CROSS-POLLINATION OR CONTAMINATION: GLOBAL INFLUENCES ON NEW ZEALAND LAW

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Abstract

This article explores three main questions. First, how international is our law? This requires an examination of New Zealand's international treaty obligations and their effect on Parliament, the courts and the common law. Other global influences discussed include customary international law, model laws that deal with cross-jurisdictional issues and decisions of foreign courts. Secondly, is international influence something new? This paper suggests not. Finally, should we be worried about global influence on our legal system? Consideration is given to alleged dangers faced by parliamentary sovereignty, executive authority and judicial independence. The paper concludes that, while we can learn from the world and there are times when international harmonisation is important, we must be cognisant of Aotearoa New Zealand's heritage, culture and our unique legal character.

I. Introduction

Do global influences on the New Zealand legal system improve our law by cross-pollination or do they contaminate our law? Or is the answer somewhere in-between? This paper examines three main questions: the first is how international (or global) our law actually is; the second is whether any global influence on our law is something new; the third is whether we should be worried about global influences.

II. How International Is Our Law?

I first examine the various international treaties to which New Zealand is a party and the effect of these treaties domestically, then customary international law. The third topic is the model laws that have been developed

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in an international context and how they have been applied in New Zealand. Finally, I examine how decisions of courts from other jurisdictions are used by New Zealand judges, before coming to a conclusion.

A. New Zealand's international treaty obligations

According to the Ministry of Foreign Affairs and Trade's Treaty website, as of 30 January 2015, New Zealand is a party to close to 800 multilateral and 800 bilateral/plurilateral treaties (including amendment treaties).[1] New Zealand's international relations involve cooperation on a wide range of matters; these relationships bear not only on New Zealand's relationships with other states[2] but also have implications for individuals and corporations.[3]

Some of the topics that are covered by treaties include war and peace, disarmament and arms control, international trade, international finance, international commercial transactions, international communications, the law of international spaces (for example, the sea, Antarctica and outer space), the law relating to the environment, human rights and related matters, and labour conditions and relations.[4] This is not meant to be a comprehensive list of topics but this brief list shows the wide range of subjects that treaties cover.

1. The treaty-making process

So how does New Zealand become bound by international treaties? Domestic law making is primarily the role of Parliament. By contrast, as a part of the royal prerogative, the power to take treaty action rests with the executive branch, which is generally responsible for New Zealand's foreign affairs. Parliament is not fully excluded from the treaty-making process and, over the last two decades, changes have been made to ensure it is made aware of important treaties that the executive is considering ratifying.[5]

Certain treaty actions (those related to multilateral treaties or major bilateral treaties of particular significance) must, after Cabinet's approval,

1 See Ministry of Foreign Affairs and Trade [MFAT] "New Zealand Treaties Online" available at <www.treaties.mfat.govt.nz>. As noted in the MFAT's international treaty making guide, given that "many treaties are only in force for a limited period of time, New Zealand has been party to almost twice that number": see MFAT "International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements" (September 2012) available at <www.mfat.govt.nz> at 3.

2 As a state, New Zealand is bound by the treaties it enters into and the obligations under them must be performed by New Zealand in good faith.

3 G Palmer "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 VUWLR 57. For example, some treaties, such as international investment treaties, give individuals rights too.

4 For an account of New Zealand's various international obligations, see Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996).

5 For a history as to this change, see David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 590–594.

be presented to the House of Representatives for examination.[6] The Foreign Affairs, Defence and Trade Committee then decides what select committee the treaty should be referred to.[7] The committee to which the treaty is referred to then reports back to the House.[8] Where the treaty requires alignment of domestic law with the obligations of the treaty, the government will pass or amend legislation (assuming it can get the support of the majority of the House) before it ratifies the agreement.[9]

While there is now some parliamentary scrutiny, treaties for the most part, remain the domain of the executive.

2. The effect of treaties domestically

As to the domestic effect of treaties, there are broadly two main groups of states: the monist and dualist states. New Zealand purports to be a dualist state.

In monist states, there is a unitary view of the law and these states see both domestic law and international law as creating rights and duties even without express incorporation. Under a monist system, the act of ratifying a treaty will mean that the instrument becomes binding at domestic law.[10]

By contrast, in dualist states there is an emphasis on the fact that international law and domestic law exist separately and cannot purport to have an effect on, or overrule, each other. In dualist states, international treaties are not incorporated into domestic law until the legislature decides to incorporate the international instrument into domestic law through legislation.[11]

While these may appear to be two distinct systems, in some circumstances this distinction is not quite so stark. In countries like the Netherlands and France, although treaties have immediate domestic effect, any ratification of a treaty requires the assent and approval of the legislature. So, although no further legislative action is necessary before the treaties have domestic effect in those countries, in effect the treaty has already been subject to the approval of both the legislature and the executive.[12]

6 Statutes are presented with an accompanying "National Interest Analysis" which outlines important matters such as the reasons for New Zealand becoming party to the treaty and the costs to New Zealand for compliance: see Cabinet Office *Cabinet Manual 2008* [Cabinet Manual] at [7.112]–[7.115]; and McGee, above n 5, at 593–594. See also at [7.119] of the Cabinet Manual where it states that the government cannot take any binding treaty action on a treaty that has been presented to the House until the relevant select committee has reported, or 15 days have elapsed from the date of presentation, whichever is sooner. See also Standing Orders of the House of Representatives 2000, SO 387(2).

7 Cabinet Manual, above n 6, at [7.118].

8 See McGee, above n 5, at 595.

9 See MFAT "International Treaties List" (July 2012) at 3 for a diagram as to the treaty making process for multilateral and bilateral treaties.

10 See Malcolm Shaw *International Law* (6th ed, Cambridge University Press, New York, 2008) at 93–95.

11 At 93–95.

12 See David Sloss "Domestic Application of Treaties" in Duncan B Hollis (ed) *The Oxford Guide to Treaties* (Oxford University Press, Oxford, 2012) 367 at 368–376.

