S428 SCOTT, R. J. International human rights and same-sex marriage.

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INTERNATIONAL HUMAN RIGHTS AND SAME-SEX MARRIAGE: A CASE NOTE ON *QUILTER V ATTORNEY-GENERAL* [1996] NZFLR 481.

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I INTRODUCTION

In May of this year, Kerr J, sitting in the High Court of New Zealand, delivered a judgment that for some was a disappointment, while others around the country breathed a sigh of relief. Three lesbian couples, who had been refused marriage licences, sought a declaration that they were legally able to marry under the relevant New Zealand legislation. Kerr J dismissed the application.

The disappointment and relief at the decision reflected nothing more than opposing "moral" ideas and values. In a case dealing with an issue such as this, it is easy to forget the most important thing, and to cloud the outcome with moral judgments and policy issues that are not or should not necessarily be the deciding factor. What is that most important thing? The law. This was simply a case asking what is the law in New Zealand? More specifically, it was a case of statutory interpretation.

In this paper I will consider the provisions of the Marriage Act 1955 (the Act), as well as other relevant legislation. I will look at and use the same tools used by Kerr J to interpret the Act, and analyse his conclusions along the way; those tools being the Act itself, the common law and other New Zealand legislation. The main purpose of this paper however will be to study New Zealand's international human rights obligations and their impact on interpretation of the Act. It is my intention to illustrate the correct interpretation of the Act as allowing same-sex marriages.

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II THE MARRIAGE ACT 1955

The Act itself does not provide us with a definition of "marriage". For this reason it is necessary to use the techniques of statutory interpretation to ascertain exactly what is a marriage for the purposes of the Act, and therefore, what constitutes a legal marriage under the laws of New Zealand. In his judgment Kerr J admitted that the statute is worded in gender non-specific language, but seems to place more emphasis on the wording of the second schedule.

It is clear that the Act itself prima facie does not rule out same-sex marriages, due to its use of gender neutral language such as "persons" and "party to [the marriage]".[1] Kerr J however found that specific reference to a man being prohibited to marry a certain class of woman, and vice versa, in the second schedule "must show Parliament intended that marriage meant a union between a woman and a man, and not between persons of the same sex."[2] It is respectfully submitted that this finding is not the logical conclusion one can draw from the Act. The purpose of the second schedule is in fact to list the restrictions on marriage. The list is in itself exhaustive as it leaves no room for adding any other restrictions. Not only is it a rather strained conclusion that by reference only to prohibited marriages between people of different sexes same-sex marriages are excluded, but if Parliament did wish to prohibit marriage between

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[1] See for example ss 15-22.

[2] *Quilter v Attorney-General* [1996] NZFLR 481,501.

people of the same sex then the schedule is the perfect place to do it. An argument could be made that this interpretation creates a situation where if two women can marry, then two sisters could also marry, as they are not listed in the schedule. However, anomalies do occur in the law from time to time, and this is not enough in itself to point to a prohibition of same-sex marriages. If Parliament intended to rule out same-sex marriages, marriage to someone of the same sex as yourself would simply be added to the restrictions already listed. However, marriage to someone of the same sex is not listed in these second schedule restrictions, and therefore an argument against same-sex marriages based on this schedule must fail.

Kerr J's next finding on the Act itself is that the marriage solemnisation wording specified in s31 (the "marriage vows"), also show that Parliament intended marriage to be only between people of different sexes.[3] The relevant part of s31 is:

> "(3) During the solemnisation of every such marriage each party to it shall say to the other:
>
> ...I, A.B. take you C.D. to be my legal wife (or husband), or words to similar effect."

This section neither expressly nor impliedly says that one party must say "I take you to be my wife", whilst the other party must say "I take you to be my husband", and therefore the use of the words wife and husband do not definitively show that the legislature intended marriage between different sexes only as held by Kerr J.

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[3]See above n2, 501-502.

A simple and unstrained reading of the section implies that both parties could say, for example, "I take you to be my wife", and this would be perfectly legal.

His Honour, in further analysis of this section said "I therefore do not find that the words "to similar effect" were used to permit a marriage of a couple of the same sex, by allowing the vow to be altered accordingly."[4] As already shown, there is no need for the vow to be altered, but it can in fact be changed to use words such as "spouse" or "partner". While this may offer only minimal support for an argument for same-sex marriages, it certainly does not suggest that they are excluded by the legislation.

Kerr J was swayed by the fact that in spite of modern day attitudes, as he puts it, "no amendment has been made to the Act to specifically permit marriages of same-sex couples."[5] However, as I have shown, no amendment is necessary as the Act also does not specifically prohibit marriages of same sex couples. In fact, the Act does not specifically permit a number of things that no one would argue were prohibited due to this lack of specificity, for example, inter-racial marriages. Traditionally these were not commonly accepted in society, just like same-sex marriages, but an argument that inter-racial marriages are illegal because they are not specifically permitted by the Act would undoubtedly fail in these modern times. This is an example of how interpretation

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[4]Above n2, 502.

