(1) This section applies to any proceedings relating to an application made under this Act for an order relating to the custody of, or access to, a child … (2) Where … it is alleged that a party to the proceedings has used violence against the child or a child of the family or against the other party to the proceedings, the Court shall, as soon as practicable, determine … whether the allegation of violence is proved.
632 Ibid, s 29A provided for medical or psychological reports to be made available to the Judge.
Some three years after the access applications, on 24 June 2003, the Family Court dismissed the application for access under section 16B of the Guardianship Act 1968.\textsuperscript{633}

Notably, Walsh DCJ was not satisfied, on the balance of probabilities, that ER did in fact sexually abuse the children; however, he considered that the author nonetheless posed ‘an unacceptable risk’ to the safety of the children. He determined that ‘whatever in fact took place’ between the author and the children ‘had a lasting and profound impact on them.’ The children had expressed the wish not to have contact with their father. Under these circumstances, Walsh DCJ concluded that it would not be in the interests of the welfare of the children to grant access to ER. Walsh DCJ also noted that the proceeding had unfortunately become prolonged, and that ‘[t]hroughout these proceedings there has been a concern about delays in getting this matter on for hearing’. Walsh DCJ noted the difficulties posed in resolving access issues when sexual abuse allegations required police investigation.

ER appealed Judge Walsh’s decision to the High Court. Mr Bott (my chambers colleague) advanced domestic and international arguments on the basis that the provisions of the Covenant, and the European Convention on Human Rights,\textsuperscript{634} as interpreted in \textit{Sahin v Germany}, disclosed a fundamental parental human right

\textsuperscript{633} \textit{ER v FR}, Family Court, Wanganui, Walsh DCJ, 24 June 2003.

\textsuperscript{634} Whilst NZ is not a party to the European Convention on Human Rights I find judges pay more attention to judgments of the ECourtHR, than to the HRC especially at lower levels of the Court structure. Given there is a European Court of Human Rights rather than a Committee and especially when a Grand Chamber sits with 17 judges it is hard for domestic judges to ignore. But some judges don’t know what the HRC is, and its importance, so it is easier to ignore. Whilst not binding the ECourtHR is nevertheless highly persuasive. The Supreme Court noted in \textit{Siemer v Solicitor-General [2010] 3 NZLR 767 (SC)} paragraph 21 the two treaties in the same sentence ‘Neither the International Covenant on Civil and Political Rights nor the European Convention on Human Rights provide for a right to trial by jury.’ The Minister of Justice in his replies to oral questions HR/CT/720 in New York on NZ’s fifth periodic report (discussed more fully in chapter 10) said ‘The judiciary had frequent recourse to the Covenant, which had been cited in more than 150 decisions of the superior courts, and to the Bill of Rights Act, which had been referred to in 2,500 decisions in the last decade.’ So on average 15 times a year the covenant is cited hardly “frequent recourse”. A search of LexisNexis on 15 January 2013 for the previous 10 years revealed 333 case hits for European Court, and only 111 for the Human Rights Committee whilst not scientific searching a 3 times better rate for Europe is explainable as many more lawyers are familiar with British case law, and its overshadowing by the European Convention on Human Rights, and therefore more likely to be aware of Strasbourg case law than Covenant, and cite European Law. ECHR law is also more detailed. Also see note 638, below.
of access to children, which had been insufficiently taken into account in the earlier proceedings in Family Court. On 7 November 2003, Neazor J of the High Court upheld the Family Court’s decision with respect to access to the two daughters, but decided that the Family Court should reconsider its decision with respect to access to the son, because no allegations of abuse against him had been made.

**Court of Appeal**

I applied on behalf of ER to the Court of Appeal for leave to appeal the High Court’s decision with respect to the daughters, seeking a Declaration of Inconsistency of the relevant provisions of the Guardianship Act with the Covenant. ER cited to the Court of Appeal the ECHR’s judgment in *Hendriks v The Netherlands*, where the Court observed:

> “…the law should establish certain criteria so as to enable the courts to apply to the full the provisions of article 23 of the Covenant. It seems essential, barring exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact between the child and both parents.”

The Court of Appeal, on 6 April 2004, conducting a full oral hearing on the application for leave refused leave to appeal, holding that a Declaration of Inconsistency could only be made with respect to the NZBORA. Further, it held that, in any event, neither the Family Court’s decision nor the process it followed in reaching it was inconsistent with article 23 of the Covenant. It considered the Committee’s Views in *Hendriks* inapposite to the present case, reading the Hendriks report as referring to the need to establish criteria whereby access is refused only where such refusal is in the interests of the child. *Hendriks* did not expressly require that a Court considering access address individually all possible forms of indirect access before refusing access completely.

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635 *Hendriks v The Netherlands* 5 EHRR 223 (1982).
636 Ibid, paragraph 10.4.
637 Articles 23 and 24 overlap, Article 23, provides for respect the family as a fundamental group, and Article 24 protection of the child’s rights to be part of his family (including the father).
638 *ER v FR* [2004] NZFLR 633 (CA).
E’s allegation of sexual abuse

Two weeks later, on 21 April 2004, and some four years after ER’s original access application, the son, E, (now almost twice the age he was when the case started) made allegations of sexual abuse against ER. The police reopened the investigation into ER, and an interview with ER was conducted. In May 2004, the Family Court adjourned the access application with respect to the son, which had been remitted by the High Court, on account of the police investigation. In September 2004, the police decided not to lay charges against ER. In November 2004, counsel for FR (the children’s mother) recommended that the Family Court obtain an updated psychological report in relation to the son. Between May 2005 and 6 July 2006, attempts were made by ER’s then counsel to agree on the terms under which the report would be obtained. Walsh DCJ, by minute on 6 July 2006 to all counsel, raised his concerns regarding the amount of time the matter was taking to progress to hearing. He requested all counsel to focus on the need to complete all steps, tender any relevant evidence and have the issues heard. Eventually the report was completed on 27 October 2006.

The HRC’s views of March 2007 were released a month or so later, and factored into the rehearing.

A rehearing took place in the Family Court over the course of a week in August 2007. Mr Bott and I were counsel for ER. ER was granted access to E, but only by letter. That limited access judgment was appealed to the High Court and was heard in November 2007.

Events following the High Court judgment are dealt with below.

The HRC communication

The Committee articulated the complaints of author EB (formerly ER) at paragraphs 3.1-3.6, saying violations of Articles 2, 14(1), 17, 23, 24 and 26 were

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639 E was born 21 June 1997.
640 EB v New Zealand (“EB”).
claimed on EB’s own behalf, and violations of Articles 17, 23 and 24 were claimed on behalf of EB’s children.

Article 2 breach alleged and dismissed

The HRC record stated that EB alleged a violation of Article 2 (an allegation also made in J.S. as further discussed in Chapter ten below) in conjunction with the other above-mentioned Articles on three distinct bases:

1. The State party failed to provide for an effective remedy for the breaches of substantive rights detailed in this case;

2. The Court of Appeal decided it had no jurisdiction to grant a declaration that New Zealand law was inconsistent with the Covenant, or to grant an effective remedy based thereon;

3. The State party failed to ensure that the Covenant’s guarantees are either expressly incorporated in its law, or to ensure that its law was interpreted so as to respect and give effect to the Covenant rights of the author and his children.

The HRC dismissed the Article 2 claim as ‘insufficiently substantiated.’\(^{641}\) To avoid similar non-consideration of a difficult issue again in J.S. a substantially more elaborate claim was set forth in that case as described in the next chapter.

Article 17, 23 and 24 breaches alleged

The Article 17 claims relied for precedent on European law,\(^ {642}\) which requires exceptional circumstances to justify complete termination of parental rights of access; no such exceptional circumstances existed in EB’s case. By parallel reasoning, the author claimed a violation of Article 23, right to family and a violation of Article 24, child’s right to be part of his family.

\(^{641}\) Ibid, views paragraph 8.5.

\(^{642}\) Gorgulu v Germany ECHR, Application No. 74969/01, 26 February 2004 at paragraph 48: ‘The Court recalls that it is in a child’s interests for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances.’
Dealing with the claims apart from undue delay and fair trial. The Article 26 discrimination claim was made up of two parts. First, the author argued that the Court of Appeal’s construction of the Guardianship Act created an unjustified distinction between persons found not to have committed sexual abuses, and those that had, ironically treating those who had committed sexual abuse with more favour than those who had not committed abuse. This strange and discriminatory result comes about because a Court on an access application is required to consider a series of specific issues where domestic violence or abuse has taken place, but where no such acts have been proved to have taken place, the matter is left to the court’s residual discretion. Whilst discretion could be seen as more favourable, ER would have been better off under the statutory formula.

Strangely, on the second branch of the Article 26 claim, the Committee only partially recorded views on what I had perceived as a sure winner. The second part of the Article 26 argument was that the history of EB’s case revealed systemic discrimination in Family Court matters in the Privy Council and Supreme Court. The Court of Appeal judgment was 6 May 2004, but Privy Council appeals were barred from 1 January 2003 and after by s 42 of the Supreme Court Act 2003. Prior to the Supreme Court Act 2003, appeals in civil matters of $5,000 or more, were a matter of right to the Privy Council. All other appeals were at the discretion of the Court of Appeal or by special leave of the Privy Council. Under the new Supreme Court Act, family matters continued to receive no particular recognition; instead, matters of commercial significance are given great weight in considering leave to appeal. Section 13(2)(c) highlights this category of cases for special consideration as follows: ‘the appeal involves a matter of

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Note 631, above.

Privy Council: 1910 No 70 (L3)—New Zealand (Appeals to the Privy Council) Order 1910 (SR & O and SI Rev 1948, Vol XI, 409; SR 1973/181) I had in Bennett v Superintendant, Rimutaka Prison (No 2) [2002] 1 NZLR 685 (CA), challenged the Rules as unlawfully discriminatory favouring commercial matters over human rights, the Court of Appeal decided that was a matter for the Privy Council. The preamble to the 1910 Order in Council records the new provision for rules to appeal to the Privy Council that it was ‘expedient with a view to equalising as far as may be the conditions under which His Majesty’s subjects in the British Dominions beyond the Seas shall have a right of Appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such Appeals’ The point was raised in the HRC in EB as the Supreme Court had no jurisdiction to grant leave in Family case. The Supreme Court Act was amended to allow leave in Family Cases.
general commercial significance’. There had therefore been no jurisdiction for a right to appeal family matters to the Privy Council, and no jurisdiction for the Supreme Court to hear family matter appeals or appeals from first instance district Court appeals until the Judicature Amendment Bill (No 3) 2005 was passed.  

Indeed as matters of family law such as access to, and custody of, children exclusively begin in the Family Court, leave is required even to appear before the Court of Appeal. By contrast, large commercial claims or serious criminal trials can and do start in the High Court, and therefore have a right of appeal to the Court of Appeal. The lack of categorisation of family matters as equally deserving of attention by two superior Courts was discriminatory. In the HRC’s views, no reference at all was made to the primary submissions, but the supplementary submissions were considered. The author provided a copy of the Judicature Amendment Bill, introduced into Parliament in May 2005, whose object is to alleviate the Court of Appeal’s workload while simultaneously increasing access to it, in order to avoid ‘an erosion of access to justice’. On this point, the Committee stated:

8.4 As to the claim under article 26, the Committee is of the view that the author has not made out a sufficiently substantiated argument as to discrimination suffered by him in the present case, and considers that the claims advanced under this head are better addressed in the context of the claims under articles 17 and 23 of the Covenant.

With respect, as the discrimination is systemic and applies to all family cases, including his, EB had no right to appeal to the Supreme Court: what more substantiation is required beyond the words of the statute? The implied recognition in the Judicature Amendment Bill that the discrimination was to be removed should also have supported the argument that this discriminatory scheme was a violation of Article 26. However, whilst the Committee no doubt viewed the law as subject to remedial change shortly, that did not assist EB.


646 EB, paragraph 6.
How the claim is better advanced under Article 17 and 23 still escapes me, especially as the claims under Articles 23, 24 and 26 are then dismissed because EB has not got the consent of his children to raise claims under those articles (or Article 17).

… Nothing in the file indicates that the author ever sought to obtain his children’s authorization to act on their behalf, although it transpires from the material before the Committee (see para 2.4) that the children had expressed the desire not to have contact with their father. In the circumstance, the Committee considers that absent such authorization, the author has no standing to advance claims under articles 17, 23 and 24 on behalf of his children.

This lack of consent finding in respect of his children, is a rather chicken and egg argument: how do you seek consent or get such authorization, when you have had no access to your children for the last five years? This is, after all, the very essence of the complaint. The Committee itself even noted that ‘in principle, a non-custodial parent has sufficient standing to raise such issues on behalf of his or her child(ren).’

In both domestic law, and arguably Covenant jurisprudence, EB was still a guardian, and could litigate on the children’s behalf, something the Committee did not consider. The absence of an oral hearing prohibited any opportunity to answer questions from the Committee that might have clarified such issues prior to judgment being rendered. However, given the Committee’s ultimate findings, this finding that the author was not authorised to make claims on his children’s behalf absurdly undermines the Committee’s own views. The Committee itself noted that once parental alienation occurs, then the longer the delay, the more both domestic and Covenant rights become nugatory.

9.3 The Committee refers to its constant jurisprudence that “the very nature of custody proceedings or proceedings concerning access of a divorced parent to [the parent’s] children requires that the issues complained of be adjudicated expeditiously”. The failure to so ensure may
readily itself dispose of the merits of application, notably when – as in the present case – the children are of young age, and irreparably harm the interests of a non-custodial parent. The onus is thus on the State party to ensure that all State actors involved in the resolution of such issues, be they the courts, the police, child welfare authorities and others, are sufficiently well resourced and structured and establish their priorities in order to ensure sufficiently prompt resolution of such proceedings and safeguard the Covenant rights of the parties.

[Emphasis added]

First claim of Article 14 breach—undue delay

EB complained of a two-fold violation of the fair trial right in Article 14. First, given the nature of the parental and child interests at stake, the protracted proceedings violated the right to duly expeditious determinations. In particular, the tardiness of the police in investigating the two abuse complaints (each eventually proving to be unfounded) contributed to the delay. Relying on the Committee's views in Fei v Colombia,651 EB argued that the lapse of two years to determine the access application for the daughters, and the then-current-and-continuing lapse of over three years to determine the application for access to the son, were each in breach of rights of prompt trial. The Committee agreed:

9.4 ... In particular, the State party has not shown the necessity of police investigations of the extended period of time that occurred in this case in respect of allegations which, while certainly serious, were not legally complex and which at the factual level involved assessment of oral testimony of a very limited number of persons. The procurement of psychological reports to assist the court has also been particularly prolonged. The Committee notes further the concerns expressed by the domestic courts as to the passage of time in the proceedings. It follows, given the priority accorded to resolution of such matters and in light of the Committee's jurisprudence in comparable cases (see Fei), that the author's right to an expeditious trial under article 14, para 1, of the Covenant was violated with respect to the application concerning S. and C., and continue to be violated given the still outstanding (as of September 2006) resolution of the application concerning E.