But is even this the full story? New Zealand is classified as a dualist state but domestic incorporation by the legislation is not the only way that domestic law can be altered by international law. In fact, international law has an effect on both the actions of the legislature and the courts.[13]

3. Parliament and treaties

First, as to the influence on our legislative drafting process, the Legislative Advisory Committee Guidelines require those involved in drafting legislation to comply with any applicable international obligations and standards and that includes international customary law.[14] Thus international obligations have an effect on our legislative drafting process.

Secondly, many of our international obligations are, in any event, incorporated, in whole or in part, in domestic legislation. Indeed, some of the treaties New Zealand enters into require New Zealand to pass domestic legislation. As noted above, the practice is for such legislation to be passed by Parliament before there is any ratification of the treaties in question.

4. Role of the courts and treaties

Moving to the role of the courts and treaties, there are two relevant issues under this heading. The first is the role of international law in the interpretation of legislation. The second is the influence, or otherwise, of international law on the common law.

5. Interpretation of legislation

Moving first to the interpretation of legislation, I think it is fair to say that it has become established in recent years that there is a presumption that Parliament intends to legislate consistently with international obligations. This means that, to the extent that the words allow, legislation will be

13 Professor David Sloss, in a recent lecture, said that courts in monist and dualist states in fact approached international law in much the same way. He identified three main groups of rules at international law: horizontal rules (those regulating state to state conduct); vertical rules (those regulating the conduct between states and private parties); and transnational rules (those regulating the conduct between cross-border private parties): David Sloss "Domestic Courts and the International Legal System" (Public lecture, Victoria University of Wellington Faculty of Law, 15 June 2015). It was his main thesis that, depending on the type of rule in question, courts were either more likely to view the international norms as "law" and give effect to them or, alternatively, view them as more political norms which were inappropriate for domestic courts to deal with. While Professor Sloss argued that courts were likely to view transnational rules as the former, and horizontal rules as the latter, he suggested that the application of vertical rules was more nuanced.

14 Legislation Advisory Committee "Legislation Advisory Committee Guidelines on the Process and Content of Legislation" (Committee Report, 2001).

interpreted accordingly.[15] It has also become quite clear in recent years that, if there is a broad based statutory discretion given to the executive, then this discretion must be exercised consistently with international obligations. So, just as the Legislation Advisory Committee requires legislative drafters (and therefore Parliament) to ensure that legislation is consistent with international obligations, this presumption is given effect to by the courts in its interpretation of legislation.

Professor Geiringer has suggested that there are two approaches taken by the courts to international obligations when interpreting legislation.[16] The first approach she calls the presumption of consistency approach, meaning that the courts will interpret legislation so that it is consistent with New Zealand's international obligations. The second approach she calls the mandatory relevant consideration approach. By this she means that the courts will require decision-makers to take international obligations into account as a required consideration in the decision-making process.

For myself, I think that those two approaches are not really two distinct approaches to the interpretation of legislation. I think they just reflect the different types of international obligations that New Zealand has entered into. So, where the international obligation requires New Zealand to act in a particular way or not to act in a particular way as the case may be, then legislation will, to the extent possible, be interpreted to allow New Zealand to fulfil that obligation. On the other hand, where it is clear that international law allows states to take into account obligations other than the particular international obligation that is at issue, then effectively the international obligation will merely become a mandatory relevant consideration.[17] Having said this, I think that the categorisation may nevertheless be useful when considering the different cases that have arisen.

So to give an example of what might be seen as the presumption of consistency approach, the high-water mark may be the Court of Appeal's decision in *Sellers v Maritime Safety Inspector*.[18] That case concerned the

15 See *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289 where Keith J stated the "presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations". Similarly, in *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 [*Ye v Minister of Immigration* (CA)] at [84], I said "[a]lthough international instruments are not directly incorporated into domestic law it is assumed, as a matter of statutory interpretation, that insofar as their wording allows, statutes should be read in a way which is consistent with New Zealand's international law obligations." The majority of the Supreme Court in *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 [*Ye v Minister of Immigration* (SC)] at [24] endorsed the principle "that the Act should be interpreted a way that is consistent with New Zealand's obligation to observe the requirements of applicable international instruments". See also the discussion of the statutory presumption in the recent Supreme Court case of *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [143]–[144] per McGrath J and at [207] per Glazebrook J.

16 See C Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

17 See *Ye v Minister of Immigration* (CA), above n 15, at [84]–[90].

18 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

Maritime Transport Act 1994. This Act allowed the Director of Maritime Safety to grant or deny any pleasure craft permission to depart from New Zealand if the craft's safety equipment was inadequate. In the guidelines the Director issued for exercise of his powers under s 21, the Director set out some basic requirements for all pleasure craft including a requirement to carry a radio and an emergency locator beacon.

Mr Sellers, whose yacht was registered in Malta, successfully challenged the Director's requirement that he carry a radio after having been convicted of a breach of the Act. The Court of Appeal held that applying the Director's minimum requirements to a vessel that was registered elsewhere contravened the international law of freedom of the high seas under the United Nations Convention on the Law of the Sea. The Director's powers to make determinations in respect of the adequacy of the ship's equipment had to be read subject to, and be exercised in conformity with, the relevant rules of international law.[19]

The reason this case has been seen as the high-water mark of the presumption of consistency approach, according to some commentators, is that it is said to have effectively overridden the purpose of the provision, which one commentator said must have been to reduce the need for wasteful marine search and rescue operations caused by ill-equipped pleasure craft in the large part of the Pacific Ocean for which New Zealand has search and seizure responsibility.[20]

Turning to the relevant considerations approach, the most commonly cited example is the case of *Tavita v Minister of Immigration*.[21] This involved whether Mr Tavita, who was an overstayer, was allowed to remain in New Zealand where he had a New Zealand-born child. In that case Cooke P, as he then was, was very scathing of the Crown's argument that the Minister, in exercising his discretion, was entitled to ignore international obligations, including the Convention on the Rights of the Child. He said that this argument was an unattractive proposition and implied that New Zealand's adherence to the international instruments in question had been at least partly "window dressing".[22] The Minister was ordered to reconsider the decision.