[5]Above n2, 495.

of laws can change with changing social ideas and values. It would not be going too far to say that due to its gender non-specific language the Act does not specifically permit marriage between opposite sexes either.

It is therefore apparent that the focus should be on what the Act specifically prohibits as opposed to what it specifically permits. Based on this analysis same-sex marriages are legal as they are not prohibited by the Act. If, however, this analysis is incorrect in interpreting the Act too widely, then at the least the Act can be said to be unclear and ambiguous on this issue. It therefore becomes necessary to look to the common law definition of marriage and the aids of statutory interpretation to give the Act a clear meaning.

III THE COMMON LAW DEFINITION OF MARRIAGE

The traditional common law view of marriage as quoted by Kerr J comes from Lord Penzance in the 1866 case of *Hyde v Hyde & Woodmansee*:[6]

> I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

This definition is so outdated that it surely cannot apply to marriage in New Zealand in 1996. First, this was a case about polygamy, and therefore a strong argument can be made that the focus of this definition is on the "one" and not on the "man" and "woman". It should also be noted

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[6](1866) [1861-73] All ER 175, at 177.

that Lord Penzance says "for this purpose". This gives more weight to the argument that the emphasis is on the "one", as this is what was relevant to this case, or relevant "for this purpose". It suggests that the judge did not necessarily intend for his definition to become the standard common law definition of marriage. Kerr J refers to the case of *Ming Ng Ping On v Ming Ng Choy Fung Cam*[7] where Sugarman J held that the references to Christianity meant merely a marriage in which the relationship was understood in Christendom, not a marriage between Christians only. The definition should still not be used in modern day New Zealand. Nothing in law can be judged on the basis of Christianity alone when New Zealand is a multi-cultural country with people practising a multitude of religions, and many who follow no religion at all. How a marriage is understood in Christendom is irrelevant. What is important is how a marriage is understood in law. Ellis J in *Attorney-General v Family Court at Otahuhu*[8] reduced Lord Penzance's definition to "a voluntary union, until death or divorce, between one man and one woman, to the exclusion of all others."[9] To take away the idea of a Christian marriage from Lord Penzance's definition takes away a key element of it and therefore makes it a different definition altogether. Ellis J perhaps went too far in trying to alter the traditional definition instead of coming up with a more appropriate and modern definition of marriage.

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[7][1964] NSWR 953 at 954, 955.

[8][1995] NZFLR 57.

[9]Above n8, 59.

Kerr J's reference[10] to the definition of marriage in the case of *Lindo v Belisario*[11] is even more questionable. In this case Sir William Scott in considering what is marriage said:[12]

> It is a contract according to the law of nature, antecedent to civil institution, and which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts, to live together...where two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutes, might safely be presumed to be, as it is popularly called, a marriage in the sight of God.

This definition is very outdated. Two persons of different sexes engaging by mutual contracts to live together is not an appropriate definition of marriage; in modern times even flatmates fit into this part of the description. Ideas of procreation being tied to marriage are also no longer relevant[13] due to infertility, couples not wanting to have children and so on. "[L]asting cohabitation" is also not necessary with the high rate of divorce in modern times, and once again, a reference to "in the sight of God" is both unnecessary and inappropriate. This may be a way of simply referring to common law marriage as opposed to state licensed marriage, but if this is so then it still does not help us

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[10]Above n2, 484.

[11](1795) 1 Hag Con 215.

[12]Above n11, 230-231.

[13]As recognised by Ellis J in *Attorney-General v Family Court at Otahuhu* [1995] NZFLR 57.

as marriages must be state licensed under the present New Zealand law. This definition therefore does not help at all.

Traditional common law definitions of marriage are therefore inapplicable to modern day marriage in New Zealand. One factor that they all leave out is the modern necessity for marriages to be legally recognised by the state.[14] State recognition is needed to distinguish marriage from other relationships so as to define who gains the benefits from marriage under the law. For this reason it is important to consider what the state recognises as being marriage, and as the Act itself is not clear, it is necessary now to consider other relevant New Zealand legislation.

IV OTHER NEW ZEALAND LEGISLATION

Kerr J accepted "that the common law may alter as attitudes, views and concerns of society vary and change and as well that it should expand to meet such variations and changes."[15] However he placed more emphasis on what he considered to be amendments to other legislation that would be necessary if he found for the plaintiffs. At pages 489-490 of the judgment his Honour set out the various New Zealand statutes that refer to married couples, and at page 491 he drew conclusions as to how same-sex couples would fit into this legislation.