[Emphasis added]

The winning issue speaks loudly for itself; lengthy police investigations, and psychologists' reports that took years, perhaps made the result inevitable. In light

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of these facts, the Government’s rejection of the Committee’s views, discussed below, is alarming.

_Sole dissent_

There was a single dissenting member on the HRC. Ms Wedgwood’s (USA) dissent was spirited and particularly attracted the State Party in its response. The dissent is contained as normal as an appendix to the views. She stated the Committee had failed to fully explain the facts of the case, and that the potential gravity of harm must bear on both the process of investigation, as well as the remedy granted. She noted the first legal step taken within the family was not EB’s seeking of access, but a protection order sought by FR; only after the protection order was issued did EB apply for access. Of course, one could argue that this was simply the logical unfolding of events – a parent would not need an access order before steps were taken to bar that parent from access. It is not uncommon for parents subject to protection orders to fail to fight them on the first occasion, due to unfamiliarity with the legal system and a (perhaps misguided) hope of reconciliation. The literature is replete with articles including whether accusations made by spouses are true or not, as well as articles on the veracity of sexual misconduct allegations. In the particular case of EB, it is noteworthy that on a charge of breach of the protection order, the Judge found no cause to answer it because the Judge disbelieved the allegations made by the mother.

Ms Wedgwood continued to focus on the potential gravity of the alleged offenses, stating:

> the Family Court [Walsh DCJ] was confronted by several disturbing allegations, “C” the eight-year-old daughter reported in two interviews in June 2001 and October 2002 that her father had had genital contact and sexual intercourse with her on a number of occasions. “S” the eleven-year-old daughter also stated that her father had touched her sexually on repeated occasions.

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652 pp 17-20. There are no paragraph numbers.
653 E.g. Darryl Richardson, _The Effects of a False Allegation of Child Sexual Abuse on an Intact Middle Class Family_ (MSc Thesis, Eastern Washington University, 1998) http://www.ipt-forensics.com/journal/volume2/j2_4_7.htm Accessed 23 May 2013—showing one US study of 1.1 million allegations of which only 20% were substantial enough to be included in a national study.
It is important to keep in mind that the allegations were not just of touching, but included repeated rapes. Ms Wedgwood made no comment on the medical evidence, which firmly concluded the daughters were virgins; it seems the presumption of innocence receded into the background. Ms Wedgwood further stated the Family Court did find that the father’s admitted actions and ‘lack [of] insight as to how the children have been affected’ justified the denial of any right of visitation with the children.

This is similar to Walsh’s DCJ’s attitude toward ER in the Family Court. In a chronology produced for the Principal Family Court Judge to aid a response by the State Party to the HRC, a sealed memorandum came to light that revealed significant concerns regarding Walsh DCJ’s lack of impartiality to conduct the original hearing (an issue discussed further below).

Ms Wedgwood had further concerns regarding assessing delicate family factual situations, and the potential trauma on the children, and also expressed concern regarding the son’s allegations (the actual substance of the case). She stated that it was not a simple custody dispute, and therefore the Committee should not interfere. She provided no answer to the majority view that delay irreparably harms the father, making no reference to the singular absence of sufficient police officers, the failure of psychologists to report in a timely fashion, or the absence of any medical evidence to support the sexual abuse allegations. Once again, the absence of an oral hearing in these proceedings prohibited any chance of providing explanations regarding matters of a concern to Committee members.

**Second claim of Article 14 breach – no lawful, competent court**

In addition to the undue delay claim discussed above, EB argued that there had been a separate violation of Article 14 because EB’s appeal was not heard before a lawful, competent court, as the High Court Judge in question (Justice Neazor) was not lawfully appointed. EB argued that the Judge continued to act five years after the formal retirement age of 68, while applicable legislation only permits two years of additional work. This alleged breach was dismissed as not raised before
the domestic courts. The Committee did not respond to the extensive submission that pursuit in domestic courts, where no remedy for Covenant breaches is available, was pointless. The legal arguments in NZ ran in the Wikio judicial review, and under the covenant is the same: does this form of appointment breach judicial independence? In a recent Privy Council case, the Chief Justice of the Cayman Islands attempted to litigate a similar point.

This very issue of an unlawful court resurrected itself in the rehearing in the Family Court, discussed below.

**State Party’s Response to the HRC’s Views**

The State Party in its response to the HRC’s views said that the NZ police investigations in this case had been a complex matter, and that they had conducted a thorough review of the four separate investigations relating to the author. The State Party did not consider speed to be the paramount consideration, and argued that it was in the author’s interests for the investigations to be carried out in a manner that respected both due process and matters such as evidential integrity. Accordingly, the Government of NZ felt the delay was not unreasonable, and therefore it did not accept the views of the Committee that a breach of Article 14 had occurred. The response also noted that the Family Court was running a pilot programme called ‘Parenting Hearings

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654 **EB v New Zealand**, paragraph 8.2. However it was futile as the same point was dismissed in Wikio (see next footnote).

655 My client could have sought prohibition in respect of that challenge, but he elected not to do so as I expected Wikio and Beckham v Attorney General High Court, Wellington, McKenzie J, CIV 2004-485-2198, 11 July 2008 a judicial review to run faster; however, that case got held up with legal aid delays. See the discussion after note 672.

656 **Chief Justice of the Cayman Island (Appellant) v The Governor and The Judicial and Legal Services Commission [2012] UKPC 39**. The Chief Justice wanted a Judge who had reached 65 to be reappointed until 70, the Governor on advice decided to make a shorter appointment. The Chief Justice challenged this based on the need to preserve judicial independence so that Grand Court Justices enjoy security of tenure free from discretionary incursion by the Executive. The Chief Justice tried to use the leapfrog provision of section 4 of the Judicial Committee Act 1833 which provides a mechanism for bringing any issues before the Judicial Committee which a petitioner wants determined by the Committee: it is intended to be limited to issues which cannot be determined through the ordinary judicial process. Whilst the Privy Council granted leave they then determined is was the wrong process, and the normal Court process was required, so the main issue is undetermined.

Programme: Less adversarial children's hearings aimed at resolving cases in a less adversarial manner and reducing delay by shortening families' involvement in litigation.658

Author’s Follow-up Response to the State Party’s Response

The Author responded to the Government’s alarming rejection of the Committee’s views by alleging a lack of good faith, or even bad faith.659

In 2010 the Committee in public session in New York at which I was present and had mentioned to get the EB case as number 4 of the list of issues on which the Committee would question the Government.660 The questioning included a request for an update from Ms Keller (Switzerland).661

The Minister of Justice’s answer included that the Government did not agree with Committee’s assessment that undue delay had occurred in that case, delays reflected complexity and sensitivity. ‘Nevertheless, the Government acknowledged that the efficiency of the Family Court could be improved, and had taken concrete steps to accelerate Family Court procedures, including by promoting less adversarial hearings.’ A case-flow analysis was being done and the Court’s Rules Committee was amending its rules to allow judges to make decisions earlier in proceedings where counsel failed to take agreed steps or failed to appear.662

Mr O’Flaherty (Ireland) said:664

Lastly, returning to New Zealand’s response to the E.B. case, he welcomed the news that it had sped up the judicial matrimonial procedures in response to the communication submitted to the

659 See discussion of the shadow report in Chapter 11.
660 List of Issues to be taken up in connection with the consideration of the fifth periodic report of NZ (CCPR/C/NZL/Q/5) 24 August 2009: ‘No 4. What measures have been taken by the State party to implement the Committee’s Views under the First Optional Protocol to the Covenant in E.B. v New Zealand?’
661 I attended the issues-setting meeting, and spoke to the members of the Committee dealing with NZ, the year before in Geneva. See discussion on shadow reports in chapter 11 below.
662 Summary records CCPR/C/SR.2696, 7, 17 June 2010.
663 Ibid, paragraph 16.
664 Ibid, paragraph 48.
Committee, as it demonstrated that the Government was moving towards applying the remedy suggested by the Committee. Furthermore, the fact that the communication had had such direct results served as a useful indicator of the impact of the Committee’s work.

Ms Keller (Switzerland) with a follow up comment hit the nail on the head from EB’s perspective: She said:

With regard to the *E.B. v. New Zealand* case, she encouraged the delegation to use the example of the communication to reconsider national law and policy. It was somewhat bittersweet for an individual to have the impression of winning a case before the Committee but for no change to result in the individual’s situation.

This was wishful thinking from Mr O’Flaherty in respect to any compensation for EB, and from Ms Keller that the national law would be reconsidered.

The Committee conclusion of the fifth periodic report, the issues, and questions was:

8. While welcoming the decision of the State party to undertake a case-flow analysis of the Family Court with a view to reducing delays in issuing decisions following the views adopted in Communication No. 1368/2005 (CCPR/C/89/D/1368/2005/Rev.1), the Committee is concerned that the authors of the case have not yet received reparation. (art. 2)

*The State party should give full effect to all views on individual communications adopted by the Committee, in order to comply with article 2, para 3, of the Covenant which guarantees the right of a victim of a human rights violation to an effective remedy and reparation when there has been a violation of the Covenant.*

[**Bold** in original]

**Later events**

**Family Court judgment**

After the rehearing in Family Court as ordered by the High Court, Aubin DCJ granted EB access to his son E, but only by letter, and nearly eight years after the application was first lodged. That limited access, and also the constitutional issues raised, were extensively appealed.

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665 Note 672, below, paragraph 39.
I raised with the High Court the issue of the unlawfulness of Aubin DCJ sitting in the Family Court on the remanded case on 20 August 2007. Aubin DCJ was, like Justice Neazor, a retiree who had been reappointed for over what was the statutory period. Mallon J dismissed this claim, and it was not further appealed as ER had effectively won an access argument. I was somewhat disappointed not to make more progress on this point given the Court of Appeal’s decision in *R v Te Kahu*:

[34] The opportunity to continue working after retirement may be of much value to a Judge who is nearing retirement. Likewise, a Judge who holds an acting warrant may well wish to secure a renewal of that warrant. It is not altogether far-fetched to suppose that a Judge who became unpopular with the government of the day would not receive appointment (or renewal of appointment) as an Acting Judge. It is still less far-fetched to suppose that Judges might come to believe that. This means that there is scope for the perception that Judges who are concerned about reappointment on an annual or biennial basis, and thus may be anxious not to create any waves, are not as independent as those who have permanent tenure.

Nevertheless, the same issue surfaced again in *Wikio v New Zealand*, and in *Taito* and *Jessop* in respect of even shorter period appointments (less than 3 months).

In respect of the principal issue of access, Her Honour allowed the appeal:

[220] In my view it was in the welfare and best interests of the child for the possible resumption of contact between the son and the father to have been the subject of a plan (as proposed by Dr Parsonson) rather than to have been dismissed as too difficult or as having low prospects of success. If the view was that even one supervised contact, with a review before any further contact could take place, would cause to the son, at his age and stage, a real risk of emotional harm that was not outweighed by the long term prospects of a relationship with his father, then that could have been the end of the matter unless and until circumstances changed. If, however, the view was that the emotional risks to the son from a plan towards possible resumption of contact were low, I consider that this was

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667 *Millar v Dickson* (2001) GWD 26-1015, 2001 SCCR 741, 2001 SLT 988, 2002 SC (PC) 30, [2001] HLR 59, [2001] UKHRR 999, [2001] UKPC D 4, [2001] 1 WLR 1615, [2002] 3 All ER 1041, [2002] WLR 1615. The essence of the judgment was that Scottish temporary sheriffs were insufficiently independent of the Executive for the purposes of Article 6 of the ECHR (similar to Article 14 ICCPR) because they had insufficient security of tenure. Although the judgment did not imply that any sheriff had acted improperly, it found that it was important for the arrangements relating to judicial terms and conditions to be free of appearance of bias.
the appropriate course taking into account all the factors relevant to the son's welfare and best interests.

…

[227] The appeal is allowed. In view of the absence of a current assessment of whether there are real and material emotional risks to the son if supervised contact with the father was to be resumed in some way, the parties are to file written submissions within 30 days as to whether the proceeding is to be referred back to the Family Court and on what terms or whether the matter might be resolved in some other way.

This was a pyrrhic victory.668

Lawfully-appointed Judges

The Attorney-General had been granted leave to intervene on the issue of the independence of the Judge (in both the Family and High Courts). It had become apparent that Aubin DCJ, the Judge sitting in the Family Court, as well as being a temporary Judge, had, like Justice Neazor, not sworn his Oath of Office—a point that had not occurred to me to raise in EB. The Attorney-General at the request of Counsel confirmed Aubin DCJ (and also Justice Neazor) was not sworn (in accordance with current practices).669 The Attorney-General supported my submissions that Judges need to swear their Oaths of Office before taking up their office. The Australian High Court judgment in Forge v Australian Securities and Investments Commission,670 where a similar issue had arisen, assisted. Although the Court was unable to rule on the matter in Forge because the issue of the unsworn judge had not been raised in the lower courts, nevertheless both Glesson CJ, and Kirby J had useful dicta that supported my view. Glesson CJ said:

23. Finally, before an acting Judge enters upon the performance of duties pursuant to a commission, he or she must take the judicial oath or affirmation, which is a commitment to do right to all manner of people without fear or favour, affection or ill-will … [5]

Fn 5 Oaths Act 1900 (NSW), s 8 and Fourth Schedule [Similar wording in the Oaths and Affirmation Act 1957 NZ]

668 See below.
669 That meant 39 temporary District Court Judges were in the same position, as the Attorney-General had advised that is was not current practice to re-swear oaths.
670 Forge v Australian Securities and Investments Commission [2006] HCA 44.
And Kirby J:

269. ... Like permanent judges, acting judges are obliged to take not only the oath of allegiance but also the judicial oath (to “do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will”) [288]. These oaths are not seen as mere words. Acting judges have “all the powers, authorities, privileges and immunities and fulfil all the duties of” permanent judges...

Her Honour Mallon J held that each time a person is appointed as acting District Court Judge, that person is required to take an oath. Because that did not happen in the case of Aubin DCJ, it was necessary to consider the consequences of his failing to swear the Judicial Oath. Her Honour discusses the de facto doctrine, which she briefly says is summarised in Wade & Forsyth, Administrative Law, as applying to validate the acts of a Judge even though his or her appointment is invalid due to some unknown flaw in the appointment or authority. The actions are validated on the basis that the public must be able to rely on the acts of Judges when there is no reason to suppose that they were not validly appointed, and Mallon J concluded that the case of Aubin DCJ was squarely within the doctrine. Some years later in a currently on-going Pitcairn case it occurred to me I had missed s 26 Oaths and Affirmations Act 1957 (whose schedules include District Court Judges):

26 Effect of neglecting to take oath

(1) If any officer mentioned in this Act or in the Schedule 2 or Schedule 3 to this Act declines or neglects, when any oath required to be taken by him under this Act is duly tendered, to take that oath, he shall if he has already entered on his office vacate the same, and if he has not entered on the same be disqualified from entering on the same; but no person

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671 ER v FR, note 630, above, paragraph 116.
673 There was no discussion of Buckley v Edwards [1892] AC 387 (PC), where without legislation allowing appointment of a sixth judge, the (purported) appointment by the Governor of Worley Bassett Edwards as a sixth supreme court judge, and parliamentary appropriation of salary, was held invalid.
674 Note 346, above, paragraph 120.
675 CA1/2013 and see note 677 below.
shall be compelled in respect of the same appointment to the same office
to take any oath more than once.