The Supreme Court in *Ye v Minister of Immigration,* in relation to the provisions of the Act that was before it, confirmed that the interests of any child is an important consideration in the decision making process.[23] The Supreme Court did not, as it was invited to do, hold that the best interests of the child was the overriding test. This is because the Convention on the Rights of the Child does not seek, at least in the immigration context, to make the

19 At 62. The Court also stated at 62 that, as a result of this requirement for conformity, that it would "sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change".

20 Hanna Wilberg "Judicial Remedies for the Original Breach?" [2007] NZ L Rev 713 at 722. See also Paul Myburgh "Shipping Law" [1999] NZ L Rev 387 at 398.

21 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

22 At 266 per Cooke P.

23 *Ye v Minister of Immigration* (SC), above n 15, at [24] and [25].

best interests of the child *the* primary consideration to be taken into account. It only seeks to make the interests of the child *a* primary consideration.[24]

The Convention thus recognises that there will be other considerations that may override the best interests of the child, including the right of the state to control its borders. This is particularly the case where the issue involves deportation of a parent for a crime. It is clear, however, that weight is built into the Convention test. The best interests of the child is a *primary* consideration. This is why the Supreme Court in *Ye* said that it must be taken into account as an important consideration, but not necessarily the overriding one. This case illustrates the point that the nature of the Convention obligation impacts on the approach taken by the courts.

The third case I am going to discuss, *Attorney-General v Zaoui (No 2)*, is also a good illustration of the approach taken by the courts differing according to the nature of the international obligations.[25] *Zaoui* concerned the prohibition on torture, which is contained in our domestic New Zealand Bill of Rights Act 1990[26] as well as in a number of international instruments and under customary international law. In particular, however, the case concerned the prohibition on deporting people to a risk of torture in another jurisdiction.[27] The Supreme Court interpreted that the Minister's power to deport[28] as requiring both procedural safeguards and the substantive result that there would be no risk of deporting Mr Zaoui to a risk of torture.[29] The strength of the obligation with regard to torture appeared to be a major factor in interpreting the legislation in that case.[30]

I do note that the Crown had in fact accepted in *Zaoui* that the Minister was obliged to comply with the relevant international obligations relating to torture[31] and that the Immigration Act 2009 has introduced a new category of protected person (which applies to persons who do not qualify as refugees).[32] The new category deals with situations where a person could be at risk of torture, arbitrary deprivation of life or cruel treatment if they are removed

24 At [25].

25 *Attorney-General v Zaoui (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

26 New Zealand Bill of Rights Act 1990, s 9.

27 While the Supreme Court recognised that the prohibition on torture is a peremptory norm of customary international law (jus cogens), the Supreme Court held that the prohibition on refoulement to torture does not have that status: *Attorney-General v Zaoui (No 2)*, above n 25, at [51].

28 Under s 72 of the Immigration Act 1987. Since that decision, the Immigration Act 2009 has come into force.

29 See *Attorney-General v Zaoui (No 2)*, above n 25, at [91]–[93].

30 For Professor Geiringer's comments on the case, see C Geiringer "International Law through the Lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300 where she commented on the Supreme Court's approach as "expansive" (at 318); and C Geiringer "*Zaoui* revisited" (2005) NZLJ 285. See also my paper "From *Zaoui* to Today: a review of Recent Developments in New Zealand's Refugee and Protected Persons Law" (Paper presented for the International Association of Refugee Law Judges Regional Conference, 23 March 2013).

31 See *Attorney-General v Zaoui (No 2)*, above n 25, at [54] and [75].

32 See Immigration Act 2009, ss 130 and 131.

from New Zealand to another jurisdiction. This illustrates the importance placed on international obligations by all three branches of government.

6. Influence on the common law

New Zealand's international obligations also have an influence on the development of the common law. As we have seen, international obligations are binding on New Zealand in its capacity as a state. Arguably therefore, as a branch of the state the judiciary has a duty to respect those international obligations. This applies particularly to human rights obligations and is of course recognised in our Bill of Rights explicitly, as pointed out by the Chief Justice in her dissenting judgment in the case of *Chapman v Attorney-General*.[33] I will not discuss that case,[34] apart from noting that it concerned compensation for breaches of the Bill of Rights by the judiciary. It did not concern the role of the judiciary in developing the common law and whether that should be developed in accordance with New Zealand's international human rights obligations.

Skating away from the *Chapman* controversy, I turn to a possibly more palatable account of international influences on the common law for those who may be concerned about the independence of the judiciary, which was the concern of the majority in *Chapman* in the context of the particular issue before the Court there.[35] This is that international obligations are necessarily part of the values, norms and principles to be taken into account when developing the common law.[36] If nothing else, it would be particularly churlish if judges in interpreting legislation took cognisance of international obligations but refused to do so in the development of the common law.

So, just to take an example of this phenomenon, I refer to the development of the tort of privacy by the courts in New Zealand. I am not to be taken as commenting substantively on whether that development has been a good idea or not, nor on how far the tort extends. I am just pointing out that, in the development of the tort in *Hosking v Runting*, the Court of Appeal made

33 See *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [14].

34 For a critique of that case, see PA Joseph "Constitutional law" [2012] NZ L Rev 515 at 519–527.

35 See *Attorney-General v Chapman,* above n 33, at [161]–[202] per McGrath and William Young JJ, and at [212]–[215] per Gault J.