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[14]This has perhaps replaced the traditional necessity for marriages to be recognised by God.

[15]Above n2, 489.

As with the vows in the Act, Kerr J concluded here that the references to "husband" and "wife" show that marriage can occur only between people of different sexes. However, while the statutes he refers to do use the terminology of husband and wife they do not expressly say nor imply that in a married couple there must be a husband and a wife. For example, s3 of the Family Protection Act speaks of "the wife or husband of the deceased." There is no reference made to the fact that the surviving spouse must be of a different sex to the deceased. It is not a strained interpretation of this legislation to say that the deceased could be a woman and the surviving spouse could also be a woman, therefore still being "the wife of the deceased". This is the case for many of the statutes relied on by Kerr J.

There is little doubt that the wording of some legislation would better accommodate same-sex marriages if amended. However this is no reason to interpret the law as not allowing them. To eliminate a possible interpretation on the grounds that minor changes in the wording of some statutes may be needed to allow same-sex couples access to those benefits enjoyed by couples of the opposite sex is a weak argument. First, it would not be impracticable or impossible for Parliament to amend the statutes. Secondly, and more importantly, such amendment is not actually necessary to make same-sex marriages valid or legal. The fact that the couples would not enjoy the benefits of different-sex marriage offered by the legislation does not in itself prohibit their marriage. Instead it gives rise to discrimination arguments regarding the legislation.

The Births, Deaths and Marriages Registration Act 1995 (the BDMRA), refers specifically to the "husband and wife" as being the two parties to a marriage[16]. Therefore a strong argument can be made from this that Parliament intended marriage to be only between a man and a woman; Kerr J relied heavily on this.[17] However, as argued by counsel for the plaintiff, the definition of marriage adopted by s2 of the BDMRA is that in the Marriage Act 1955. We can not use the BDMRA to interpret its "parent" Act conclusively. If same-sex marriages are allowed under the Marriage Act then they must also therefore come under the BDMRA. While the BDMRA may not show an intention by Parliament to allow same-sex marriages, it also does not prove an intention to exclude them.

The next piece of New Zealand legislation which it is important to consider is the New Zealand Bill of Rights Act 1990, (NZBORA). Under s19 of this Act everyone has the right to freedom from discrimination on the basis of sex or sexual orientation. Kerr J made a finding that same-sex couples who wish to marry are discriminated against.[18] He then considered s6 of the NZBORA which says that if legislation can be given a meaning that is consistent with the rights and freedoms contained in the NZBORA, this meaning shall be preferred. His Honour concluded that the Act cannot be given a meaning consistent with the

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[16]See for example s55 of the BDMRA.

[17]See above n2, 504.

[18]Above n2, 504.
This is of course only if his interpretation of the Marriage Act is correct and it does prohibit same-sex marriages.

NZBORA[19]. However, as has been the focus of this paper so far, the Act is not as clear cut as Kerr J would like to believe. The Act does not specifically rule out same-sex marriages and therefore there is unquestionably scope to interpret it to be compatible with the right not to be discriminated against found in the NZBORA.

Kerr J said that if he was wrong in respect of s6, then Parliament still had the right to impose "such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society" under s5 of the NZBORA. He therefore concluded that Parliament "is entitled to reasonably limit the persons able to marry so that couples of the same sex are not entitled to go through a marriage ceremony."[20] It is submitted that this is not a "reasonable" limitation at all. Both law and society have accepted homosexuality.[21] Still homosexuals remain a disadvantaged group in society in respect of some issues. With other disadvantaged groups, for example, racial minorities, work is done to give them more opportunities and to make them more equal. A marriage recognised by the state confers legal benefits on the parties to the marriage, and is arguably the "ideal" status in our society. This has the potential to seriously disadvantage those who under law can not marry, in this case, people of the same sex. The most commonly put forward arguments against

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[19]Above n2, 504.

[20]Above n2, 505.

[21]See for example the Homosexual Law Reform Bill 1985 and the ensuing legislation. Even the fact that sexual orientation has been included as a prohibited ground of discrimination shows a modern day acceptance of homosexuality.

same-sex marriages rest on traditional Judeo-Christian beliefs and values which are not universally accepted in modern day society. Therefore it cannot be a "reasonable" limitation, and should not be considered.