The Australian judgment of *Kutlu v Director of Professional Services Review* also supports the view the *de facto* doctrine does not apply.

Whilst not agreeing with Mallon J’s conclusion, the ultimate apparent access victory precluded any further appeal at that time. I did, however, write to the Attorney-General and the Chief Justice advising them that as the *de facto* doctrine cited by Mallon J only applies up until the time *de facto* appointees became aware of the omission and all retired Judges were now on notice of the omission, the protection no longer applied.

The Covenant position is set out in GC 32/19:

The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, para 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. ... It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, *the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

*Emphasis added*

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677 I followed this up in *Mailley v General Manager Auckland Central Remand Prison*, High Court Auckland, CIV 2008-404-008316, 20 December 2008, before John Hanson J a retired Judge who had not sworn his new oath. I insisted he could not sit until he did swear his Oath. He then swore his oath in chambers. The Writ of Habeas Corpus sought was granted. In the Pitcairn Court of Appeal, all three judges were required to attend a special sitting of the Pitcairn Court of Appeal, having previously not lawfully sworn an Oath. *Warren v The Queen* [2013] PICA 1 (12 April 2013). In January 2014, Robertson P, was sworn in again for the third time as he had been incorrectly sworn in as President rather than Acting President.
The source of the General Comment appears to be an appointment requirement in a Slovakian Concluding Observation, which is exceedingly brief.678

18. With respect to article 14 of the Covenant, the Committee notes with concern that the present rules governing the appointment of judges by the Government with approval of Parliament could have a negative effect on the independence of the judiciary. Therefore:

the Committee recommends that specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence through the adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary, be adopted as a matter of priority.

[Bold in original]

I assume the Committee considered the well-known ECHR jurisprudence on the point as set out in Findlay v UK,679 which is cited in over 100 ECHR judgments.

Appeal and Cross-appeal to the Court of Appeal

E, the son, attempted to appeal the judgment of Aubin DCJ permitting limited access. The Mother did not. I was of the view that this was a surrogate attempt, and therefore argued that E might well have been parentally alienated, and a pawn of FR. I further took the view that on the statutory scheme, children only had a right to appeal from the Family Court to the High Court, but not beyond.680

Three actions were taken. I filed (1) a notice of opposition under protest to the jurisdiction, (2) an appeal against the appointment of a litigation guardian for E681 (as there was no jurisdiction), and (3) a cross-appeal on the constitutional issues of judges swearing Oaths of Office, and accepting recurring appointments as retirees.

678 Concluding Observations of the Human Rights Committee: Slovakia, 4 August 1997, CCPR/C/79/Add.79.
679 Note 160, above, 244-245.
680 73. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (Also see Bryan v the United Kingdom judgment of 22 November 1995, Series A no. 335-A, 15, paragraph 37).
681 I was conscious this argument appeared Covenant inconsistent, by limiting children’s rights.
681 E was then 12 years old.
The appeal, and cross appeal, were eventually discontinued, in part because Hammond J of the Court of Appeal believed the judgment was not yet capable of sealing as a further psychologist’s report was required. This discontinuance was negotiated, as his mother FR returned all ER’s letters, and E apparently wanted to prevent access. Short of forcing him to see his father by use of the Police, access was not going to happen in such an environment.

**Judicial Review proceedings**

Complex and lengthy judicial review proceedings have been filed following the views of the HRC. A significant concern arose from a 28 June 2001 memorandum, the contents of which were sealed and unavailable to counsel for ER until the morning of the rehearing in August 2007, which said in part:

MEMORANDUM OF COUNSEL FOR THE CHILDREN

MAY IT PLEASE YOUR HONOUR:

...

5. Detective O’Neill for the Police has stated that the Police would prefer that no access occurs between the children and their father while this investigation is being completed and at least until the father is interviewed. Detective O’Neill reported that the child, Cheyenne, disclosed feeling intimidated and threatened by the father in relation to these abuse matters.

6. As Counsel for the children I ask that your Honour direct that access be suspended.

7. Given the sensitive nature of the matters raised in this Memorandum, I have been asked by the Police not to disclose details of the disclosure to Counsel acting for the father, and accordingly I have not sent Counsel a copy of this Memorandum.

[Emphasis added]

Walsh DCJ responded to this letter by stating that he had no other option but to suspend access.

Counsel for ER then made allegations against five respondents: the Family Court, the Attorney-General, the Counsel for the Child, FR (nominally only), and Walsh DCJ. The causes of actions included (1) the tort of unlawful conspiracy
between counsel for the child, the Police, and Judge Walsh, (2) Malicious civil prosecution or abuse of civil process by counsel for the Child, (3) quashing of the suspension application, (4) quashing of the decisions contained in the minute suspending access, (5) misfeasance in a public office by Judge Walsh in respect of the application and the hearing, (6) disproportionately severe treatment under s 9 NZBORA, (7) lack of good faith by the Government in its response to the HRC and/or inadvertently misleading the Committee, and (8) domestic undue delay. The following remedies were sought: (1) judicial reviews of Judge Walsh’s actions, (2) judicial review of the Government’s response to the HRC, (3) a declaration of domestic undue delay, and (4) the award of significant damages, including special damages in respect of legal fees. The author, who was disillusioned by the years of litigation, ultimately discontinued the claim. In Chapman v Attorney-General, the Supreme Court decided compensation was not payable by the government for breaches by judicial officers of the NZBORA.

**Conclusion**

With all this litigation, a High Court appeal, an appeal and cross-appeal in the Court of Appeal, and a complex judicial review, this was a large investment in time and money for ER. Regrettably with all letters from ER to his son E having been returned, and an appeal being made by E himself to prevent access, it seemed unlikely that any access would be forthcoming. After discussions with an expert psychiatrist in the field of parental alienation, ER was invited to reconsider continuing the litigation in the light of the fact E was now 12, and that he had not seen his father for 8 years and seemed unlikely to do so, legal victory or not. That advice coincided with the final settlement of the long-standing matrimonial property aspects of ER and FR, which resulted in a shortage of funds.

It would seem the HRC at paragraph 9.3 of the views are accurate:

> The failure to so ensure [promptly] may readily itself dispose of the merits of application, notably when – as in the present case – the children are of young age, and irreparably harm the interests of a non-custodial parent.

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682 Chapman v Attorney-General [2011] NZAR 598 (SC). Counsel for Chapman has advised he will take that point to the HRC, but I have seen no sign of it.

683 Section 335 Lawyers and Conveyancers Act 2006 appears to bar contingency fees in family and judicial review proceedings.
Within any statutory recognition of Covenant rights in NZ, the views of the HRC can effectively be ignored, and indeed in this case they seemingly were. No compensation will ever be paid. This plainly demonstrated the weakness of rights protection in NZ.

The Independent Police Conduct Authority (‘IPCA’), did note the HRC comment:

75. The Authority also notes the recent findings of the Human Rights Committee in its conclusions to the fifth periodic report:

“While welcoming the initiatives taken to protect children from abuse and noting the State party’s acknowledgement of the need for addressing this issue, the Committee expresses concern at the incidence of child abuse in the State party. The State party should further strengthen its efforts to combat child abuse by improving mechanisms for its early detection, encouraging reporting of suspected and actual abuse, and by ensuring that the relevant authorities take legal action against those involved in child abuse.”

Whilst on a systemic level a full-scale inquiry into police practice was carried out, and more resources were allocated to avoid delay in the Family Court and by the police, partly due to ER’s communication, that was of little help to ER.

Whether the violation found of the Covenant and the Committee’s expected award by the State Party of compensation can be enforced, as the Optional Protocol providing the right of communication is arguably a self-enforcing treaty, and therefore part of domestic law remains untested.

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\[684\] Paragraph 18.
\[685\] The discontinuance of the claims was without prejudice to any complaint to the IPCA who in May 2010 made 34 recommendations in part one of its report accepted by the Police to undertake an extensive series of improvements to practices, policies and procedures for the investigation of child abuse.
\[685\] In part two of the IPCA’s report a further recommendation was made to extend monitoring for a further year.
\[686\] Note 62, above.
Chapter 10—J.S. v New Zealand—Habeas Corpus delay whilst Supreme Court on vacation

Introduction

This chapter canvasses Mr J.S.’s 2008 communication to the HRC (views determined 2012). Having unsuccessfully used habeas corpus to obtain Mr Sestan’s release under the NZBORA, an international challenge was made. The Author raised two main issues in his communication. The first claim alleged a failure to receive a speedy hearing before an independent and impartial tribunal due to the absence of sufficient judges in the Supreme Court to permit a vacation hearing. Interwoven with this proposition was the further proposition that NZ breached the underlying principle of the Covenant—the Rule of Law. Secondly, the communication raised the issue of the inability to obtain an effective remedy for Covenant breaches based on the status of the Covenant in NZ. In this chapter there is a continuation of the chapter 2 proposition that the Covenant is a weak tool and a breach of Article 2 was alleged. As a breach of Article 2 cannot be made on its own it needed to piggyback on to a breach of another article.

The Sestan judgments of the High Court (“Sestan HC”), Court of Appeal (“Sestan CA”), and Supreme Court (“Sestan SC”) set out the material facts of the case. They are summarised as follows.

Mr J.S. was arbitrarily detained in a psychiatric hospital from 28 October 2006 until 10 January 2007, in breach of the well-known Winterwerp principles as he


688 More accurately the week before the Christmas vacation. This failure was claimed as a breach of Articles 9(1), (4), and 14 of the Covenant.

689 This claim was articulated as a breach of Article 2(3) of the Covenant.

690 Sestan v Auckland District Health Board, High Court Auckland, CIV 2006-404-6868, Asher J, 14 November 2006 (‘Sestan HC’).

691 Sestan v Director of Area Mental Health Services, Waitemata District Health Board [2007] 1 NZLR 767 (CA) (‘Sestan CA’).

692 Sestan SC Note 237 above.

693 Winterwerp v The Netherlands (1979) 2 EHRR 387, 402, paragraph 39: In the Court’s opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of ‘unsound mind’. The very nature of what has to be established is, a true mental disorder calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory
was not reliably shown to be of unsound mind and there was no emergency. The principal reasons for his detention were ‘grandiose ideas’ and his alleged ‘road rage’. It was not shown by the detaining Health Board that he needed compulsory detention and treatment, rather than outpatient treatment or no treatment. In my opinion, Mr J.S.’s past psychiatric history unduly influenced both the decision to detain him (this argument being advanced on appeal), and the Court of Appeal’s decision to refuse habeas, which was unable to be advanced to the Supreme Court as leave to appeal was refused. Whilst past psychiatric history may have some relevance the issue was not prior mental state, but current mental state.

An extensive analysis of the facts was laid out in Sestan CA and summarised as follows:

The grounds of appeal were wide-ranging and diffuse. In essence it was contended that, as there were breaches of some provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT) and the New Zealand Bill of Rights Act 1990 (NZBORA), the processing of Mr Sestan under the MHCAT was unlawful and that he is, therefore, subject to arbitrary detention contrary to s 22 of the NZBORA.

Mr Sestan, aged 42 at the time of his detention, had a historical diagnosis of bipolar/schizoaffective disorder. He could become psychotic when manic, and was occasionally depressive. He had been subject to five admissions to hospitals since 2002; his well-being depended on his taking prescribed medication. On 27 October 2006, his mother contacted the Community Health team because of concerns about her son's well-being. She was anxious about a traffic incident, his elevated mood and excessive spending, including his purchase of two apartments with virtually no deposit. His prior psychiatric history had included several serious behavioural outbursts, including jumping from a balcony,

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694 Sestan CA, paragraph 31—The Court of Appeal found that whilst Mr Sestan was a proposed patient, he was not ‘detained’, and therefore the NZBORA did not apply.
695 Sestan HC; paragraph 10.
696 Ibid; paragraph 6.
697 If a person is found mentally ill, non-compulsory treatment or treatments in the community are also options.
698 Sestan CA, paragraphs 3-18.
nakedness in public places, hallucinations, seeing evil spirits and abandoning his car on a motorway.

In the High Court Mr Sestan challenged (by way of habeas corpus) what occurred on three separate grounds: (1) that the proper process was not followed for Mr Sestan to be detained under s 9(2)(d) of Mental Health Compulsory Assessment and Treatment Act 1992 ("MHCAT"), (2) that the reassessment and resulting second certificate issued under s 12 of the MHCAT was premature and invalid and (3) whether Mr Sestan was actually mentally disordered.

The Court of Appeal outlined a three-step process under the MHCAT for compulsory inpatient treatment of someone who is mentally ill.\textsuperscript{699} The first step is application to the Director of Area Mental Health Services (DAMHS) for assessment of a suspected mentally disordered person (as required by s 8A). As part of the application, a medical examiner who has examined the person in the last three days provides a medical certificate to the effect he or she believes that there are reasonable grounds to believe that the person is mentally disordered (as required by s 8B). Next, once the DAMHS has received the application and medical certificate, a s 9 assessment takes place. The s 9 assessment requires that a medical practitioner determine and certify reasonable grounds for believing that the person is mentally disordered, and that it is desirable that the proposed patient undergoes further assessment (pursuant to s 10(1)(b)). The first period of assessment must take place over a period no longer than five days. A clinical reassessment must occur before the expiration of the five days (pursuant to s 12). During that initial assessment examination, the responsible clinician may certify that the patient must undergo a further period of assessment (as provided in s 11(1)). This second period of assessment and treatment, if required, lasts for 14 days. Before the expiration of that 14-day period, a certificate of final assessment must be made (as provided by s 14). Finally, should the responsible clinician's opinion be that the patient is not fit to be released, a compulsory

\textsuperscript{699} Ibid, paragraphs 16 and 17.
treatment order application is made (pursuant to s 17), heard in the Family Court.\footnote{192}

As counsel in the Court of Appeal, I contended that there were multiple failures to follow the statutory requirements throughout the compulsory assessment and treatment process. Three of my arguments were:\footnote{701}

- The statutory process required a family member to be present as a protection; none was present;
- The detention was unlawful as he was not ‘mentally disordered’ as defined in the Act, and it was therefore an arbitrary NZBORA detention, reduced to a tick in a box approach by the deciding review judge;
- The evidence relied upon to justify his detention was irrelevant.

Concerned by the delay in the Court of Appeal’s rendering of a judgment and the forthcoming Christmas break, I sought a leapfrog appeal to the Supreme Court on the grounds the Court of Appeal had not made a decision; the next day the judgment from the Court of Appeal issued.\footnote{702} The Court of Appeal challenge failed. I withdrew the leapfrog appeal, and lodged an application for leave to appeal simpliciter.