36 See Treasa Dunworth "Law Made Elsewhere: The Legacy of Sir Ken Keith" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 126 at 133 where she argues that international law operates as influential authority and its influence will depend on factors such as the value of the international principle and its need for influence domestically, or the way in which a particular rule fits within the domestic system. See also Mayo Moran "Influential Authority and the Estoppel-Like Effect of International Law" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (2005) 156; Alice Osman "Demanding attention: The roles of unincorporated international instruments in judicial reasoning" (2014) 12(2) NZJPIL 345 at 349–356; and Janet McLean in "Divergent Legal Conceptions of the State: Implications for Global Administrative Law" (2004) 68 Law & Contemp Probs 167 at 177–178.

some comments about the role of international law in the development of the common law.[37]

For example, the then President, Gault P, and Blanchard J in their judgment said that there is increasing recognition of the need to develop common law consistently with international treaties to which New Zealand is a party.[38] They went on to say that this is an international trend.[39] They also said that it was unreal to draw upon the decisions of courts in other jurisdictions as commonly happened and yet not to draw upon the teachings of international law.[40] They then referred to the fact that privacy was a fundamental right included in art 17 on the International Covenant on Civil and Political Rights and said that the fact that the right to privacy was not recognised in our Bill of Rights did not prevent the common law from being developed to protect particular aspects of privacy.[41] More recently Whata J, in the case of *C v Holland*, made similar comments, including that the ratification of international conventions confirming privacy based rights raised a presumption that domestic laws should be applied and, if necessary, developed consistently with the values of privacy.[42]

B. Customary international law

Customary international law arises out of the combination of state practice and a belief by states that the practice is an international legal obligation (*opinio juris sive necessitates*).[43] As Associate Professor Treasa Dunworth has said, this makes customary international law inherently paradoxical in that the law is (at least partly) created by a belief that it is the law.[44] It has also been argued that the test for the creation of customary law makes the law rather nebulous and rather hard to ascertain.[45]

37 *Hosking v Runting* [2005] 1 NZLR 1 (CA).
38 At [3]–[6].
39 At [6].
40 At [6].
41 At [19]. A similar comment was made by Tipping J at [226].
42 See *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [69]. See also Osman, above n 36, at 354 and *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 where Mason CJ and Deane J recognised that "[t]he provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law."
43 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [207] where the International Court of Justice stated "for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the opinion juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it". See also Treasa Dunworth "The Rising Tide of Customary International law: Will New Zealand Sink or Swim?" (2004) 15 PLR 36 at 36.
44 Dunworth, above n 43, at 36.
45 See for example, Shaw, above n 10, at 51–53.

It has long been accepted that customary international law is automatically a part of domestic common law as long as it is not inconsistent with an act of Parliament or with a prior judicial decision of final authority.[46] The fact that this is so is another thing that muddies the waters as far as the dualist theory's conception of international law as only being incorporated by domestic legislative action.

Dualism is complicated further by the fact that evidence of the existence of customary law can be derived from the existence of widely subscribed multilateral treaties. This means that if, in fact, something covered by a treaty is actually customary international law, it is automatically part of New Zealand law, despite it not having been incorporated into domestic legislation.

C. Model laws

The next topic in this survey of international influences on New Zealand law is that of model laws prepared by international organisations to deal with issues that have an international, or cross jurisdictional, character. A number of these model laws have been adopted by New Zealand.

I offer two examples. The first is the Arbitration Act 1996 which is based substantially on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.[47] Secondly, the Electronic Transactions Act which adopted much of the UNCITRAL Model Law on Electronic Commerce.

An interesting feature of the Electronic Transactions Act 2002 is s 6, an interpretation principle providing that regard may be had to international documents relating to the Model Law in the interpretation of the Act. So this gives statutory recognition to the importance of those international documents in interpretation and, at least implicitly, the need for international consistency in interpretation.

46 See James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 67. This so called doctrine of "incorporation" was explicitly stated by Lord Denning MR in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (CA) at 554 where he said, "[s]eeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows ... inexorably that the rules of international law, as existing from time to time, do form part of English law." See also Doug Tennent *Immigration and Refugee Law* (2nd ed, Lexis Nexis, Wellington, 2014) at 29.

47 See Arbitration Act 1996, s 5(b). The Law Commission, in its report that preceded the Arbitration Act 1996, recommended the adoption of the UNCITRAL Model Law for international commercial arbitration: Law Commission *Arbitration* (NZLC R20, 1991). Some of the reasons for that included that "harmonising international trading laws can only assist a nation as economically dependent on international trade as is New Zealand" and the fact that many of our neighbouring States in the Pacific rim had already adopted the Model Law: at [78].

It is worth mentioning that international influences on our legislation go wider than the adoption of model laws. For example our Personal Property Securities Act 1999 (PPSA) is based on a Canadian model.[48]

D. Decisions of foreign courts

Finally, I examine the influence on our law of decisions of foreign courts. The first point to note is that the decisions of foreign courts are of obvious relevance when they relate to statutes which incorporate international obligations into our law. It is important, as I have just noted, that there is international consistency of interpretation for those types of instruments. Of course, that does not mean that those decisions in other jurisdictions are binding on New Zealand. They are just relevant in assessing what the international position is with regards to interpretation.

Just to give an example of this, the Supreme Court in *Secretary for Justice v HJ,* when considering the provisions of the Care of Children Act 2004 implementing the Hague Convention on the Civil Aspects of International Child Abduction, made reference to international commentaries which discussed the preliminary work on the Convention and also discussed a number of overseas cases dealing with Hague Convention principles.[49]

The same arguments for the need to have regard to off-shore cases apply when international obligations are otherwise relevant to the issue before the court. For example, where there is a need to interpret domestic statutes in a manner consistent with New Zealand's international obligations or when international consistency of treatment of a particular issue is important, such as on issues affecting trade.

Finally, clearly New Zealand is not an isolated legal island. It exists in the sea of the common law and how the courts have dealt with issues in other jurisdictions may be very helpful to a New Zealand court, especially for an issue that may not have arisen in that form in New Zealand.[50] Indeed,

48 The relevance of Canadian cases in New Zealand PPSA cases has been highlighted in various cases. For example, see *Service Foods Manawatu Ltd (in rec and in liq) v NZ Associated Refrigerated Food Distributors Ltd* (2006) 9 NZCLC 263,979 (HC) at [3]. However, the Court of Appeal observed in *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) at [16] per Robertson and Baragwanath JJ that in that case, the "decision must turn on the effect of the New Zealand legislation, which is not wholly identical to that of the various Canadian jurisdictions".