Jurisprudence on the NZBORA indicates that legislation should be given as broad an interpretation as is possible in order to bring it in line with the NZBORA. For example, Cooke P in the cases of *Noort v Ministry of Transport* & *Curran v Police*[22] held that while the NZBORA is not supreme law, the Court has an obligation to act within the spirit of the Act, and that a generous interpretation of the rights and freedoms is required. It is also relevant, as noted by Kerr J, that s5(j) of the Acts Interpretation Act 1924 requires a statute to be interpreted fairly, largely and liberally according to the intent of Parliament. While Parliament may not have intended to cover same-sex relationships with the Marriage Act, this would be because it did not have them in mind. Therefore it follows that it can not have been Parliament's intention to prohibit them. Kerr J also refers to the ambulatory approach to interpretation which would enable modern attitudes to be taken into account.[23] His Honour discounts this approach because despite changing attitudes Parliament has not amended the Act to specifically permit marriages of same-sex couples. However, this is a matter of interpretation and no amendment is necessary. The ambulatory approach supports an interpretation

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[22](1992) 1 NZBORR 97.

[23]Above n2, 494-495.

allowing same-sex marriages as modern attitudes are more accepting of homosexuality. Taking all these relevant factors into consideration it was possible for Kerr J to conclude that same-sex marriages were not excluded by the Act.

Kerr J argued that Parliament had the chance to provide for same-sex marriages when the Act was amended in 1995, but did not do so.[24] His Honour related this to the question of the intent of Parliament. Counsel for the plaintiffs raised the point that Parliament simply did not think to make such an alteration. As Kerr J pointed out we do not know what Parliament was thinking, and therefore we also do not know that Parliament did not want to amend the Act in this way. It is submitted that Parliament also had the chance to amend the Act to expressly exclude same-sex marriages, but this amendment was not made either.

The final piece of New Zealand legislation which is important to consider is the Family Proceedings Act 1980. Counsel for the plaintiffs raised an issue based on this Act, but Kerr J does not deal with it in his judgment. Much of the Act refers to "party/parties to the marriage" and is therefore gender neutral. Section 31 of the Act sets out the grounds on which a marriage can be void. The use of the word "only" prima facie means that s31 is an exhaustive list. There is nothing in this section that states that a marriage is void if the two parties are of the same sex. This is to be contrasted with the equivalent United Kingdom provision in the

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[24]Above n2, 495.

Matrimonial Causes Act 1973, in which s11(c) expressly requires the parties to be male and female. A marriage is void under this section unless the parties are "respectively male and female". This supports the validity of same-sex marriages in New Zealand as Parliament has not expressly or impliedly made a same-sex marriage void by enacting a provision similar to the United Kingdom one.

Kerr J concluded his analysis of the relevant legislation by noting:[25]

> If parliament considers marriages between same-sex couples should be recognised and registered as such, then it must enact a provision or provisions which makes it quite clear that is what it intends. No such provision or provisions have been enacted and I therefore conclude, that Parliament has not as yet decided that same-sex marriages should be permitted.

Parliament has enacted the necessary law under which couples may marry. As established, this law is not clear. It is part of the role of the courts to determine the meaning of ambiguous or unclear legislation. Parliament has not specifically outlawed same-sex marriages, and therefore it is up to the court to look at the legislation which has been enacted and to interpret it. With respect, Kerr J appears to have opted for an easier route out of the issue.

Another key tool in the interpretation of legislation to which the courts should have regard is New Zealand's international human rights treaty obligations.

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[25]Above n2, 505.

V INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS

Kerr J dealt with these in less than a page of his judgment.[26] With respect, not nearly enough emphasis was put on New Zealand's treaty obligations as statutory interpretation tools. New Zealand is under a legal obligation to, where possible, interpret its legislation so as to make it compatible with the rights and freedoms set out in these documents. The reasons for this are discussed later in the paper.

There are three international human rights treaties to which New Zealand is a party and which are relevant in deciding this issue: the Universal Declaration of Human Rights 1948, (the Declaration), the International Covenant on Civil and Political Rights 1966, (the ICCPR), and the Covenant on Economic, Social and Cultural Rights 1966, (the CESCR). I will first set out the relevant provisions of and information relating to these documents, and then go on to explain their impact on the issue of same-sex marriages in New Zealand.

A THE DECLARATION

After World War II a call was made for a United Nations prepared International Bill of Rights. This led to the adoption of the Declaration by the United Nations General Assembly on 10 December 1948. The relevant sections here are:

> Article 1 - All human beings are born free and equal in dignity and rights...(emphasis added).

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[26] See above n2, 499.

> Article 2(1) - Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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 (emphasis added).
>
> Article 16(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family...(emphasis added).

As this was a General Assembly Resolution, traditionally it would not be regarded as binding. However, there are two schools of thought which suggest that the Declaration has acquired legal force over time by common acceptance. The first argues that it constitutes an authoritative interpretation of the provisions of the Charter of the United Nations, and the second that a number of its provisions have become customary international law and as such are binding. This second argument is known as the incorporation school of thought. Following this idea, if the Declaration is customary international law, it would therefore form part of New Zealand's domestic law, even though not committed to statute.[27] The International Court of Justice has given legal status to some General Assembly Resolutions, particularly those which are constantly repeated.[28] The Declaration remains an important and integral part of international human rights law. It is also the "parent" of both the ICCPR and the CESCR.