In a three-paragraph judgment issued two months later, the Supreme Court dismissed the application for leave to appeal, failing to fairly or fully describe what had happened, and ignored the Covenant.\footnote{703}

\footnote{700} Ibid, paragraph 17.
\footnote{701} These claims could equally have been brought for judicial review or for s 84 review. Section 84 is a rarely used form of a hybrid habeas/judicial review where a High Court Judge reviews the validity of the detention under the Mental Health (Compulsory Assessment and Treatment) Act 1992.
\footnote{702} The application to the Supreme Court was made under s 14 of the Supreme Act 2003, and s 17 Habeas Corpus Act 2001, each of which permits an application in exceptional circumstances. In the alternative to a judgment from the Court of Appeal, an order requiring the Court of Appeal to issue a judgment was sought.
\footnote{703} Sestan SC.
The applicant in this Court, however, the applicant has been released into the community subject to a Community Treatment Order. His counsel, Mr Ellis, did not seek to advance any argument that in these circumstances there can be said to be a continuing detention. Accordingly, there is now no basis upon which a writ of habeas corpus could be issued.

[2] The questions which the applicant wished to raise, having expanded considerably in the Court of Appeal and again in the present application to this Court, are more appropriately addressed by way of a judicial review proceeding which counsel has indicated as the likely course.

[3] We record that the Solicitor-General, Mr Collins QC, had given notice of application by the Attorney-General for leave to intervene if we were minded to grant the leave application and was in Court for that purpose, but, as leave has not been granted, that application lapses.

**Discriminatory and sanist approach**

Mr Sestan did not believe that at the time of his detention he was mentally disturbed. He believed he was locked up because of his psychiatric history, and because of a temporary breakdown in communication with his mother. His reason for buying an apartment was his desire to leave his mother’s home, together with a wish to buy an investment property.\(^{704}\) The legal test on *Winterwerp* principles is whether he was ‘reliably shown’ to be of unsound mind, and dangerous to himself or others.\(^{705}\) In that respect, his opinion is as valid as a psychiatrist’s—unless the psychiatrist can show reliably he is of unsound mind, but there is a presumption of sound mind to be displaced.

The problem inherent in being locked up—essentially on the say of a single psychiatrist\(^{706}\)—is that one is subject not only to compulsory assessment from a sole source, but also potentially subject, based on that assessment from a sole source, to compulsory treatment using mind-altering drugs.\(^{707}\) In this model an

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\(^{704}\) He apparently had both the funds for the purchase and assuming the investment property was let sufficient to service the loan.

\(^{705}\) Note 693, above.

\(^{706}\) Technically, the psychiatrist’s opinion must be supported by a non-independent psychiatric nurse (junior to the psychiatrist). Such a process reverts to pre-Victorian placement procedures before two independent opinions were required. For a modern discussion, see Hans Joachim Salize, Harald Dreßing and Monika Peitz, 'Compulsory Admission and Involuntary Treatment of Mentally Ill patients—Legislation and Practice in EU Member States, Final Report (presented [to the Health and Consumer Director General of the European Union] by the Central Institute of Mental Health) (February 15, 2005), 124-27.

\(^{707}\) The question of whether this is a breach of the Covenant or of the NZBORA right to freedom of thought appears never to have been canvassed. The Covenant right to freedom of thought is absolute (by virtue of the inability to derogate from that right as provided in
assessment of ‘reliably shown’ to be mentally ill is not possible.\textsuperscript{708} Perlin describes mental health law as inherently ‘sanist’ because it discriminates against a category of people because of their mental disorder.\textsuperscript{709} I agree such discrimination exists on the basis of their illness. What happened in Mr Sestan’s case was sanist, as despite not reaching the Winterwerp standards\textsuperscript{710} he was treated as of unsound mind; I stated in a 2007 paper:\textsuperscript{711}

Compulsory detainment, (accompanied by compulsory treatment) by a single psychiatrist, and the absence of an automatic right of appeal before a judicial body is out of step with international trends, and combined with the practical absence of meaningful rights reduces mental patients to a type of second class citizenry, on par with blacks in apartheid regimes requiring passbooks, or with early (1933) Nazi discriminatory laws, and is such that it may not be justified in a free and democratic society.

If sanism was at play, a judicial body not exhibiting that trait could cure it.

\textsuperscript{708} Note 693, above.

\textsuperscript{709} Michael L Perlin, ‘On Sanism’ (1992) 46 Southern Methodist University Law Review 373, 374, identifying prejudice toward the mentally ill among ‘well-meaning citizens’ as the same ‘quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry’, which in turn is reflected into our legal system.

\textsuperscript{710} Note 693, above.

Also note the comment of Joseph et al as to Article 7 of the Covenant as to the origins of the prohibition of Torture and other ill-treatment.\textsuperscript{712} In my view, the issue of compulsory detainment based on psychiatric status is likely to become a major international and domestic human rights issue in the next decade, especially with the coming into force of the Convention on the Rights of Persons with Disabilities ("CRPD,"\textsuperscript{713}) and the global lobbying towards more personal autonomy at the root of the CRPD. Kayess and French\textsuperscript{714} observed:

Re-iterating the claim made many times by national and non-government delegations in the course of CRPD negotiations. Ambassador MacKay [of New Zealand] Chairman of the Ad Hoc Committee that developed the CRPD text, characterised the CRPD as embodying a 'paradigm shift' away from a social welfare response to disability to a rights-based approach. The UN High Commissioner for Human Rights has also characterised the CRPD as enshrining this paradigm shift in attitudes. She has conceptualised the CRPD as rejecting the 'view of persons with disabilities as objects of charity, medical treatment and social protection and as affording persons with disability as 'subjects of rights, able to claim rights as active members of society'.'

[\textit{Emphasis added}]

With the introduction of CRPD, an argument that whilst not being sane, (a disability), does nevertheless not permit compulsory medical treatment becomes feasible. Compulsory treatment is not equal treatment before the law.\textsuperscript{715} The

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\item \textsuperscript{712} Note 64, above paragraph 9.99: ‘Specific prohibition was a response to the atrocities of Nazi doctors in concentration camps during WWII’: And see Palmer Reg Orovwuje and Professor Anthony Taylor, 'Mental Health Consumers, Social Justice and the Historical Antecedents of Oppression' in Professor Anthony Taylor (ed), \textit{Justice As A Basic Human Need} (Nova Books, 2006) reported that between January 1940 and September 1942, ‘in what might be seen as a trial run for the ‘final solution’, 70,723 mental patients were gassed. The patients were chosen from lists of those whose lives were not considered ‘worth living’ that were drawn up by nine leading professors of psychiatry and thirty-nine top physicians.


\item \textsuperscript{715} See for example, United Nations Committee on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, General Comment (Draft) on Article 12 Equal Recognition Before the Law (CRPD/C/11/4, 25 November 2013):

7. States must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit
\end{itemize}
paternalistic approach to mental health law used by England, Australia and NZ is in contrast to the advocacy approach in the US, and may prove difficult to change even after the CRPD has come into force. An anti-discrimination approach may be fertile.\textsuperscript{716}

However, there is now some support for my opinion in the 2013 recommendations of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: \textsuperscript{717}

Revise the legal provisions that allow detention on mental health grounds or in mental health facilities, and any coercive inventions or treatments in the mental health setting without the free and informed consent by the person concerned. Legislation authorizing the institutionalism of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished.

As Thomas J correctly stated in \textit{Quilter v Attorney-General}, [unlawful or unjustifiable] discrimination is ‘odious’ and ‘inherently antithetical’ to democracy.\textsuperscript{718} Unlawful discrimination on the basis of mental impairment is as odious as any other form of discrimination.

In \textit{Chu v District Court at Wellington}\textsuperscript{719} I had argued successfully for the mandatory presence of a support person for my client during assessment. Mr Sestan had no such support person present here.\textsuperscript{720} Neither was he offered the chance to obtain legal advice, a right to which anyone arrested or detained is entitled under s 23(1) of the NZBOR\textsuperscript{A} and under Article 14(3) of the Covenant.

\begin{footnotesize}
forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.

8... (The denial of legal capacity to persons with disabilities has, in many cases, led to the deprivation of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.)

\textsuperscript{716} Perlin’s “sanism”, note 709 above.
\textsuperscript{717} UN Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment, 'Annual report, A/HRC/22/53' (1 February 2013) Recommendations, paragraph 89(d) (on persons with psychosocial disabilities).
\textsuperscript{718} \textit{Quilter v Attorney-General} [1998] 1 NZLR 523 (CA).
\textsuperscript{719} \textit{Chu v District Court at Wellington} [2006] NZAR 707 (HC).
\textsuperscript{720} Sestan CA, paragraphs 50-55, 59-60. He was not very helpful, but those who are uncooperative at a police station do not lose their rights, it is remarkable that those being ‘questioned’ in a mental health context should lose their rights.
\end{footnotesize}
The Court of Appeal held that Mr Sestan’s right was not violated because he was not ‘detained’ (at least not as contemplated by the NZBORA provision) at his assessment interview.\(^ {721}\) In my view, persons being questioned by mental health staff are ‘detained’,\(^ {722}\) and just as there is a Police Detention Legal Assistance Scheme that provides free legal advice for persons not yet charged at the Police station, there should be an equivalent service at psychiatric hospitals for persons not yet determined to be of unsound mind.\(^ {723}\) Why the principle in the Matter of the Mental Health of KGF\(^ {724}\) was not followed is concerning. The Court articulated that principle as follows:\(^ {725}\)

> As a starting point, it is safe to say that in purportedly protecting the due process rights of an individual subject to an involuntary commitment proceeding—whereby counsel typically has less than 24 hours to prepare for a hearing on a State petition that seeks to sever or infringe upon the individual's relations with family, friends, physicians, and employment for three months or longer—our legal system of judges, lawyers, and clinicians has seemingly lost its way in vigilantly protecting the fundamental rights of such individuals.

ECHR jurisprudence also reflects liberty rights for people with psychiatric disorders, and is more developed in this area than the Covenant.\(^ {726}\) That jurisprudence notes that mental illness may entail restricting or modifying the manner of exercise of such rights, but it cannot justify impairing the very essence of the right.\(^ {727}\) Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves,\(^ {728}\) to allow the minimal impairment of rights for those with a mental disability. A recent advance, finding

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\(^ {721}\) Sestan CA, paragraphs 19-39 inc.

\(^ {722}\) A claim to the Committee Against Torture would also have been possible. The Subcommittee operating under the Optional Protocol to the Convention Against Torture visited NZ for the first time in 2013; a public report on the visit is expected to be released in mid-2014.

\(^ {723}\) R v Z [2008] 3 NZLR 342 (HC)[59] … paragraph (1) of the Chief Justice’s Practice Note … provides that police must not suggest that it is compulsory for the person questioned to answer.

\(^ {724}\) In the Matter of the Mental Health of KGF 2001 MT 140. The proposed Sestan detention was shorter than the detention at issue in KGF, but the principle is still the same.

\(^ {725}\) Ibid, paragraph 42.


\(^ {727}\) Note 693, paragraph 60, above.

\(^ {728}\) Ibid.
various breaches including one concerning compulsory medication as an Article 8 privacy breach, is X v Finland.\footnote{X v Finland ECHR, Application No. 34806/04, 3 July 2012: 220. The Court considers that the forced administration of medication represents a serious interference with a person’s physical integrity, and must accordingly be based on a “law” that guarantees proper safeguards against arbitrariness… 221. On these grounds the Court finds that the forced administration of medication in the present case was implemented without proper legal safeguards. The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of sufficient safeguards against forced medication by doctors deprived the applicant of the minimum degree of protection to which she was entitled under the rule of law in a democratic society (see Herczegfalvy v Austria 1992 ECHR 83, 1993 15 EHRR 437, paragraph 91, and, mutatis mutandis, Narinen v Finland ECHR, Application No. 45027/98, 1 June 2004.)}

What I had failed to reference in the Court of Appeal argument was s 15 of the Legal Services Act 2001 (repealed),\footnote{Now in Legal Services Act 2011, s 18(7)(b).} which provided that prospective patients were in a special category, and were entitled to receive free legal advice prior to being formally ‘detained’, making such prospective patients one of the very few groups to whom advice is to be given regardless of their financial means under the Legal Services Act. However, unlike the Police Detention Legal Scheme where lists of lawyers available free of charge are available for detainees at police stations, no such scheme existed for psychiatric institutions. To its credit, the respondent health board agreed to set up a scheme utilising local JP’s,\footnote{What they would know of mental health or human rights law is debatable, and they as a general rule are unlikely to factually be a proper substitute for free legal advice, and the non provision of lawyers providing free legal advice is wrong in principle. Arguably, it is discriminatory under the Covenant on Article 26 grounds; under domestic law, psychiatric illness or intellectual or psychological disability or impairment are prohibited grounds of discrimination pursuant to s 21(h) Human Rights Act 1993. See also Chairperson-Rapporteur: Leïla Zerrougui, ‘UN Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6’ (2004), paragraph 51. The Working Group was of the view that holding mentally disabled persons against their will in conditions preventing them from leaving may, in principle, amount to deprivation of liberty. Suing in domestic law proceedings may be difficult however—see Seal v UK ECHR, Application No. 50330/07, 7 December 2010. In that case, the ECHR found discriminatory mental health rights (limitation on right to sue) were not a breach of the European Convention as they were proportionate. The House of Lords were split 3-2 with a powerful dissent from Baroness} The Court of Appeal’s judgment that Mr Sestan was not entitled to immediate legal advice might have been different if this section had been argued.

Undoubtedly, mental patients are one of the most vulnerable groups in society. The right to question a proposed patient without counsel present\footnote{Some human rights like the right to counsel are incorporated into domestic law. Arguably, it is discriminatory under the Covenant on Article 26 grounds; under domestic law, psychiatric illness or intellectual or psychological disability or impairment are prohibited grounds of discrimination pursuant to s 21(h) Human Rights Act 1993. See also Chairperson-Rapporteur: Leïla Zerrougui, ‘UN Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6’ (2004), paragraph 51. The Working Group was of the view that holding mentally disabled persons against their will in conditions preventing them from leaving may, in principle, amount to deprivation of liberty. Suing in domestic law proceedings may be difficult however—see Seal v UK ECHR, Application No. 50330/07, 7 December 2010. In that case, the ECHR found discriminatory mental health rights (limitation on right to sue) were not a breach of the European Convention as they were proportionate. The House of Lords were split 3-2 with a powerful dissent from Baroness} is unlawfully discriminatory.\footnote{Perlin notes, the Rights Illusion that so long as mentally}
disabled individuals are not assured of access to adequate and well-structured counsel, all of the rights talk and law reform efforts of the past two decades will be little more than an illusion.\textsuperscript{734}

\textbf{Inpatient or Outpatient? And European standards}

A reader might consider Mr Sestan’s complaints are standard administrative law fare. Lord Woolf in \textit{Brooks v DPP} said: ‘where the liberty of the subject is at stake, technicalities are important.'\textsuperscript{735} Further, Habeas Corpus is not standard administrative law, and is of constitutional importance. Lord Bingham MR made this point in \textit{Re S-C (Mental Patient: Habeas Corpus)}, stating that no adult citizen be detained against his will except by authority of law, a principle dating back to the Magna Carta.\textsuperscript{736}

Mr Sestan did not believe that he was ill at the time he was interviewed. Such concepts as ‘grandiose ideas’ are easily misapplied. He had in fact decided to live apart from his mother, and to buy two apartments, and had organised a bank loan for that purpose.\textsuperscript{737} He had also driven poorly. It is highly disturbing that bad driving, and buying what other people consider the wrong flats, can result in compulsory detention under the MHCAT.