49 See *Secretary for Justice v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [42].

50 For statistics as to the citation of various overseas cases by New Zealand courts, see generally: Jeremy Finn in "New Zealand Lawyers and 'Overseas' Precedent 1874–1973 – Lessons from the Otago District Law Society Library" (2007) 11 Otago LR 469; James Allan and others "The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?" (2007) 11(3) Otago LR 433; Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Methods in New Zealand* (Lexis Nexis, Wellington, 2002) 261; and Russell Smyth "Judicial Citations: An Empirical Study of Citation Practice in the New Zealand Court of Appeal" (2000) 31(4) VUWLR 847.

it is not just decisions from the common law world that may be relevant.[51]

E. Conclusion: tentacles of international influence

So what has this brief survey shown us? As has been discussed, international law and international influences pervade many areas of our law and affect all three branches of government. International law affects statute law, both when it has been directly incorporated and also in cases where it has not, through the presumption of consistency used in interpreting those statutes. It also affects the common law. Finally, the executive must exercise its statutory powers consistently with international obligations if the domestic legislation allows.

Therefore, the view of law as either domestic or international law is inadequate.[52] The relationship can be seen as being mediated through a semi-permeable membrane,[53] whereby international norms are actively brought into New Zealand by any of the three branches of government (the executive, Parliament and the judiciary) or passively diffuse into New Zealand's jurisprudence through international customary law. As Sir Geoffrey Palmer states:[54]

> [f]or many years, international law and municipal law have been seen as two separate circles that never intersect. Increasingly, however, the way to look at them, I suggest, is that there are two circles with a substantial degree of overlap and indeed it can be argued that there is only one circle.

III. Is international influence something new?

So is this international influence on New Zealand's law something new? Well, certainly foreign influences on New Zealand law are not new. From the time of British settlement the law of New Zealand was tied to the British

51 For example, in the case of *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR which dealt with a Facebook page host's liability for defamatory posts of third parties, the Court of Appeal examined New Zealand, United Kingdom, Australian and Hong Kong precedent. The increased citation of overseas precedent is likely due to the fact that the legal issues that arise are faced by numerous jurisdictions, and even if these issues arise in a different legal system (such as a civil law jurisdiction), the way the issues have been analysed and resolved may still be of real assistance.

52 See Mayo Moran "Influential Authority and the Estoppel-Like Effect of International Law" in George Williams and Hillary Charlesworth (eds) *The Fluid State* (Federation Press, Sydney, 2005) at 157; Osman, above n 36, at 345–350.

53 The term semi-permeable membrane is taken from Sir Jeffery Jowell and Dawn Oliver (eds) *The Changing Constitution* (7th ed, Oxford University Press, New York, 2011) at 142. The concept of permeability is also used by Janet McLean, above n 36.

54 See also Palmer, above n 3, at 59.

legal system,[55] subject to the continued existence of Māori customary law as is discussed briefly later in this paper. Many English statutes (or statutes derived from English statutes) applied in New Zealand. In addition, the common law, until probably as late as the 1980's, was the common law of England.

Indeed, in the early days, the principal function of the Privy Council was to maintain uniformity with the common law of England across the common law world (apart, obviously, from the United States). For example, in a 1927 appeal from Canada to the Privy Council, Viscount Dunedin uttered the then orthodox position that the House of Lords "is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it".[56]

1. Role of the law of nations

So what about international law? William Blackstone over 200 years ago said that the law of nations (meaning presumably the customary law governing relations between nations) is adopted to "its full extent by the common law" and as such is "part of the law of the land".[57] This shows that the recognition of customary international law as part of our law is not new.

So far as New Zealand's human rights international obligations are concerned, it has been suggested that this is merely a recalibrating of what is now being called the principle of legality, whereby courts do not impute to the legislature an intention to abrogate or curtail fundamental common law rights or freedoms.[58] The presumption of legality used to be based on pro-democratic property based values but is now, under the presumption of consistency with international human rights obligations, based on a more modern set of values, including the protection of fundamental human rights derived from New Zealand's international obligations.[59]

Finally, it is, however, true that the very strong presumption that now applies of interpreting statutes consistently with international obligations is somewhat new in that the position, even at the beginning of the 1980s,

55 See J Spiller, J Finn, R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 76, citing W Blackstone *Commentaries on the Laws of England Vol 1* (15th ed) at 107, where the authors stated when England "acquired a new colony by settlement, the colonists carried with them those elements of English law, statutory and common law".

56 *Robins v National Trust Co Ltd* [1927] AC 515 (PC) at 519.

57 William Blackstone *Commentaries on the Laws of England* (1765–1769) Book 4 at 67. Similarly, when discussing arts 31 and 32 of the Vienna Convention on the Law of the Treaties, the Supreme Court in *Attorney-General v Zaoui (No 2)*, above n 25, at [24] said those articles "are accepted on all sides as stating the rules of customary international law for the interpretation of treaties *and which, as such, are part of the law of New Zealand*" (emphasis added).

58 It is said that the principle of legality's roots can be traced back to Lord Mansfield's judgment in *Somerset v Stewart* (1772) Lofft 1; 98 ER 499 (KB). See Dan Meagher "The Common Law Principle of Legality in the Age of Rights" (2011) 35 MULR 449 at 452–456.

59 See D Dyzenhaus, M Hunt and M Taggart "The Principles of Legality in Administrative Law: Internationalisation as Constititionalisation" (2001) 1 OUCLJ 5 at 7 and 32–33. See for example the comments made in *Helu*, above n 15.

was that ambiguity was needed to invoke the presumption of consistency.[60] This change, however, to a stronger presumption of consistency probably reflects a change in statutory interpretation principles generally and the modern purposive approach to the interpretation of statutes, as against the older interpretation style that concentrated on the words and rules of interpretation.[61]

2. So what is the situation?

So where are we at? International law, or at least international influences, permeate virtually all of the areas of the law and affect all three branches of the state. We have also seen that this is not really anything new. There has been a shift from a reliance on Britain to a more varied reliance on multiple sources, although probably still dominated by influences from the common law world and by influences that are generally international, such as those from international instruments New Zealand has entered into or customary international law.