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[27]See for example *Triquet v Bath* (1764) 3 BURR 1480 and *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881, per Lord Denning at 889.

[28]See for example *The South-West African Case* [1966] ICJR 5, 292.

B THE ICCPR

This was signed by New Zealand on 12 December 1968, and ratified on 28 December 1978. Some reservations were made at this time, but none that are relevant to this discussion.[29] The First Optional Protocol to the ICCPR was ratified in New Zealand on 28 May 1989 and came into force three months later, making it possible for individuals to take a claim against the state to the Human Rights Committee. The relevant sections of the ICCPR are:

> 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 recognised 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.
>
> Article 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.
>
> Article 23.2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
>
> 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 (emphasis added).

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[29]For a list of New Zealand's reservations see: *Human Rights - Status of International Instruments* United Nations Publication (New York, 1987)43.

This document can be argued to have strong legal status and to therefore be binding on the States Parties, particularly due to the obligations it contains in Article 2 for States Parties to implement it into domestic law. It is binding on the legislature so that it legislates in accordance with the obligations contained in the document. It is binding on the judiciary so that the obligations are considered, where helpful, in statutory interpretation, as is discussed in Parts VIII-X of this paper. Article 2.1 as well as being an anti-discrimination clause, is also an undertaking to respect and ensure the rights. Under Article 2.2 the legislature is required to adopt legislative or other measures as necessary to give effect to the rights. Article 2.3 contains a very strong remedies clause, providing a three-pronged obligation to ensure that remedies for breaches of the Covenant will be both granted and enforced by competent authorities. The obligations set out in Article 2 are extensive, and through ratification of the treaty they create strong legal status for the Covenant.

C THE CESCR

This Covenant is different from the ICCPR in its legal nature. It imposes a duty on states to take reasonable steps to comply with the treaty. Article 2.1 says that a state must take steps "to the maximum of its available resources", and therefore does not impose any strong obligations on States Parties. However, it was signed by New Zealand on 12 December 1968 and ratified on 28 December 1978 and therefore its provisions are still relevant when considering New Zealand's

international human rights obligations. Once again, certain reservations were made by the New Zealand government at this time, but none that are pertinent to the issues in this case.[30] Article 10 says that the "widest possible protection and assistance" should be given to the family, particularly for its establishment. The traditional view of Mum, Dad and the kids cannot be the definitive family in our modern society with single-parenting, step-parents, homosexual couples raising children together, and many other examples of the modern family that do not fit the traditional mould. Marriage, though not essential in the definition of family, is in itself the establishment of a new family and is therefore covered by Article 10.

VI BREACH OF THE ANTI-DISCRIMINATION SECTIONS

The discrimination sections contained in these documents provide a prohibition against discrimination on a number of stated grounds. Sexual orientation is not one of the listed grounds. However, the words "such as" suggest that the list is not exhaustive and that other grounds may be implied. As well as this, jurisprudence from the United Nations Human Rights Committee includes sexual orientation as a prohibited ground of discrimination. In the case of *Toonen v Australia*[31], the Federal Government supported an interpretation of the words "other status" as including sexual orientation, a view supported by Sarah Joseph in her article "Gay Rights Under The ICCPR -

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[30]Above n29, 13.

[31]UN Doc CCPR/C/50/D/488/1992.

Commentary on *Toonen v Australia*"[32]. She argues that it is easy to see sexual orientation as a personal characteristic and therefore a relevant "other status".[33] The Committee however did not have to decide this saying instead that "[t]he committee confines itself to noting however that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."[34] The Committee did not give their reasoning for this conclusion, but it could be based on the interpretation of the word "sex" to mean both gender and the practice of having sex, from which it would follow that "sex" included sexual orientation. There is a strong argument that sexual orientation could be considered to be an "other status" or that it could be an implied ground. However, at least for the purposes of the ICCPR the Human Rights Committee has decided that it is covered by the term "sex". If the Marriage Act is interpreted to exclude same-sex marriages then this constitutes discrimination on the grounds of sexual orientation as it would dictate that homosexual people could not marry their partners while heterosexual people could. Such an interpretation of the Marriage Act is not consistent with the developing interpretation of the ICCPR.

VII BREACH OF THE RIGHT TO MARRY

Although she disagrees with the prospect of same-sex marriages, Maja Eriksson starts her book *The Right to Marry and to Found a Family - A World-*

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[32](1994) 13 University of Tasmania LR 392.