It is well established, within basic human rights law, that the minimal interference to rights is the preferred result, and as such, outpatient treatment should have been explicitly considered. It was therefore particularly concerning that no form of outpatient treatment was even contemplated as a possibility. The question of inpatient versus outpatient care is not a simple one, but was not properly considered here.

\begin{itemize}
\item \textsuperscript{734} Hale. Whether the result would be the same under the Disabilities Convention remains to be seen, and no doubt its jurisprudence will develop in due course.
\item \textsuperscript{735} Michael L Perlin, ‘Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases’ (1992) 16(1) \textit{Law and Human Behavior} 39, 45.
\item \textsuperscript{736} \textit{Brooks v Director of Public Prosecutions and Another} [1994] 1 AC 568, 582G.
\item \textsuperscript{736} \textit{Re S-C (Mental Patient): Habeas Corpus} [1996] QB 599 (CA), 603C.
\item \textsuperscript{737} However easy it was to obtain a bank loan, presumably he had to meet some objective financial criteria.
\end{itemize}
The ability of psychiatrists to accurately determine mental illness and especially ‘dangerousness’ is a highly contentious and debatable issue; compulsory assessment should not also mean compulsory treatment. NZ itself in its third periodic report to the HRC acknowledged that once the need for treatment is established, a further decision must be made as to whether treatment should take place on an inpatient or outpatient basis.

The then current European standards for detention certainly were not met in Mr Sestan’s case. Baroness Hale remarked in a discussion of R v Wilkinson that a patient’s detention is a means to an end, and should not be an end in itself. In other words, hospitals exist to look after people and, it is hoped, make people better—they are not prisons. Notably, forcible medical treatment is allowed in psychiatric hospitals even though it is not permitted in prison. Such treatment is degrading, unless it can be convincingly demonstrated to be medically necessary.

Her Ladyship asks the question why it should be acceptable to treat an incapacitated person in a degrading manner if such treatment were not acceptable for a capacitated person, [or for a prisoner]. What makes medical treatment different from other types of treatment? [It could alleviate symptoms, cure, or the side effects could make you worse. With respect to the Wilkinson case in particular, she comments that the degradation of an incapacitated person shames us all, and that most people are able to appreciate that they are being forced to do something against their will even if they are not able to make the decision as to whether it should or should not be done.

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738 See Tony Ellis, ‘Breaking the Ambivalence towards Mental Health: An International Revolution? Human Rights in a World of Fear and Diminishing Resources’ (Paper presented at the Australia and New Zealand Association of Psychiatry Psychology and Law, 26th Annual Congress, Lorne, Victoria, 11 November 2006). Also see the discussion of Fardon v Australia note 79, above in the Remaka and Dean Chapters, above.

739 Note 9, above, paragraph 50.

740 R v Wilkinson, note 726, above.


742 Ibid, p 67.

743 Ibid, p 79.
Where was the medical necessity to compulsorily treat Mr Sestan? No doubt he was locked away for his own good in the view of the medical professional detaining him. However, the Roulet judgment of the California Supreme Court reminds us that history is haunted by the accusing cries of those locked away ‘for their own good.’ It is small solace to a person wrongly judged mentally ill that his road to commitment was paved with good intentions.

I recall the famous words of Justice Brandeis in *Olmstead v United States*:745

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

HRC beneficence or any court’s beneficence is presumably preferable as it is a “judicial” type decision not an executive one.

The Special Rapporteur on Torture’s 2013 annual report further notes Article 14(1)(b) of CRPD that the existence of a disability shall in no case justify a deprivation of liberty,746 and calls for the abolition of legislation authorising preventive detention on the grounds of the likelihood of the danger to oneself or others.747

Mr Sestan unsurprisingly challenged his detention. He sought a s 16 MHCAT review—a review known as the ‘safety valve’ provision.748 He did this twice, on 1 and 8 November 2006. The District Court Judges in my opinion did not hold proper hearings; they literally ticked the required forms, and gave no reasons for

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744 *In Conservatorship of Roulet* (Cal 1979), 23 Cal.3d 219.
746 Arguably a detention because you have or are suspected of having Bird Flu, or Anthrax, would be justifiable, as protecting others' lives and health. Those who do not have the capacity to consent need Court appointed guardians with power of decision making, subject to satisfactory safeguards. So the Rapporteur’s ‘in no case’ is overstated.
748 Sestan (CA) [84]: The s 16 procedure has been described as a 'safety valve' to ensure that the patient's right to liberty is not curtailed for medical or other irrelevant reasons (*L v Director of Mental Health Services* [1999] NZFLR 949 (HC) at p 954). Section 16(1)(b) provides that ‘a Judge must examine the patient as soon as practicable’. It is reasonable that the Judge provides his determination at the earliest possible time. In such circumstances it is not a breach of the NZBORA for the Judge to give a 'tick the box' decision and provide further reasons if requested at a later time.
dismissing the reviews, merely recording a conclusion. Mr Sestan was not released. These dismissals were not in accordance with the standard requirement under administrative law to provide reasons for a decision,\textsuperscript{749} nor were they in accordance with the then recent judgment of the ECHR in \textit{Gajcsi v Hungary},\textsuperscript{750} finding the Court’s decision to prolong psychiatric detention had been very superficial and insufficient to show that the conduct of the patient in question had been dangerous.\textsuperscript{751} The ECHR held that the decision was therefore inadequate to meet the requirements of a procedure prescribed by law within the meaning of Article 5.1 of the European Convention.

But the reasoning of the District Court on review was non-existent. The failure to provide reasons at the time the judgment is rendered is a serious erosion of rights when one cannot challenge the failure to release from detention by habeas corpus, but needs to rely on judicial review or s 86 of the MHCAT, a form of statutory review rarely used. The Working Group on Arbitrary Detention\textsuperscript{752} found mental health detention was covered by customary international law, and is therefore part of the common law of NZ.\textsuperscript{753} Additionally, s 22 of the NZBORA prohibits arbitrary detention,\textsuperscript{754} and bolsters the common law right in NZ. Despite the protections theoretically offered by both common and statutory law, Mr Sestan did not receive relief from the Court of Appeal.\textsuperscript{755} What happened in the Supreme Court, the major complaint of Mr Sestan is discussed below.

\textsuperscript{749} See the leading case of \textit{Lewis v Wilson and Horton [2000] 3 NZLR 546 (CA)}. Three considerations are identified as supporting the giving of reasons: to provide openness in the administration of justice, to enable the lawfulness of the decision to be assessed by a superior Court and to impose a discipline of rationality on the decision maker, approved in \textit{Taito PC} at paragraph 17.

\textsuperscript{750} \textit{Gajcsi v Hungary}, ECHR, (Application 34503/03 3 October 2006). To review on these grounds needs a judicial review not a District Court s 16 review, which focuses on the medical grounds.

\textsuperscript{751} Ibid, paragraph 18.

\textsuperscript{752} Note 733, above.

\textsuperscript{753} Ibid, paragraph 53.

\textsuperscript{754} Section 22 states: ‘Everyone has the right not to be arbitrarily arrested or detained.’

\textsuperscript{755} According to the Court of Appeal, Mr Sestan’s case may have better been brought by way of judicial or a statutory s 84 review see paragraphs 45 and 91. In \textit{B v Auckland District Health Board [2010] NZCA 632, 20 December 2010} the Court of Appeal reaffirmed the approach taken in \textit{Sestan CA}, rejecting a habeas appeal by stating the issue of whether there was sufficient grounds to make a determination of mental illness was better approached on judicial review or a s 84 inquiry. It should have made little difference under which legal framework these claims were brought if the law on arbitrary detention, and the requirement that reasons be provided, had been properly applied.
Chronology

Having set out the primary issues in Mr Sestan’s case, it is useful now to review the sequence of events. After his detention, Mr Sestan instructed a local Auckland lawyer to seek a writ of habeas corpus in the High Court. The application was heard promptly on 14 November 2006, and was denied two days later. I was instructed to appeal, and lodged and argued an appeal in the Court of Appeal on 29 November 2006. Although s 17 of the Habeas Corpus Act 2001 required that habeus corpus matters take precedence, urgency, and priority over all other matters in the High Court, Court of Appeal, and Supreme Court, judgment was not delivered on Mr Sestan’s appeal in the Court of Appeal until 12 December 2006. This significant delay meant a final appeal to the Supreme Court was unable to be heard before the Christmas and summer holidays.

As the Supreme Court had insufficient Judges, it adjourned the application for leave to appeal (it will be recalled that there is no automatic right of appeal) for two months, until 14 February 2007, and wrongly blamed Mr Sestan (in reality his counsel) for the delay. The case was obviously of some importance as the Solicitor-General in person sought leave to intervene. The Supreme Court ignored Mr Sestan’s submissions, made in December 2006 that vigorously protested the government’s failure to provide adequate judicial resources necessary to ensure judicial independence. On 14 February 2007, the Supreme Court declined at an oral hearing leave to appeal.\textsuperscript{756} It also required Mr Sestan to pay his own costs.\textsuperscript{757} The entire habeas process took three months.

During the period of delay, on 10 January 2007, Mr Sestan was released from inpatient to outpatient care. That meant it was probably legally impossible for the Supreme Court to consider his habeas application on domestic law grounds.\textsuperscript{758}

\textsuperscript{756} Transcript of Sestan SC (Supreme Court, McGrath J/Ellis, 14 February 2007) pp 7-8.
\textsuperscript{757} I took the view that legal aid was unavailable in the short time frame, as the High Court legal aid application decision was not made until after the Court of Appeal judgment issued, and the effort of applying for legal aid is not worth the trouble especially for out-of-town clients, and when time is of the essence. Costs are not normally awarded against losing plaintiffs in habeas applications.
\textsuperscript{758} Ibid pp 1-2. ‘The Solicitor-General appeared to have the view that a community order might be amendable to habeas corpus, I advised the Court ‘no superior Court in the common law world who have addressed the question of whether a Community Treatment Order is a detention for these sorts of purposes – so I was left with that proposition. It’s a first, and
however, the Court could have treated the application as seeking a declaration of inconsistency (Compulsory assessment or assessment and treatment a breach of Section 22 NZBORA—arbitrary detention), or a Covenant remedy (Breach of Article 9(1) (arbitrary detention) or Article 17 (privacy)), an approach it had been invited to take although it elected not to do so. Mr Sestan was therefore denied an Article 9(4) Covenant remedy (speedy court hearing) because of the delay caused by the failure of the Judiciary to act independently and/or properly allocate resources. These issues re-emerged in E v Norway.

Strategic reasons for J.S. approach to HRC

Arbitrary detention issues can be complex. I didn’t consider this was but the Manuel habeas corpus law restricted what could be argued on a habeas. (In 2012 the Supreme Court indicated in Kim they were prepared to reconsider this). Regrettably, on a habeas corpus it is hard to marshal an array of domestic and international law arguments at short notice, and even more difficult to persuade the Courts to hear them. Thus, approaching the HRC via a communication was strategically a more viable option.

Even if it was not possible to fully argue before the HRC that the detention was arbitrary, and therefore a breach of Article 9(1) until after a subsequent judicial review (because of the need to exhaust domestic remedies), two issues could be immediately raised: (1) that the absence of sufficient Supreme Court Judges causing a failure of the Supreme Court to promptly hear the habeas was a breach of Article 9(4), and (2) that the Supreme Court, in merely considering the domestic legal arguments highlighted the fact that the very status of the Covenant in NZ, and the lack of effective remedy, is a breach of Article 2(3).

The Supreme Court not only declined to consider Article 9(4), but also international case law. It considered the substance of the case moot because Mr Sestan was at that time released to outpatient treatment, ignoring The Matter of

then my learned friend Mr Butler drew my attention to the very strong case of, it’s probably called Bellmarsh No.2’ but it’s Secretary for State v JJ That was a detention orders for terrorists. I was not prepared to argue at first instance in the final appellate Court a “detention” based on a terrorist case.’ Tipping J at p 3 said that was fair.

Note 120, above. See discussion below.

Note 87 above.
the Mental Health of K.G.F. where the Montana Supreme Court reasoned that although the 90-day detention order at issue in that case was no longer in force.\textsuperscript{761}

19. ... this Court ‘reserves to itself the power to examine constitutional issues that involve the broad public concerns to avoid future litigation on a point of law.’ \textit{In re N.B.}, 190 Mont. at 322-23, 620 P.2d at 1230-31 (concluding important constitutional questions were not rendered moot by patient’s release from Warm Springs mental health facility and observing that approximately 100 Montanans each year are involuntarily committed for three months of treatment and evaluation in that facility).

The Supreme Court also gave no consideration to \textit{Thwaites v Health Services Centre Psychiatric Facility}, in which the Manitoba Court of Appeal, on an application for habeas similarly overtaken by events (and by remedial legislation), nevertheless treated the proceedings by consent as if they were for a declaration of inconsistency.\textsuperscript{762} Given the complexity of the issues arising, I had considered seeking an additional judicial review on the arbitrariness of Mr Sestan’s detention,\textsuperscript{763} and those of others in like circumstances, before filing the communication. I rejected that approach because of the time it would take, and the complexity of the arguments. A communication was then lodged on the equivalent international breaches.

\textbf{The Covenant Challenges—Breach of Article 2}

The arguments laid out in Chapter 2 of this thesis, based on Article 2 of the Covenant, s 4 of the NZBORA, general principles of good faith, and the prohibition against pleading domestic law to justify breach of a treaty pursuant to Articles 26 and 27 of the VCLT, were advanced to the HRC, and are not repeated here but amplified where necessary.

Article 2(3) states (Article 2 of the Covenant is set out in full in Appendix 1):

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding

\textsuperscript{761} Note 724, above.
\textsuperscript{762} Note 707, above.
\textsuperscript{763} Alleging an arbitrary detention under s 22 NZBORA and Article 9(1) of the Covenant.
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;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

It is not possible to bring a challenge to Article 2(3) in the abstract, as the Article relates to effective remedies for breach; one needs to demonstrate a breach of some other Article of the Covenant before an Article 2(3) argument can be made. Accordingly, I linked the Article 2(3) challenge with the claim that there was an arbitrary detention, inadequate number of judges, and delay (Articles 9 and 14) in rendering judgment were themselves breaches of the Covenant. Additionally, I advanced that the Government had breached Article 2(1), which requires the Covenant be respected without discrimination, supplemented by the non-discrimination provision Article 26, and Article 2(2), which requires that immediate steps be taken to implement the Covenant.