IV. Should we be worried?

On to the final part of my paper I pose the question: should we be worried by all of this? I will examine this under a number of headings. The first concerns an alleged threat to parliamentary sovereignty. The second concerns the curtailing of the executive's freedom to act. The third alleged danger is to judicial independence. Finally, I attempt to ask, and at least partially answer, the question of when and where international influence is appropriate in New Zealand law.

A. Parliamentary sovereignty

1. Treaty-making process

Concern has been expressed that the executive entering into treaties without parliamentary input is a threat to parliamentary sovereignty. Treaties now create a wide range of obligations for New Zealand and are not limited to relations between states. Given the significant implications treaties can have on national legal and administrative systems, the economy and individual citizens, there was a concern that the practice whereby "treaties are entered

60 See *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) where the Court of Appeal held that an open-ended administrative discretionary power could not be confined by implied limits derived from international law.

61 For an explanation of this shift, see Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis New Zealand Ltd, Wellington, 2015) [*Burrows and Carter*] at 223–250. Despite s 5(j) of the old Acts Interpretation Act 1924 mandating a purposive approach, for most of this section's life it was honoured in the breach: see 223–227.

into by the executive, without significant parliamentary or public involvement, is undemocratic".[62] This has been termed the "democratic deficit".[63]

On the other hand, there have been concerns that giving Parliament more oversight into the treaty-making process would lead to intrusion upon the exclusive domain of the executive to govern and to enter into treaty negotiations.[64]

The compromise between the two positions has led to the current approach (discussed above)[65] to require parliamentary scrutiny of treaties before they are entered into and the practice of delaying ratification until any legislation is actually in place, if the treaty requires legislation. This gives a larger role to Parliament and has thus reduced the "democratic deficit" inherent in signing international treaties.

Some argue there are still deficiencies. For example, Associate Professor Treasa Dunworth considers that there is insufficient consultation with relatively little time for the public to make submissions and that the National Interest Analysis[66] papers have not been as thorough as they should have been.[67] Associate Professor Dunworth therefore says that:[68]

> [a]lthough there has been some measure of increased transparency and public participation as a result of the changes to the treaty-making process, overall, the executive did not relinquish any real power to Parliament.

2. Interpretation principles

Part of the concern about parliamentary sovereignty relates to the interpretation principles used by the courts to interpret statutes consistently with international obligations. It is said that this usurps the parliamentary law-making function under the guise of interpretation. [69] It is argued that the presumption that Parliament did not intend to legislate contrary to international principles is just not warranted. Further, critics argue Parliament

62 At [57].
63 At [57].
64 New Zealand Law Commission *The Treaty Making Process: Reform and the Role of Parliament* (NZLC R45, 1997) at [81].
65 See above at pages 62–63.
66 See above at n 6.
67 T Dunworth "The Influence of International Law in New Zealand: Some Reflections" in G Morris, J Boston, P Butler (eds) *Reconstituting the Constitution* (Springer Heidelberg Dordrecht, London, 2011) 319 at 320–326. This criticism has been recognised within government: see Regulations Review Committee "Inquiry into regulation-making powers that authorizer international treaties to override any provision of New Zealand Enactments" (2002) I.16H March AJHR at 6.
68 Dunworth, above n 67, at 326.
69 This wording is taken from Lord Simonds in the case of *Magor and St Mellons Rural District Council v Newport Corp* [1952] AC 189 (HL) at 191 where on appeal, he criticised the lower court judge's approach to statutory interpretation as a "naked usurpation of the legislative function under the thin guise of interpretation".

cannot be assumed to be cognisant of the myriad of international instruments when legislating.[70]

In modern times, with the Legislative Advisory Committee Guidelines stating that Parliament, when legislating, has to make sure that it does so consistently with international obligations including customary international law, means that the assumption that Parliament did not intend to legislate contrary to international obligations is probably as warranted as any other assumption that you can make about the intention of Parliament and it is really part of the old debate about whether Parliament can have an intention and whether it is better to talk in terms of purpose rather than intention, arguments I do not intend to traverse.[71]

As to the issue of usurpation of parliamentary authority, the interpretation principle does not apply when Parliament has expressly legislated contrary to international obligations. Parliamentary sovereignty must prevail. Further, the presumption itself can only operate so far as the words of the statute allow.

There is an issue of controversy which is exemplified by the *Sellers* case (discussed above) where it has been argued that the overlay of international law worked contrary to the purpose of the statute. One possibility is that the case was wrongly decided. I do not want to make any comment on that possibility, but I do note that the law of the sea and the adherence of other nations to that convention is in fact a very important one for New Zealand, given its isolation and its reliance on transport or trade, at least for physical goods. So it could be argued that consistency with that convention (if indeed that was what *Sellers* achieved) is particularly important.

And, of course, Parliament is always free to legislate in the future to make it clear that it does wish to override international obligations, but then it will be doing so in full knowledge of any consequences (international or otherwise) that might arise from that decision and with input into that process from all of the parliamentary processes, including the select committee process.

B. Executive authority

As regards the constraining of the executive authority by requiring the executive to exercise powers consistently with international obligations, questions have been raised as to the legitimacy of judges restraining executive

70 This criticism was outlined by McHugh J in the High Court of Australia decision *Al-Ketab v Godwin* [2004] HCA 37, (2004) 219 CLR 562 at [65].