[33]Above n32, 398.

[34]Above n31, 12.

Wide Human Right[35] with the idea that:[36]

> Marriage is still universally the most common way to establish a family, the basic nucleus of society's structure, and the right to marry is a basic human right recognised world-wide.

The American Supreme Court has decided several cases in the last century whereby marriage has now achieved the status of a fundamental human right. To quote a few, in *Maynard v Hill*[37] marriage is described as "the most important relation in life", in *Meyer v Nebraska*[38]it is "essential to the orderly pursuit of happiness by free men", and more recently the Court in *Zabloki v Redhail*[39] said "the right to marry is of fundamental importance for <u>all</u> individuals" (emphasis added). Surely it is contradictory to build up a strong jurisprudence stressing the fundamental nature of the right to marry and then denying it to one group in society. It is true that it is not a complete denial. A gay or lesbian person still has the right to marry somebody of the opposite sex. It is also true that Parliament is entitled to limit whom you can marry; very few people would argue that by law a man should be able to marry his sister for example. However, the right to marry is indirectly denied when people are allowed by law to marry only a class of people whom they would not want to marry. For example, a lesbian who is

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[35](Uppsala Studies in Law, no. 28, Sweden 1990).

[36]Above n35, 25.

[37]125 U.S. 190 (1888).

[38]262 U.S. 390 (1923).

[39]434 U.S. 374 (1978).

told by law that she may marry only a man will not want to do this, and therefore may never be able to marry despite the fact that she wants to get married and has a prospective partner (another woman). It is in this indirect way that the right to marry is breached where same-sex marriages are excluded. Parliament's ability to limit who is allowed to get married must also be restricted with the fundamental right to marry overshadowing the restrictions. Parliament has expressly said that a marriage between siblings is void. This is representative of general societal attitudes that incest is wrong. If a time ever comes when incest is acceptable then Parliament can lift the restriction and give siblings the right to marry. Parliament has not expressly said that same-sex marriages are void, and with increasing societal acceptance of homosexuality it is submitted that a limitation of this kind is not acceptable under the principle of the right to marry.

Robert Cordell describes marriage as "one of the basic fundamental rights afforded people of...the world."[40] Marriage binds people both symbolically and legally[41], and leads to rights and benefits not available to unmarried, for example same-sex, couples. These benefits include such things as inheritance and succession rights, next-of-kin status and state benefits reliant on married status, to name but a few.
Same-sex couples are discriminated against if forbidden to marry as they are unable to gain

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[40]"Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause" (1994) 26 Col HR LR 247.

[41]Above n37, 247.

access to the benefits of marriage, both social and legal.

In his judgment Kerr J considered international treaties saying that they are "important"[42], but placing little importance on them in the overall scope of his decision. His Honour found that these covenants, while they do protect the right to marry, refer only to couples of different sexes, and not to same-sex couples. He based his conclusion on the specific wording of the ICCPR, that is, "the right of men and women of marriageable age to marry", claiming that the use of the words men and women indicate couples of a different sex. It is submitted that this is not the only inference that can be drawn from this provision. A logical interpretation is not that men and women have the right to marry <u>each other</u>, but rather that men have the right to marry, and that women have the right to marry. Therefore this provision does not rule out same-sex marriages. Kerr J limited his discussion of the international treaties to the right to marry, and did not consider issues of discrimination based on sexual orientation. His Honour stated that the international obligations do not override the domestic law of New Zealand.[43] Where this is correct the Courts are under a legal obligation to interpret ambiguous legislation, such as the Marriage Act, so that it complies with the treaties as will be discussed shortly.

To interpret the Marriage Act against same-sex marriages is in breach of the prohibitions

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[42]Above n2, 499.

[43]Above n2, 499.

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against discrimination and goes against the right to marry contained in these international treaties. So are the New Zealand Courts obliged to make decisions consistent with New Zealand's international human rights treaty obligations?

VIII JURISPRUDENCE ON THE INFLUENCE OF HUMAN RIGHTS TREATIES

There is much jurisprudence strongly supporting the idea that international human rights obligations are mandatory considerations in decision making, or as in this case, in interpretation. This is aside from any arguments based on obligations in the documents themselves to implement the treaties at a domestic level. There is little point in having international treaty obligations if they are not given effect to in domestic law. The principle of "good faith" must be applied here. In other words, if a state has signed and ratified the treaty then it must have intended to be bound by its provisions. It is assumed that the treaty was signed in good faith, and not just for image reasons.[44]

If a statute names a treaty or aims to implement one, then that statute can be interpreted using the treaty. Treaties can also be used to interpret statutes which do not implement them.[45] In the case of *Van Gorkom v Attorney-*

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[44]This is particularly so on consideration of the reservations made by states on ratification of a treaty. If there are any provisions a state does not want to comply with this is stated at the time of ratification. It logically follows from this that any provisions which a state has not made a reservation about, the state must be agreeing to comply with.