The Covenant Challenges—Breach of Articles 9 and 14

Mr J.S. based his challenge that Articles 9(4) and 14 of the Covenant had been breached primarily on his inability to receive a hearing of his leave application in the Supreme Court, as the Court rose for two months for the summer vacation. He relied on E v Norway, where the ECHR found it is incumbent on the judicial authorities to make the necessary administrative arrangements, even during a vacation period, to ensure that urgent matters are dealt with speedily, particularly when an individual’s personal liberty is at stake.

In short, it was a very simple communication compared to the various others.

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\(^{764}\) See, eg, Anderson v Australia CCPR/C/88/D/1367/2005 (2006), paragraph 7.6. The Committee recalls that article 2 of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant, and notes that article 2, paragraph 3(a), stipulates that each State party undertakes 'to ensure that any person whose rights or freedoms [...] are violated shall have an effective remedy'.

\(^{765}\) Note 120, above.
NZ Government’s Response to Communication

The State Party submitted that the allegations contained in the communication were (1) inadmissible, as they were unconnected to the alleged breaches of the Covenant in respect of Mr J.S. and consequently are inadmissible _ratione personae_ and (2) wholly unsubstantiated, as Mr J.S. did not allege any breach of his substantive Covenant rights.\(^766\)

The author replied to these submissions—using the words of Judge Borrego Borrego of the European Court of Human Rights dissenting in _Kafkaris v Cyprus_—that ‘the reasoning of the [Government] is far removed from reality, as though it has been pronounced from an ivory tower.’\(^767\)

The State Party also submitted that, while Mr J.S. had the option to seek interim release pending the appeal or the application for leave, he did not do so. In response to this, the author queried whether any court other than the High Court had jurisdiction to hear such a claim,\(^768\) and further answered that even if there were jurisdiction, there should be no need to seek an interim order when priority and urgency were required for hearing a claim for a final order. If the Supreme Court held the view that it could grant an interim order for release, then the Supreme Court could have suggested so to Counsel, and could have held an interim hearing; no such suggestion was made. Neither was that suggestion advanced by the State in the domestic courts.

Views of the Committee

The Committee made short work of the communication, and the communication like the Titanic—sank without a trace.

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\(^767\) _Kafkaris v Cyprus_ ECHR, Application No. 21906/04 2008, paragraph 76.

\(^768\) Section 11 of the Habeas Corpus Act 2001 suggests jurisdiction rests with the High Court.
After mostly quite reasonably setting out the arguments of the author and the State party three points emerged. First, the Committee decided that the length of the delays in the circumstances of the case and in view of the length of time resulted in the author failing to substantiate his article 9(4) claim. No consideration was given to the European case of *E v Norway*, or any case law to arrive at its conclusion. The Committee recitation in Draft General Comment 35 that *periods of eight days at first instance, three weeks at second instance, and two months at third instance were satisfactory in context* offer no explanations to why *E v Norway* did not apply. Secondly, as for the claim of lack of financial and administrative independence, in that the court failed to take steps to obtain an additional judge it accepted the views of the State that the Supreme Court felt it unrealistic to require counsel to prepare submissions quickly. That decision was made ad hoc by a single NZ judge without reasons. The HRC made no comment that the author asked for a hearing in 4-days’ time, two days each for counsel to prepare submissions (little time was needed as it was a repeat of the Court of Appeal arguments). They ignored the author’s submissions, set out at paragraph 2.7 of their views, that the real reason was an inadequate number of judges, and accepted the views of the State party the real reason was complexity. Therefore the author had again not substantiated this point, which was inadmissible. Thirdly, the claim that Article 2 was breached by the failure of the State to fully implement the Covenant was dismissed as inadmissible because it was too general. That might have been a valid dismissal except that in the Committee’s conclusions on the fifth periodic report discussed in the next chapter, the first issue discussed arising for my shadow report was that very issue, and the Committee specifically said:

7. The Committee reiterates its concern that the Bill of Rights Act 1990 (BORA) does not reflect all Covenant rights. It also remains concerned that the Bill of Rights does not take precedence over ordinary law, despite the 2002 recommendation of the Committee in this regard. Furthermore, it remains concerned that laws adversely affecting the protection of human rights have been enacted in the State party, notwithstanding that they

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769 Views 687, paragraph 6.3 and 6.4.
770 Note 120, above.
771 Note 335, above.
772 Views, paragraph 6.6.
773 Views, paragraph 6.7.
have been acknowledged by the Attorney-General as being inconsistent with the BORA. (art. 2)

The State party should enact legislation giving full effect to all Covenant rights and provide victims with access to effective remedies within the domestic legal system. It should also strengthen the current mechanisms to ensure compatibility of domestic law with the Covenant.

[Bold in original]

The Committee could have repeated its own conclusions, which were not too general in the sense it was a part of the Committee’s jurisprudence (which it had not been when the communication was lodged). However, it could have said the Committee had already decided that point in their conclusions in respect of the fifth periodic report, and therefore did not need to consider it again. Ultimately, I was probably wrong not to write a supplementary submission to the effect, that the Committee should adopt its conclusion on the fifth periodic report, but I decided not to in case that drew attention to it, and resulted in the Committee not considering the point afresh.

**Conclusion**

J.S. does clearly illustrate that however experienced one might be with covenant jurisprudence is it still possible to achieve an inadmissible communication, and without really understanding why. Lack of detailed reasoning does not assist the Committee in further development of its own jurisprudence.

Overall, whilst taking no comfort from the failure to achieve any human rights advance here, the Committee’s views are a fine example of having all alleged breaches being determined to be inadmissible, and little reasoning why that was so. The Committee’s reasoning shares with the Titanic’s iceberg a common theme: only one-tenth is visible.

Possibly some crumb of comfort can be taken in that the Committee’s concluding observations on the fifth periodic report on the status of the Covenant in New Zealand were inspired by this communication, and that a two-fold challenge on the same issue at least ultimately succeeded as discussed in the next chapter.
Chapter 11—Shadow reports—Alternative views of compliance with the Covenant

In addition to lodging communications, it is possible to develop human rights law by using the HRC periodic reporting process. State Parties submit their periodic reports every five years, providing their views on their compliance with the Covenant. A shadow report is a report to the Committee from a source other than the Government. They are an integral part of the process, enabling the HRC to question a State Party in an informed way on that State’s compliance.

I have written two shadow reports to the Committee Against Torture (“CAT”), in 2004 and 2008, and one to the HRC in 2009. All three met with some considerable human rights success, both in terms of the HRC’s and CAT’s recommendations, and by encouraging other such shadow reports to be filed, as discussed below.

What is a 'Shadow Report'?

One of the most useful national contributions for the UN's human rights treaty bodies is the independent 'shadow reports', also known as ‘alternative reports’. They resemble third-party 'amicus curiae briefs' in national courts, or expert submissions to Parliamentary Committees. Whilst such a report is primarily intended for the HRC (or other UN Committee), it has a dual purpose of educating readers. In my 2009 HRC shadow report (which the Committee publishes on line) I hoped that I can assist this educative process by describing what a report is, and what it was intended to do. Every few years there is an exchange of reports and correspondence and an interactive dialogue session in

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774 A copy of a link to the HRC issues, written replies, all shadow reports, summary records, state party follow-ups and can be found at <http://www.bayefsky.com/bycategory.php/state/123> My 2008 CAT report can be found at: <http://www2.ohchr.org/english/bodies/cat/docs/ngos/Barristers_New_Zealand42.pdf>. Both accessed 30 May 2013. The <http://www.ccprcentre.org> site (when working) has all the various reports on a single country page with links, and is much easier to navigate than the official UN pages.

775 Ibid.

776 Technically, examinations are meant to occur every five years, but Committee backlogs have elongated that.
Geneva\textsuperscript{777} between the Committee and the Government of each State Party, following which the Committee releases a report with conclusions and recommendations ("Concluding Observations"). The last examination for NZ was 2010,\textsuperscript{778} and prior to that 2002.\textsuperscript{779} Readers of my HRC 2009 shadow report were advised that the Committee’s concluding observations, along with its ‘views’ and ‘General Comments’, while not formally binding on NZ as a matter of law, constitute authoritative interpretations of international human rights law. International courts, as well as national courts in both common and civil law jurisdictions (including NZ), have regularly relied on the Committee’s statements when interpreting and applying the Covenant.\textsuperscript{780}

New Zealand’s fifth Periodic Report to the Committee was considered alongside any other new information the HRC received. Interested parties within each nation now commonly submit shadow reports to the UN human rights treaty body committees. Examples of such parties include independent national human rights institutions, non-governmental organisations (‘NGOs’) working in the field of human rights, and lawyers who act on behalf of victims of human rights abuses.\textsuperscript{781}

While this 'Shadow Reporting process' is regularly utilised in commonwealth and western countries, it has been rarely used by organisations in NZ. While this can be attributed to a lack of staffing and/or funding, a lack of awareness that such a possibility exists is also a major barrier. The writer hopes that, as a secondary goal, his shadow reports will have raised awareness in NZ of the Shadow Reporting process. There is added value in preparing a separate Shadow Report; while those submitting Shadow Reports are given the option of commenting on the Government's draft fifth periodic report (which I declined to do as I considered

\textsuperscript{777} Unusually, the fifth periodic report for NZ was addressed over two meeting sessions in Geneva and New York.


\textsuperscript{779} Summary record of the first part (public) of the 2016th meeting: New Zealand, CCPR/C/SR.2016 (2002). Whilst reports are five-yearly, systemic delays meant the previous report (the 4\textsuperscript{th} periodic report) was considered some nine years ago.

\textsuperscript{780} See, e.g., \textit{Minister for Immigration & Multicultural & Indigenous Affairs v B} [2004] HCA 20 148 ("In ascertaining the meaning of the ICCPR … it is permissible, and appropriate, to pay regard to the views of the UNHRC."); \textit{A and others v Sec of State for the Home Department} [2006] 2 AC 221 (HL).

\textsuperscript{781} See, e.g., the national shadow reports (from the Australian Human Rights Commission, NGO’s, and lawyers groups) submitted for Australia’s HRC 2009 examination <http://www.ccprcentre.org/country/australia/> accessed 30 May 2013.
there to be inadequate time allowed), part of my shadow report complains of inadequate time. Experience has shown that most Governments—especially those with upcoming national elections—are unlikely to give equal weight, as they should, to 'the not so good' as well as 'the good'. In the Foreword to the fourth periodic report, the then Minister of Justice (the Hon. Mark Burton) claims ‘considerable progress has been made in further addressing New Zealand's obligations under the Covenant.’ With respect, I could not agree. By highlighting some of the 'not so good' areas, my 2009 Shadow Report aimed to fill some of the gaps in the 5th periodic report.

Tyagi notes, that there is a growing relationship between civil society and international organizations conspicuous in the field of human rights. He further comments that:

Since most members of the HRCttee are unlikely to be experts on the legal systems and factual situations they examine, NGO briefings may help them in performing their task with greater confidence. A commentator states that often the experts [HRCttee members] read a non-governmental report and examine a government on the allegations' and that 'so far the committees [including the HRCttee] have made good use of NGO input in then questioning'. Therefore, while claiming that alternative reports are 'a vital source of information' for the UN treaty bodies, including the HRCttee, a leading NGO submits:

These alternative reports are a valuable source for Independent Experts who analyse the implementation of the United Nations Human Rights Instruments. With these reports, it is possible to see the situation as objectively as possible and to take a critical look at government action.

I agree without such shadow reports governments would effectively be unchallenged, unless the Committee were experts on every country.

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782 Note 54 above.
783 Ibid, p 217.
784 Ibid, pp 220/221.
Why write a shadow report?

Three reasons prompted me to write my 2009 HRC shadow report. First an offer of assistance initially from Mr. Naresh Perinpanayagam, who had been employed in the UNHRC secretariat, who offered pro bono time before his next assignment as a field officer in the Sudan. Secondly, the results of my two earlier reports to CAT suggested similar promising results might be expected from a report to the HRC. Thirdly, what I had learnt of the value of the reporting process from drafting this thesis effectively mandated a response to the State Party’s interpretation of events.

CAT shadow reports

In respect of the 2004 CAT concluding observations, three of the eight recommendations made by CAT were exclusively due to my input. I believe partially as a result of my CAT efforts in 2009 as lead author of a shadow report, that at least 10 recommendations were wholly or partially due to my efforts. More organisations now produce shadow reports, including the Human Rights Commission. For present purposes the most important recommendation arose from a parallel argument regarding UNCAT that was articulated in Chapter 2 of this thesis in respect of the incorporation of the Covenant into domestic law. CAT said:

C. Main issues of concerns and recommendations

Incorporation of the Convention in national legislation

4. While appreciating the steps the State party has taken to bring its domestic laws into compliance with its obligations under the Convention, the Committee is concerned that the Convention has not been fully incorporated into domestic law. The Committee notes with concern that

786 See footnotes 6, 7 and 8 of the shadow report for acknowledgements of assistance.
787 Conclusions and Recommendations of the Committee Against Torture, CAT/C/CR/32/4 (2004). Articles prohibiting torture are common to the Covenant and the Torture Convention, and issues like recognition of the treaty in domestic law and education also overlap.
788 Ibid, recommendations paragraphs 6(d), (g) and (h).
789 Note 774, above.
790 Note 787, above, recommendations at paragraphs 4(a), (b), and (c), 7, 8(a), 9, 10, 11, 12, and 14.
the New Zealand Bill of Rights, while giving effect to a number of provisions of the Convention, including article 2, has no higher status than ordinary legislation in the domestic legal order, which may result in the enactment of laws that are incompatible with the Convention. The Committee further notes that judicial decisions make little reference to international human rights instruments, including the Convention. (art.2)

The State party should:

a) enact comprehensive legislation to incorporate into domestic law all the provisions of the Convention;

b) establish a mechanism to consistently ensure the compatibility of domestic law with the Convention; and

c) organize training programmes for the judiciary on the provisions of the Convention and the jurisprudence of the Committee.

[Bold in original]

I assume the 300 references to the ECHR are not related as a reference to an ‘International’ human rights instrument but a regional one.

HRC 2009 Shadow Report

For my maiden shadow report to the HRC, on NZ’s 5th periodic report, I made a special effort. Space does not permit a detailed analysis of my 47-page shadow report, but I believe it contributed to additional commentary being lodged by the Human Rights Commission, the New Zealand Law Society (a first time submitter – I had provided my draft to them)\(^{792}\) and Sonja Cooper (a Wellington Solicitor I had advised on historic sexual abuse—the mainstay of her practice).

In July 2009, I attended in person a one-hour informal briefing on my shadow report in Geneva, Switzerland, briefing the members of the HRC allocated to consider NZ’s reports\(^ {793}\) on NZ issues for the standard List of Issues produced by the Committee for the government to answer in writing before the next

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\(^{792}\) The New Zealand Law Society Human Rights Committee notes the above issues, and one other, are raised as ‘big constitutional issues’ at: <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/NZLSHRC_NewZealand96.pdf> at 30 May 2013.