71 For academic discussion of whether Parliament can have an intention, see by Richard Ekins and Jeffrey Goldsworthy in "The Reality and Indispensability of Legislative Intentions" (2014) 36 Syd LR 39; Robert French "The Courts and the Parliament" (2013) 87 ALJ 820 at 825; and Richard Ekins "Statutes, intentions and the legislature: a reply to Justice Hayne" (2014) 14(1) OUCLJ 3. As to the caselaw questioning whether Parliament can have an intention, see for example *Lacey v Attorney-General of Queensland* [2011] HCA 10, (2011) 242 CLR 573 at [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 at [25]; and *Zheng v Cai* [2009] HCA 52, (2009) 239 CLR 436 at [28] per French CJ and Hayne J.

authority using principles that are derived from sources other than the statute delegating that authority.[72] The answer that has been suggested by Professor Geiringer is that what is at stake in this is a compromise between two different constitutional principles.[73] On the one hand, the continued importance of the principles of the separation of powers and democratic accountability, while on the other the "growing perception that governments should be held to their international … obligations and that domestic courts" have a role to play in doing so.[74]

I have always taken the view that it was the executive who took on these obligations and there is therefore really nothing wrong in saying that they should be held to them. This type of thinking, although more elegantly put, is behind the sort of comments that have been made in the cases. Lord Cooke, as he then was not, for example made it clear that the judiciary has a role in ensuring that the ratification of treaties is not mere "window-dressing".[75] Chief Justice Mason and Justice Deane, of the High Court of Australia, put it even more strongly in the case of *Teoh*, saying that ratification of a treaty could not be seen as a "platitudinous or ineffectual" act.[76]

It has been said that the requirement to hold the executive to their commitments comes from something termed the "principle of integrity in government". According to Alice Osman, this concept encompasses two ideas.[77] First, that each branch of government should act in accordance with the values they purport to uphold and if the "courts trumpet the importance of human rights, they should be willing to place weight on international human rights instruments in their decisions".[78] Similarly, the executive should not ratify conventions on "one hand and sweep them aside as irrelevant considerations with the other".[79] Secondly, the government should, as a whole, show integrity. This means that, "because the hypocrisy of one branch taints the whole, one branch may be required to give substance to the representations of another".[80]

72 For example, see Dyzenhaus, Hunt and Taggart, above n 59, at 5.

73 Geiringer, above n 16, at 72.

74 At 72. See also Dunworth, above n 68 and Wendy Lacey "The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (Federation Press, Sydney, 2005) 82.

75 *Tavita v Minister for Immigration*, above n 21, at 266 per Cooke P.

76 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291. The Chief Justice and Deane J also added (at 291) that ratification is a "positive statement" by the executive to the world and the public that the government would act in accordance with the convention.

77 Osman, above n 36, at 365–377. See also Margaret Allars "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law" (1995) 17(2) Syd L Rev 204.

78 See also Osman, above n 36, at 366.

79 At 366.

80 At 366.

C. Judicial independence

I have already mentioned the concerns about judicial independence if the judiciary is seen as part of the state for the purposes of human rights instruments. For myself, I do not consider it a bad thing for judges to be bound to apply fundamental rights and freedoms. This after all is one of the reasons for an independent judiciary.[81] However, I will not say anything more about this because it is a topic in itself.

So, moving onto the judicial use of foreign caselaw and international obligations that New Zealand has entered into, one of the concerns expressed is that this may mean that the courts are taking account of material that is effectively not relevant in the New Zealand context. Concern has also been expressed that judges, when they are looking at overseas authorities, can effectively cherry-pick the cases they wish to rely on. The late Justice Scalia, of the United States Supreme Court, has said that there is a tendency for judges to "invoke alien law when it agrees with one's own thinking and ignore it otherwise".[82] Justice Scalia said this "is not reasoned decision-making, but sophistry".[83]

An argument in favour of the use of foreign caselaw is that issues are often not jurisdiction specific. As this is the case, it must be relevant to see what courts in other jurisdictions have dealt with those issues.[84] This is especially the case for overseas jurisdictions that are relatively similar to our own, although we should perhaps be moving a bit further afield as that may widen our horizons.

Even if ultimately a New Zealand court disagrees with the offshore authority and decides that it is not something that should be applied in New Zealand, then that Court's judgment will be enriched by the court working out exactly why it does disagree and why the decision it is coming to is better. To adapt a comment of the British philosopher John Stuart Mill, if the overseas cases are right, New Zealand courts can "exchange falsehood for truth" and, if they are wrong, New Zealand courts would lose what is "almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error".[85] This is one of the best arguments

81 Office of the High Commissioner for Human Rights *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, New York, 2003) at 115.

82 *Roper v Simmons* (2005) 125 SCt 118 at 1228 (dissenting).

83 At 1228.

84 See Rebecca Lefler "A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority in the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia" (2001) 11 Southern California Interdisciplinary Law Journal 165 at 165–166. As the Privy Council recognised in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 519–520, "[t]he ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other".

85 Adapted from John Stuart Mill *On Liberty* (Longman, Roberts & Green, 1869) at 31.

against cherry-picking, (because if you only pick out cases you agree with, you lose what Mills called the "clearer and livelier impression of truth") but of course there is also an issue as to legitimacy of decisions that cherry-pick, as Justice Scalia points out.

Before I leave the topic on judicial independence, I briefly mention the issue of investment treaties and free trade agreements. In a recent speech, Chief Justice French, of the Australian High Court,[86] drew attention to domestic judicial decisions being called into question by arbitral proceedings in the course of Investor-State Dispute Settlement processes.[87] Chief Justice French mentioned in particular the High Court decision upholding plain packaging for tobacco.[88] One of the plaintiffs, Philip Morris, a tobacco company, is now effectively challenging that decision under the Hong Kong–Australia Bilateral Investment Treaty. Chief Justice French in his paper considers this has major implications for the rule of law.[89] He also mentions the wide range of governmental measures that have been the subject of challenge under investment and free trade treaties, including measures relating to renewable energy, land zoning decisions and energy tariffs and the general implications he thinks this may have for national sovereignty and democratic governance.[90]

D. When is international influence appropriate?

So to my final question: when is international influence appropriate? When there is an international dimension to a particular issue, for example issues related to international trade, then it is very difficult to argue that it is inappropriate to take into account international obligations and other international influences.

For example, for people investing in New Zealand or New Zealanders investing offshore, it is useful to have international harmonisation of law relating to commercial obligations. As the Law Commission has noted, referring to the comment in the preface to the book *The Borderless World*, "nothing is 'overseas' any longer".[91] The Law Commission went on to say that a borderless economic world has developed which at present must be regulated by states whose jurisdiction is limited by their sovereign and

86 See Robert French "Legal Practice in a Global Neighbourhood" (Sir Ninian Stephen Lecture Speech, University of New Castle, 8 August 2014) available at <www.hcourt.gov.au>; and Robert French "Investor-State Dispute Settlement – A Cut Above the Courts?" (Speech delivered at Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014).