[45]Huscroft G and Rishworth P eds. *Rights and Freedoms - The NZBORA 1990 and the HRA 1993* (Brookers, 1995).

General[46] Cooke J used both the Declaration and the Declaration on the Elimination of Discrimination Against Women to interpret legislation that was not specifically intended to implement these treaties.

Human rights have become a legitimate concern of the international community. Goal 4 and Key Objective 1 of the Ministry of External Relations and Trade 1989 Corporate Plan was:

> The promotion of international human rights standards and their observance, and in particular gaining wider respect for international human rights treaties is a stated goal of New Zealand's foreign policy.

Ideally, human rights are universal high moral standards. "Governments everywhere are...sensitive to charges from the international community that they are violating human rights provisions."[47] Different states with different cultures will often not agree on all rights as being "rights". However the universality of human rights is a key feature, and any state that has accepted an international human rights treaty has agreed to be bound by its provisions. In relation to this case, discrimination on the grounds of sexual orientation is prohibited, as discussed in Part VI of this paper, and therefore New Zealand cannot plead its own or other countries' lack of readiness to accept this in society.[48]

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[46][1977] 1 NZLR 535, at 543.

[47]Cunningham A.S. *An Analysis of New Zealand's International Human Rights Policy*, Research Paper for Degree of Master of Public Policy, V.U.W., 1990, 4.

[48]Above n32, 407.

> One must question whether a relativist approach, that is respecting predominant cultural attitudes regarding 'rights' which are not universally accepted, is satisfactory. The result could be the fragmentation of the essential universality of fundamental human rights and freedoms. The rights of individuals would vary according to their location. Why should, for example, an Algerian homosexual have fewer rights than an Australian homosexual?

Elkind and Shaw in their article *The Municipal Enforcement of the Prohibition Against Racial Discrimination : A Case Study on New Zealand and the 1981 Springbok Tour*[49] look at the question whether an international obligation needs to be in the minds of the legislature before it can be used to interpret legislation. They claim that wherever possible legislation should be interpreted in accordance with international obligations, and give several examples of cases supporting the presumption that domestic law should be compatible with these international obligations, and will be interpreted to be so where there are any ambiguities or where the legislation is unclear.[50] In considering the case of *Van Gorkom* as previously mentioned in this paper it is asked "if non-binding declarations may so influence the courts, how much more persuasive is a convention which represents a binding legal obligation."[51] Elkind and Shaw also suggest that the orthodox rule,

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[49](1984) 55 BYIL 189.

[50]Above n49, 229.
See for example *Attorney-General v British Broadcasting Corporation* [1981] AC 303, 354, [1980] 3 All ER 161, 177-8 (per Lord Scarman)
Van Gorkam v Attorney-General [1977] 1NZLR, 535.

[51]Above n49, 231.

that treaty law is not part of the domestic law, is too broad.[52] They point to the general rule of international law "*pacta sunt servanda*", "pacts are binding". They also argue that for a treaty to be implemented into domestic law it is not always appropriate for an Act of parliament to be passed, rather for the state to adopt policy consistent with the treaty.[53] This is almost definitely the case with international human rights obligations. By allowing same-sex marriages under the existing Act this would be adopting policy consistent with New Zealand's treaty obligations as it recognises the prohibition on discrimination on the grounds of sexual orientation and the right to marry.

Professor Rosalyn Higgins QC, Professor of International Law at the University of London, argues that international law is not foreign law but part of the law of the land.[54] "[I]n today's world, no domestic judge can afford to be unfamiliar with the requirements of international law...The responsibility of the state is incurred by acts and decisions of the judiciary..."[55] In the United Kingdom it is a rule of statutory interpretation where possible to construe statutes to make them compatible with

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[52]Above n49, 233-4.

[53]Above n49, 235.

[54]"The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) *Commonwealth Law Bulletin* 1268.

[55]Above n54, 1268.

international obligations.[56] In *Attorney-General v Guardian Newspapers (No. 2)*[57] Lord Goff found that the principle applies to the law in general and not just to statutory interpretation. The position in Australia is placing increasing importance on international obligations, which is summed up by Brennan J in *Mabo v Queensland:*[58]

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

The Australian Court in the case of *Minister for Immigration & Ethnic Affairs v Teoh*[59] also held that ratification of human rights treaties gave rise to a legitimate expectation that a decision maker would have regard to international covenants.