\(^{793}\) The HRC do not release the names of the Committee members who will be present at a hearing on a State Party’s periodic report prior to the meeting to avoid government lobbying. The members assigned to consider the report of a particular State Party are not necessarily the same for the next periodic report.
committee meeting, and then to answer oral questions on at the next meeting. That useful hour ended with the comment ‘hope to see you in New York.’ Unusually, no other submitter was present. The process was then divided into two sessions of the Committee, with the replies to the List of Issues being addressed at the next session in New York due to lack of time at the Geneva session. The new style process adopted since March 2012 is not addressed.  

The List of Issues that eventuated contained at least 7 of my “issues” of the 21 issues selected from all shadow reports or the Committee member’s personal interests, including four of the first six, set out as follows:

1. What concrete measures have been taken to ensure that domestic legislation is consistent with the Bill of Rights Act 1990? Is the State party considering legislation to incorporate the provisions of the International Covenant on Civil and Political Rights into domestic law, in particular those provisions not yet covered by the Bill of Rights Act 1990 (recommendation 8 of the Committee’s concluding observations (CCPR/CO/75/NZL), and paragraph 10 of the State party’s report)? Please indicate (a) the measures taken by the State party to increase the awareness of Parliament members and the Judiciary regarding the Covenant; (b) whether the State party intends to create a mechanism to ensure full compatibility of domestic law with the Covenant.

3. What measures does the State party take to ensure that every victim of a violation of the Covenant has a remedy in accordance with article 2 of the Covenant? Please provide examples of judicial decisions making reference to the Covenant in the period covered by the report.

4. What measures have been taken by the State party to implement the Committee’s Views under the First Optional Protocol to the Covenant in E.B. v New Zealand?

5. Please elaborate on the compatibility of the Prisoners’ and Victims’ Claims Act 2005 with the obligation to provide a remedy in accordance with article 2 of the Covenant.

The Government’s response in writing was formalistic, and, in my view, partly evasive. The response specifies that bills are vetted for NZBORA consistency

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795 Questions 1, partly 3, 4, 5, 13, 14 and 21.
796 Note 660, above.
when introduced, but the Government left out the fact that amendments introduced are not likewise vetted. The NZ State Party acknowledged that certain Covenant rights are not reflected in the NZBORA, because they are covered by other legislation or the common law, but it goes on further to say that under NZ’s present constitutional structure it remains open to Parliament to legislate contrary both to the NZBORA and to other legislative rights protections including the Covenant. The Government repeated that it did not accept the Committee views in *EB v New Zealand* (as to undue delay).

In my first additional submissions to the Committee, lodged 15 December 2009, following release of the issues, I said:

earlier in the year, reviews of police inaction in respect of credible allegations of child abuse in the Wairarapa district showed that the average delay between a complaint being laid and a case being fully investigated was over five years ... See editorial in The DominionPost annexed.

In my second set of additional submissions, I said that the Independent Police Complaints Authority had just released a media release saying:

The Authority has received evidence that there have been delays or issues with management of child abuse cases in districts other than the Wairarapa and is therefore treating this as a nationwide enquiry.

As to parliamentarians receiving training, they receive the Attorney-General advice (s 7 NZBORA certificate) on bills introduced, and otherwise receive

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797 Replies to the List of Issues (CCPR/C/NZL/Q/5) to be taken up in connection with the consideration of the Fifth Periodic Report of New Zealand CCPR/C/NZL/5) CCPR/C/NZL/Q/5/Add.1, 24 December 2009.
798 Ibid, paragraph 1.
799 Ibid, paragraph 2.
800 Ibid, answer to Q1 & 2.
801 Ibid, answer to Q4.
802 'Inquiry into police child abuse investigations', *DominionPost* (Wellington), 29 September 2009. Accessed 16 January 2013. The DominionPost is the daily newspaper circulating in the Capital City and other areas.
804 See also Appendix one for full text of s 7 NZBORA.
805 The Minister advised the HRC that 57 section 7 certificates had been made advising Parliament that proposed legislation was in breach of the NZBORA, and that of those pieces of legislation, 20 passed, including one non-government bill. Confirmed in Speech to Bill of Rights Act Symposium, see note 35, above.
submissions from interested parties. What is not said in the Government response is that parliamentarians receive no NZBORA or Covenant training. As to judicial training, no details were provided in the Government response as to what training is provided by the Institute of Judicial Studies, to which Judges, or over what period of time. Finally, In January 2010, the Chief Human Rights Commissioner advised me that whilst the NZ Human Rights Commission had not made a formal shadow report, they had filed a response to the List of Issues, and were sending two representatives to New York in March 2010. She also advised me the Government was taking the process very seriously, and for the first time the Minister of Justice would personally lead the NZ’s UN delegation to respond to the Committee. This was of course tactically clever, as normally ambassadors fulfil this function, and the Committee’s mana\textsuperscript{806} is no doubt raised by such implicit if not explicit recognition of its importance.

\textit{March 2010 presentation of NZ’s fifth periodic report}

I attended the New York session for another informal session over lunch with those members of the Committee allocated responsibility for NZ, and also Sir Nigel Rodley.\textsuperscript{807} We discussed our various shadow reports.\textsuperscript{808} The Human Rights Commission also had a similar private opportunity, which it took up. Whilst only perhaps a de minimus matter, the tradition of buying lunch (sandwiches) for the Committee members attending the informal gathering does not feel right; after all, one would not buy lunch for a Judge before whom one’s submissions are considered.

The Minister of Justice was supported by six NZ officials, but decided to answer all the questions himself. He presented a spirited and extremely able defence to the Committee of NZ’s human rights record; it was a very smooth and able oral presentation. Given the layout of the ‘temporary’ Hall, the Chairperson, a member of the secretariat and the NZ delegation sat on the stage, and the Committee other than the chair sat in the first three right-hand side front rows of the hall. TV

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{806} Maori word meaning power or authority.
\item \textsuperscript{807} Acting Chairperson for most of the questioning of the NZ government.
\item \textsuperscript{808} A representative of the Aotearoa Indigenous Rights Trust was also present, and the Peace Movement NZ attended by video link.
\end{itemize}
\end{footnotesize}
monitors were placed on pillars around the hall, which focus on the person speaking. It was possible to pass suggested questions to individual members of the Committee in response to some of the Minister’s replies, which I did on three or four occasions. All of the scheduled questions posed were answered on day one of the presentation. Those not answered by day two due to lack of time must be answered in writing to the Committee within 48 hours.

Despite the Minister’s sterling oral performance, his testimony seemed to have little effect on the Committee’s conclusions. He did manage to deflect criticism of the Prisoners’ and Victims’ Claims legislation in that he said the question was currently before Cabinet, and, regrettably a question about mental health patients and arbitrary detention was deferred to a written answer, giving no opportunity for a supplementary oral question.

**HRC’s conclusions and recommendations**

The Committee’s conclusions included recommendation to remove reservations to the Covenant, reduce Maori imprisonment rates, and educate, Law Enforcement Officials and the Judiciary so they receive adequate human rights training, in particular on the principle of equality and non-discrimination.

In respect of the NZBORA and the Covenant, the Committee said:

> The State party should enact legislation giving full effect to all Covenant rights and provide victims with access to effective remedies within the domestic legal system. It should also strengthen the current mechanisms to ensure compatibility of domestic law with the Covenant.

In respect of EB, the Committee said:

> While welcoming the decision of the State party to undertake a case-flow analysis of the Family Court with a view to reducing delays in issuing

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809 Note 666, above.
810 Recommendations advanced in my shadow report.
811 Note 666, above, fifth periodic report, Concluding Observations, paragraph 5.
812 Ibid, paragraph 12.
813 Ibid.
814 Ibid, paragraph 7.
815 Ibid, paragraph 8.
decisions following the views adopted in Communication No. 1368/2005 (CCPR/C/89/D/1368/2005/Rev.1), the Committee is concerned that the authors of the case have not yet received reparation. (art. 2)

The State party should give full effect to all views on individual communications adopted by the Committee, in order to comply with article 2, para 3, of the Covenant which guarantees the right of a victim of a human rights violation to an effective remedy and reparation when there has been a violation of the Covenant.

[Bold in original]

Whilst that recommendation has had no effect on the Government to date, an IPCA review of the Police was no doubt influenced by the Committee’s views. All in all it was a very satisfactory process and important learning experience. The very focused submissions from the Aotearoa Trust received a warm response, giving me the distinct impression that shorter, more topic-focused submissions would be a valuable contribution, which I intend to take up before the CRPD Committee on the topic of mental health and intellectual disability.

Other results

As a side product of my New York attendance, the New Zealand Law Foundation retrospectively granted me $NZ5,000 towards expenses, and indicated it wished to set up contestable funds for future Committee attendance, which will be of assistance to small NGO’s, and hopefully encourage additional shadow reports.816 The Chief Human Rights Commissioner supported my application.

The Human Rights Commission’s top 30 priorities,817 announced on Human Rights Day, 10 December 2010, include the following as priority number 2: ‘Establishing a fund to support civil-society participation in international human-rights mechanisms.’ Priority one was strengthening Parliament’s human-rights

816 A press release from the Law Foundation announcing the first award said: At the Law Foundation’s Annual Awards dinner, Chair of the Law Foundation, Mr Warwick Deucharss announced that the inaugural award has been won by the Human Rights Foundation of Aotearoa New Zealand’s ‘Law Foundation’s Annual Awards dinner, hosted by Justice Minister, Judith Collins at Parliament’s Grand Hall on 29 November 2002’. Valued at $10,000 annually, the Law Foundation’s newest award is available to help human rights advocates report on New Zealand’s compliance with its international treaty obligations, and is available each year to a non-government organisation or individual interested in Human Rights issues.

responsibilities by establishing a Human Rights Select Committee and tabling human-rights reports in Parliament, a matter discussed at the NZBORA symposium and privately with the Minister of Justice in New York, as well as with Attorney-General’s since 2000. Regrettably,\textsuperscript{818} the Minister of Justice decided not to seek re-election and took up private sector work. The new Minister appears to have other interests. Human rights in New Zealand will continue to evolve. In May 2013 the next CAT report is due, and in March 2015 the 6\textsuperscript{th} periodic report under the Covenant is due. I expect the shadow reporting from New Zealand will grow with those reports and the Law Foundation funding. I hope to continue to lodge communications, and participate in the shadow reporting process, having myself learnt from compiling this thesis.

\textsuperscript{818} At least from my point of view, some inevitably disagreed, as you would expect with any political figure moving on.
Chapter 12—Conclusions

The advance of fundamental human rights is slow—both domestically and internationally. Progress will continue to be slow in the 21st Century while society is developing. As French CJ said, in a speech\(^{819}\) in August 2009, Judges, academics, and lawyers will have encountered an immense variety of legislation involving the application of international conventions and treaties, an intersection that is multifaceted and complex. He considered that a greater consciousness was needed in the legal community of the opportunities and challenges that this presents.

The reluctance of the Judiciary—and the other branches of Government—to engage with complex legal arguments on human rights that rely on international jurisprudence has hampered the advance of human rights in New Zealand, and continues to cause New Zealand to fall short of its international obligations in many areas. The fundamental rights guaranteed to all New Zealanders in the Covenant, and purportedly affirmed, protected and promoted by the NZBORA, fall well short of their full measure. This has multiple causes. In part, it is self-reinforcing: because human rights safeguards are not entrenched in domestic law; because of section 4 they are taken less seriously; because they are taken less seriously there is scant recognition of their importance, and few moves to accord them higher status. But while the unentrenched status of NZBORA and the unincorporated status of aspects of the Covenant are the leading causes of the problem, they do not explain it completely.

Lack of resources and poor education are also important causes. While the Judiciary is unaware of the power of international jurisprudence—some of it binding on New Zealand according to international law—and the role it has in interpreting and applying domestic laws—and while the Bar is often reluctant to push “novel” arguments—the immediate prospects for substantial positive change are not good.

Beth Simpson, in an interesting analysis of theories of commitment to international treaties, argues that common law systems provide incentives for governments to go slow on the ratification process, especially in human rights areas, because of the precedent system and because of judicial independence. She suggests that local law is shielded from politically negotiated agreements that do not fit comfortably with locally grown law.

Considering the 1998 enactment of the UK Human Rights Act, which effectively incorporated the 1953 European Convention on Human Rights, the 20 years it took Canada to come to grips with the Covenant, and the continuing struggle for rights legislation in Australia, and New Zealand, this theory seems sound. Harland agrees, saying that, in general, the common law countries, Scandinavian countries, and those countries still following a soviet style, do not have the Covenant as part of the common law, whereas civil law and Islamic countries, as well as many countries in Central Asia and Europe with strong ties to the former Soviet Union have the Covenant as part of domestic law. As seen in Israel v Kazakhstan, ratifying human rights treaties and enforcing them are different matters.

A concerted effort of rectification will be needed across a range of sectors. For international human rights to advance in New Zealand, the executive must take its responsibilities—and its international obligations—seriously. Without adequate human rights education and resourcing, the Judiciary and the Bar cannot be truly independent, and will not be able to grapple with the true extent of the problems New Zealand faces in the area of human rights. The slowly expanding use of international legal forums—by way of communications and shadow

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820 Simmons, above note 133, Chapter 3.
821 Ibid, p 71.
823 Of the 193 countries of the UN, 167 are parties to the Covenant, and some like Iraq, Saudi Arabia, and Syria as well as two of the big players China and the US are not parties to the Optional Protocol and do not allow individual communications. Palestine has recently been granted observer status to the General Assembly as a state. Israel does not allow individual communications.
825 Note 172, above.
826 Run by the judiciary to preserve the independence of the judiciary.
reports—has an important role to play in educating the executive, the legislature, and the public at large on the status of human rights.

It should not be overlooked that domestic law already provides some considerable protections, and the use of technical points e.g. Sestan or systemic failures as in Taito illustrate this. Nevertheless, NZ’s pretence that it is better at international human rights than it is, leaves room for improvement.

The 2010 recommendation of the Special Rapporteur for the Independence of the Judiciary and Lawyers,827 that an international conference be called to enhance judicial education, especially in human rights norms, is welcome, as is the call, of the HRC828 also in 2010, to advance judicial education.

But resource constraints also have an impact on the extent to which international bodies can properly fulfil their role. Without adequate resources, including the ability to hold oral hearings, the HRC itself is sometimes unable to grasp the full ambit of the material before it; and with little time, much work, and very little administrative assistance, its decision-making process can be perfunctory—especially in respect of complex claims. It does not help that the Committee’s views are issued without any form of public hearing preceding their views.