87 French "Investor-State Dispute Settlement – A Cut Above the Courts?", above n 86, at 5.

88 *JT International SA v Commonwealth* [2012] HCA 43, (2012) 250 CLR 1.

89 At 3–6. The case is currently at the stage of dealing with preliminary objections on the basis that Phillip Morris Asia only bought shares in its Australian arm so that it could launch the case: see Amy Corderoy "Australia wins first battle in plan packaging trade dispute" *Sydney Morning Herald* (online ed, Sydney, 3 July 2014).

90 French "Investor-State Dispute Settlement – A Cut Above the Courts?", above n 86, at 3–4.

91 Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at 1 citing Kenichi Ohmae *The Borderless World* (Fontana, London, 1991) at ix.

territorial boundary.[92] It is thus necessary to strike a balance between the needs of sovereign states to regulate economic activity within their territorial boundaries and the need to create a stable environment in which international trade and commerce can operate.

It will, of course, not be appropriate to take into account international influences where that does not accord with New Zealand's circumstances, values or identity. But there will often be competing considerations in the sense that there may be measures that better suit New Zealand, or at least certain groups of New Zealanders, but nevertheless the benefits of international harmony of laws may outweigh those benefits. So there will be compromises to be made. These compromises, however, will usually be made at the level of the executive (in deciding whether to enter into treaties) or at parliamentary level (in deciding what legislation to enact), rather than through the courts.

1. Laws for New Zealand

A few more observations on the issue of unique New Zealand law, suited to our political history, socio-economic conditions, and values and identity as a nation. It is recognised New Zealand has been breaking its legal ties with Britain, and I include in legal ties the reliance on English legislation when Parliament is passing legislation in New Zealand.[93] Since the 1980s there has been a marked decline on the reliance on English cases in the New Zealand courts and certainly not the blind reliance that was seen earlier. This was recognised by the Privy Council, while appeals still went to the Privy Council, most notably in the case of *Invercargill City Council v Hamlin*, dealing with local authority negligence liability. The Privy Council recognised that the common law can diverge, because what is good law in one country may not be good law in New Zealand, due to there being different social conditions.[94]

2. Indigenous jurisprudence

I particularly want to mention one area where it is particularly important that we look at New Zealand's unique social circumstances and that is in relation to our indigenous population. Talking first about the role of the Treaty of Waitangi, this has been recognised in the *Māori Council* case[95] and the latest Supreme Court case relating to water rights[96] as being a matter of constitutional significance where Parliament has expressly legislated for the

92 See Law Commission *Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency* (NZLC R52, 1999) at [E5].

93 For example, after the First World War, Spiller, above n 55, at 115 notes that "New Zealand Parliament was content to do nothing more adventurous than to tinker with English laws." However, over the last 50 years, according to Spiller at 120, the New Zealand legislature "has benefited from a willingness both to experiment with indigenous ideas and to draw on a wide range of overseas sources for suitable models for local reforms".

94 See *Invercargill City Council v Hamlin*, above n 84, at 519–522 and 527.

95 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (often called the *Lands* case).

96 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

principles of the Treaty of Waitangi to be taken into account, such as in the State Owned Enterprises Act 1986.[97]

It is probable too that the courts will apply the presumption of consistency it uses for international treaties, even where Parliament has not expressly included the Treaty in the statute. This of course will only be insofar as the words of the statute allow.[98] There is no doubt too, to me at least, that the Treaty of Waitangi will have an influence on the common law in situations where that is appropriate.

Moving on to Māori customary law, we have already had issues with Māori customary land ownership with the foreshore and seabed case[99] and it has been recognised that tikanga Māori is part of the values of the New Zealand common law and relevant to its development by the Supreme Court in the *Takamore* case.[100] Indeed this conclusion is not in fact contrary to the common law in the sense that common law has always recognised custom as being part of the law, except to the extent that it conflicts with fundamental values or is overridden by statute.[101]

With regard to the relationship with our indigenous people, there is still, however, an international dimension. I refer in particular to the United Nations Declaration on the Rights of Indigenous Peoples.[102]

V. Conclusion

Despite being isolated geographically, New Zealand's legal system is not: international law and international influences pervade many areas of our law and affect all three branches of government. Whether the influence

97 For example, in *New Zealand Maori Council*, above n 95, Cooke P at 658 said the Treaty of Waitangi clause in the State Owned Enterprises Act has "the impact of a constitutional guarantee".

98 For a full explanation of the approach, see Wilberg, above n 20, at 719–726. With regard to the cases making use of the Treaty without direct incorporation, see *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); and *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA). See also PG McHugh "What difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public law" (2004) 15 PLR 87.

99 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

100 See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150] per Tipping, McGrath and Blanchard JJ. See further Carwyn Jones "Customary Law as part of the Common Law – Burial; Executor's Duties *Takamore v Clarke*" (2011) November Maori LR 1; Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 15–17; and Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] 1 NZ L Rev 1.

101 See *Te Runanga O Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655; and *Attorney-General v Ngati Apa*, above n 99, at[147]–[149] per Keith and Anderson JJ and at [185] per Tipping J.

102 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/296, A/RES61/296 (2007). In April 2010, the New Zealand Government officially endorsed the Declaration.

stems from treaties entered into by the executive, or customary international law that automatically diffuses into our legal system, we are amenable to international legal developments. The influence of international law, however, is not something new. Since the arrival of the British colonists, New Zealand has been influenced by overseas developments and the law of nations (international law), although there has been a shift from a reliance on Britain to a wider reliance on multiple sources.

As to whether this influence is cross-pollination or contamination depends on the context; while there are times when international harmonisation is important, there are others where we must be cognisant of Aotearoa New Zealand's unique heritage, and its own cultural and social circumstances. In essence, while New Zealand can learn from the world and vice versa, we do need to take care to keep, and not contaminate, our unique legal character where that is what is needed for New Zealand.