Delays of up to three years between lodging a claim and receiving a reply are equally unhelpful and off-putting to many a potential applicant/author,829 these delays also sit uneasily with the Covenant. Questions of reform of the Committee system are not new, as O’Flaherty observes;830 it has long been recognised that institutional as well as other types of reform are necessary to have an efficient and effective system. The political implications of that are under discussion in UN circles,831 as O’Flaherty comments at paragraph 21:

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827 Note 261, above, paragraph 101.
828 Ibid.
831 Ibid.
These measures would not, however, address the underlying challenges to the system. Despite its achievements, the system is little known outside academic circles, Government departments and officials directly interacting with the system, and specialized lawyers and NGOs. The treaty body system is rarely perceived as an accessible and effective mechanism to bring about change. Victims of human rights violations and civil society actors are unfamiliar with the system's complex procedures or are unaware of its potential. Media coverage is poor and the use of treaty body jurisprudence by lawyers and national judicial systems is limited. The visits of treaty body members to countries remains an exception, and the system is often described as disconnected from realities on the ground, with meetings confined to Geneva or New York. The number of complaints filed with the Secretariat is low in comparison to the number of individuals living under the jurisdiction of States that have accepted individual complaints procedures, and most complaints are directed toward a minority of States parties.\footnote{832}{Note 829 above, paragraph 21.}

The need to raise awareness of the international system was a topic at the NZBORA symposium in August 2010. The Justice Minister was also considering having Parliament debate the HRC conclusions.\footnote{833}{Informal record of discussions circulated to attendees.} On the death of the current monarch, there would seem to be a vague possibility of constitutional reform, which could include NZBORA reform. Perhaps wider provision for Declarations of Inconsistency might be included or, as with the Human Rights Act, or at the very least, debated. Of course what one does not have one wants, but even if we had such declarations unless the executive actually positively responds to them, there is a danger the public might regard international law as being able to be breached with impunity.

With the introduction of such declarations into the Human Rights Act 1993 (NZ), the Courts’ attitude might well change when enough have been issued for them to become more comfortable with the concept. Change can be brought about through individual communication, periodic reports, or political lobbying, or a mixture of the three. But without the political will it may well be another 10 years or more before any real progress on the Section 4 issue makes any headway. There is the inherent problem of having the fox (Parliament) guarding the hen house. However slow any headway with incorporation of the Covenant or repeal of s 4 might be, small steps along the way may still be possible, and need to be made. Ratifying the Covenant but not giving it full effect has had some positive outcome for governments, as they can take the moral and legal high ground,
without any real downside effect, apart from possible claims of hypocrisy. Governments such as our own may be committed to the Covenant but face political pressures at home, while pragmatically preventing real commitment and genuine further advancement. As Sir Nigel Rodley\textsuperscript{834} has asked ‘why do states give us these whips to flagellate themselves with?’\textsuperscript{835}

All the above possibilities, and simply public discussion about them, have potential to assist with the development of human rights, however slow the process might be. After all, human rights litigation is one of the methods by which civil society organisations can bring about social change. At one stage, in an attempt to capitalise on Lord Cooke’s support for the United Kingdom Human Rights Act,\textsuperscript{836} I had got Lord Cooke to agree to advocate the incorporation of the Covenant in domestic law; however he had second thoughts and changed his mind. Given that two former Lord Chancellors, Sir Thomas Bingham MR and Lord Chief Justice Taylor, supported that legislation, the absence of any leading NZ judicial figures does not bode well for judicial support.

One Committee reform suggestion has been to merge the HRC and the Economic, Social and Cultural Committee. (CESC).\textsuperscript{837} That of course would be a major boost of human rights by simply giving the less enforced economic, social and cultural rights more bite, irrespective of which end of the spectrum of that argument you stand as to whether they are human rights or not. Nevertheless, anything that makes the process better known, such as any extension to economic, social and cultural rights, can only help with public awareness of the Committee, and hence of the underlying issues of rights.

The link between human rights protection, and economic progress was emphasised by Kofi Annan in his Millennium Report:\textsuperscript{838}

\begin{quotation}
It is now widely accepted that economic success depends in considerable measure on the quality of governance a country enjoys. Good governance
\end{quotation}

\textsuperscript{834} In 1993 the UN Special Rapporteur on Torture, now an HRC member from the UK.
\textsuperscript{835} Quoted by Beth Simmons, note 133, above p 57.
\textsuperscript{837} Note 830, above, p 326.
comprises the rules of law, effective State institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decision that affect their lives. While there may be debates about the most appropriate forms they should take, there can be no disputing the importance of these principals.

A further possibility is the formation of a World Human Rights Court.\(^{839}\) Creating it as a Court rather than a Committee would assist with its national acceptance. Whilst its formation is only a remote possibility, it has perhaps been made easier by the creation of the International Criminal Court, a limited form of human rights court.\(^{840}\)

Inevitably some countries would not join for a variety of reasons. However as previously indicated, China and the US do not allow individual communications now, so that would make no real difference. Even a discussion of these topics would bring into focus the place of the Covenant, and s 4 of the NZBORA.

Louise Arbour comments\(^{841}\) that at the end of the day, States accept the human rights system formally, [as in the case of NZ] but do not engage with it, or do so in a superficial way [rejecting the finding in EB but at least engaging and showing some responsiveness] either as a result of lack of capacity, or lack of political will. Lack of political will was the root cause of s 4 and the failure to incorporate the Covenant, probably because of centuries long ties to parliamentary sovereignty. It is hard to conceive that swift legal progress in NZ will be made in the acknowledged absence of political will, and this can only confirm that the development of human rights legislation will indeed be slow.

Equally, there is lack of political will to reform the UN committee process (or lack of money, or both). The Committee structure of the UN needs reform. Months delay in domestic courts for a habeas, and then waiting three years for the Committee’s views is not within the spirit of the Covenant. Likewise, not being able to be present when a communication is heard hardly assists the

\(^{840}\) Limited because of limited scope of the jurisdiction, and because of the refusal of a number of states to participate. The US withdrew, Russia has signed but not ratified, and China has not signed. There are 121 State parties as at 16 January 2013. <http://www2.icc-cpi.int/Menus/ASP/states+parties/>.
\(^{841}\) Note 829, above, paragraph 16.
development of the law, or encourages interaction. The unlawfulness of such a breach before a domestic court at a non-public hearing at first instance would result in a Covenant breach. What became apparent to me during the course of this thesis was that simply writing shadow reports and presenting communications was not enough. Being present assisted with advancing the context of the report. Country reports may indeed be more important than individual communications at least in a broad sense, though obviously from an author’s perspective they are not. The Committee functions on multiple layers, so then must human rights lawyers to fully understand and influence the process. But human rights lawyers are unlikely to be fully cognisant of that without being present, and learning to lobby as well as simply bringing cases.

Patience is needed. For example, the 2003, 7-6 finding in Rameka in relation to psychiatric reports was effectively advanced in Fardon\textsuperscript{842} in 2010. Slow progress but progress nevertheless. Human Rights evolve both forward \textsuperscript{843} and backward.\textsuperscript{844} Lord Steyn (dissenting) observed in Fisher v Minister of Public Safety and Immigration\textsuperscript{845} that a dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow. In that way a dissenting judgment sometimes contributes to the continuing development of the law. To develop rights, lawyers must try not to be frightened of losing today; if the argument is sound it may well succeed tomorrow. Whilst I had not previously specially considered myself an arbitrary detention expert, at least in the international field, after noting 14 references to New Zealand cases\textsuperscript{846} in which I was counsel, I need to reconsider and can take some solace, as win or lose one may have some role in developing the jurisprudence for the better.

My next step may well be complaining of the absence of UN resources to the Secretary-General which is no doubt the cause for the delays and private hearings held by the Committee such a complaint will have no short term effect but in the long term it might, thereby enhancing tomorrow’s human rights.

\textsuperscript{842} Note 79, above.
\textsuperscript{843} See Chapter 1, above.
\textsuperscript{844} Consider Syria in 2013.
\textsuperscript{845} Fisher v Minister of Public Safety and Immigration [1998] AC 673, 686 (HL).
\textsuperscript{846} Jessop, Rameka, Dean, Manuel, Van der Platt and J.S. (and also A v New Zealand note 82, above).
Appendix 1—Relevant Articles of the ICCPR

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized 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;

(c) To ensure that the competent authorities shall enforce such remedies when granted.
Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

   (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit
at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

**Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or
international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.
Article 21
The right of peaceful assembly shall be recognized. No restrictions may be
placed on the exercise of this right other than those imposed in conformity with
the law and which are necessary in a democratic society in the interests of
national security or public safety, public order (ordre public), the protection of
public health or morals or the protection of the rights and freedoms of others.

Article 23
1. The family is the natural and fundamental group unit of society and is entitled
to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a
family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the
intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure
equality of rights and responsibilities of spouses as to marriage, during marriage
and at its dissolution. In the case of dissolution, provision shall be made for the
necessary protection of any children.

Article 24
1. Every child shall have, without any discrimination as to race, colour, sex,
language, religion, national or social origin, property or birth, the right to such
measures of protection as are required by his status as a minor, on the part of his
family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 26
All persons are equal before the law and are entitled without any discrimination to
the equal protection of the law. In this respect, the law shall prohibit any
discrimination and guarantee to all persons equal and effective protection against
discrimination on any ground such as race, colour, sex, language, religion,
political or other opinion, national or social origin, property, birth or other status.

Article 27
In those States in which ethnic, religious or linguistic minorities exist, persons
belonging to such minorities shall not be denied the right, in community with the
other members of their group, to enjoy their own culture, to profess and practise
their own religion, or to use their own language.
PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee’s responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

   (b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.
Appendix 2—Relevant sections of New Zealand Bill of Rights Act 1990

An Act—
(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights
BE IT ENACTED by the Parliament of New Zealand as follows:

1 Short Title and commencement
(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.
(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

Part 1—General Provisions

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

3 Application
This Bill of Rights applies only to acts done—
(a) By the legislative, executive, or judicial branches of the government of New Zealand; or
(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

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

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

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

7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights
Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—
(a) In the case of a Government Bill, on the introduction of that Bill; or
(b) In any other case, as soon as practicable after the introduction of the Bill,—
bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

Part 2—Civil And Political Rights

Life and security of the person

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

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

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

Democratic and civil rights

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

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

19 Freedom from discrimination
(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

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

23 Rights of persons arrested or detained
(1) Everyone who is arrested or who is detained under any enactment—
(a) Shall be informed at the time of the arrest or detention of the reason for it; and
(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

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

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

(4) Everyone who is
(a) Arrested; or
(b) Detained under any enactment—
for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

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

24 Rights of persons charged
Everyone who is charged with an offence—
(a) Shall be informed promptly and in detail of the nature and cause of the charge; and
(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
(c) Shall have the right to consult and instruct a lawyer; and
(d) Shall have the right to adequate time and facilities to prepare a defence; and
(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more; and
(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25 Minimum standards of criminal procedure
Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
(a) The right to a fair and public hearing by an independent and impartial court:
(b) The right to be tried without undue delay:
(c) The right to be presumed innocent until proved guilty according to law:
(d) The right not to be compelled to be a witness or to confess guilt:
(e) The right to be present at the trial and to present a defence:
(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26 Retroactive penalties and double jeopardy
(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

Status Compendium

27 Right to justice
(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Part 3—Miscellaneous Provisions

28 Other rights and freedoms not affected
An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.
Appendix 3—Article 2 comments by HRC

Countries on which Article 2 comments have been made in HRC concluding observations apart from New Zealand include Azerbaijan, Algeria, Armenia, Australia, Botswana, Barbados, Benin, Central African Republic, Chad, Chile, Costa Rica, Croatia, Czech Republic, The Democratic Republic of Congo, Dominican Republic, Gambia, Georgia, Guatemala, HKSAR, Iceland, Ireland, Germany, Kenya, Kuwait, and others.

Country reports published otherwise than in English not included.

Concluding Observations of the Human Rights Committee, Azerbaijan, CCPR/C/AZE/CO/3, 13 August 2009, paragraph 9: ... The Committee recalls that article 2 requires that States parties should respect and ensure the Covenant rights for all persons in their territory and all persons under their control.


Concluding Observations of the Human Rights Committee: Australia, UN Doc A/55/40 (2000), paragraphs 498-528 inc. Also see CCPR/C/AUS/CO/5, 7 May 2009, paragraphs 12 and 14 in the context of education, minorities, and discrimination e.g. aborigines and homeless peoples.


Concluding Observations of the Human Rights Committee, Benin, CCPR/CO/82/BEN, 1 December 2004, paragraphs 7, 8, 12, 15, and 18.


Concluding Observations of the Human Rights Committee, Chile, CCPR/C/CHL/CO/5, 18 May 2007, paragraph 16.


Concluding Observations of the Human Rights Committee, Croatia, CCPR/C/HRV/CO/2, 29 October 2009, paragraphs 4, 5, 6, and 10.

Concluding Observations of the Human Rights Committee, Czech Republic, CCPR/C/CZE/CO/2, 9 August 2007, paragraphs 8, 9, and 10.

J.S. v New Zealand, paragraph 12.

Concluding Observations of the Human Rights Committee, Dominican Republic, CCPR/C/DOM/5, 19 April 2012 paragraphs 5, 6, 8, and 9.


Concluding Observations of the Human Rights Committee, Guatemala, CCPR/C/GTM/CO/3, 19 April 2012 paragraphs 5, 6, and 7.

Concluding Observations of the Human Rights Committee, Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, 21 April 2006 paragraphs 8 and 9.


Lesotho, Lithuania, Madagascar, Malawi, Maldives, Moldova, Mongolia, Morocco, The Netherlands, Panama, Peru, Philippines, Rwanda, Sudan, Suriname, Turkey, The Former Yugoslav Republic of Macedonia, Tanzania, Tunisia, Turkestan, Ukraine, Uzbekistan, Vietnam, Yemen, and Zambia.

870 Concluding Observations of the Human Rights Committee, Kenya, CCPR/C/KEN/CO/3, July 2012 paragraphs 5, 6, 7, 8, 19, 22, and 23.
873 Concluding Observations of the Human Rights Committee, Lithuania, CCPR/C/CO/LTU/3, July 2012 paragraphs 5, 6, 7, and 8.
875 Concluding Observations of the Human Rights Committee, Malawi, CCPR/C/MWI/CO/1, 11 November 2011, paragraphs 5, 6 and 7.
876 Concluding Observations of the Human Rights Committee, Maldives, CCPR/C/MDV/CO/1, July 2012, paragraphs 6-12 inc.
879 Concluding Observations of the Human Rights Committee, Morocco, CCPR/C/79/Add.113, 1 November 1999, paragraphs 7, 9, and 12.
885 Concluding Observations of the Human Rights Committee, Sudan, CCPR/C/SDN/CO/3, 29 August 2007 paragraphs 8, 9, 10 and 20.
889 Concluding Observations of the Human Rights Committee, Tanzania, CCPR/C/TZA/CO/4, 6 August 2009, paragraphs 7 and 8.
891 Concluding Observations of the Human Rights Committee, Turkestan, CCPR/C/TKM/CO/1, April 2012 paragraphs 5, 6, 7, 8, 13 and 14.
Some nations do lodge reports, some are significantly late, and some lodged make no meaningful if any comment in respect of article 2.

895 Concluding Observations of the Human Rights Committee, Yemen, CCPR/CO/84/YEM, 9 August 2005 paragraphs 5, 6 and 7.
896 Hale of Richmond Rt Hon The Baroness DBE PC A Lord of Appeal in Ordinary, above n, paragraphs 9-14 inc and 16.
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