Just because there exists the basic constitutional principle that the executive cannot change the law by entering into a treaty, this does not mean that failure by Parliament to

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[56]See for example *Waddington v Miah* [1974] 1 WLR 683, *R v Secretary of State for Home Affairs, ex parte Phansopkar* [1975] 3 All ER 497, *Brind* [1991] 1 AC 696.

[57][1990] 1AC 109.

[58](1992) 107 ALR 1, at 29.

[59](1995) 128 ALR 353.

incorporate the treaty into the domestic law will mean courts may not have regard to the treaty. There are at least five ways in which a court can take a treaty into account:

*as a foundation of the constitution

*as a declaratory statement of customary international law which is itself part of the law of the land

*as relevant to the determination of the common law

* as evidence of public policy

*as relevant to the interpretation of a statute[60]

There are two main schools of thought relating to the interaction of international and domestic law. The first, monoism, marries the two systems of law together. Here international law flows automatically into the legal system, and it is automatically a source of law, (but does not oust existing domestic legislation). The second is dualism, which maintains two separate legal systems. Only where the domestic system has specifically incorporated international law can the domestic system have regard to that law. Dualism is the more traditional view, but in modern times it is far too narrow. It is never true that international law has no effect in the domestic legal system, as can be seen from the examples given above of how treaties can flow into the domestic law, even when unincorporated. There is a recent evolution in the attitude of courts world-wide to the reception of unincorporated treaties.

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[60] *A New Zealand Guide to International Law and its Sources* Law Commission, April 1996, 23.

IX THE BANGALORE PRINCIPLES

In 1988 a conference was held at Bangalore in India, the result of which being a list of principles or guidelines for the application of international human rights norms into the domestic legal system. These principles were to aid states and are now frequently referred to by Commonwealth judges in their decisions, either directly, or by deciding in accordance with them. The main ideas to come out of these principles are that the domestic law, if clear, overrides international obligations, but, where an inconsistency or an ambiguity is discovered, steps should be taken to bring the domestic legislation in line with international obligations.

Michael Kirby[61] offers support for these principles in pointing out that they do not undermine state sovereignty due to the requirement of legislative ambiguity. He also argues that with ratification of the First Optional Protocol to the ICCPR, and therefore opening oneself up to international scrutiny and criticism, if domestic law is found not to be in line with international human rights obligations, a state must bring its law into conformity or be "revealed as a mere participant in human rights 'window-dressing'."[62]

The Bangalore Principles are not alarming. They are the same sorts of principles that exist in

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[61]Kirby M "The Impact of International Human Rights Norms : A Law Undergoing Evolution" (1995) 25 WALR 30, 43.

[62]Above n61, 43.

the majority of legal systems in some form or other. They are accepted as an "orthodox statement of applicable principles for dealing with gaps in the common law and ambiguities of legislation to which universal human rights jurisprudence might lend an aid."[63] In this case we have ambiguity in a piece of legislation. Therefore in applying the Bangalore Principles the New Zealand courts should be bringing the legislation in line with our international obligations and allow same-sex marriages.

X JUDICIAL RECEPTION OF HUMAN RIGHTS TREATY OBLIGATIONS IN NEW ZEALAND

New Zealand, like the United Kingdom and Australia, is developing a jurisprudence recognising the importance of international human rights norms. Based on recent case law it is evident that international human rights standards are a "significant component in the overall development of New Zealand's jurisprudence and policy."[64]

The Court of Appeal in the 1981 case of *Ashby v Minister of Immigration*[65] was reluctant to take the step towards accepting international obligations. This was a case seeking judicial review of the Minister's decision to grant entry permits to the South African rugby team. On appeal references were made to New Zealand's obligations under the United Nations Convention Against Racial Discrimination. It was argued that

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[63]Above n61, 45.

[64]Above n45, 63.

[65][1981] 1 NZLR 222.

the Minister's statutory discretion should be exercised consistently with New Zealand's international obligations, and if the discretion was so exercised, the permits ought not to have been granted. The Court, including Cooke J, held that in some circumstances Ministers exercising statutory discretion are entitled, but not bound to take into account relevant international treaty obligations. This was the leading case in this area for over ten years.

By 1992, Cooke was now President of the Court of Appeal and showing a shift in attitude, saying in the case of *Ministry of Transport v Noort:*[66]

> The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them...

A key case in this area is *Tavita v Minister of Immigration*[67]. In this case it was argued that the Minister of Immigration, in deciding to deport a Western Samoan citizen overstayer with a New Zealand born child, did not take into account the ICCPR or the United Nations Convention on the Rights of the Child. The Crown based their defence on *Ashby* saying that the Minister was entitled to ignore international treaty obligations, but this was rejected by the Court of Appeal, led by Cooke P. The Court acknowledged the unfortunate situation that could

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[66][1992] 3 NZLR 260, at 270.

[67][1994] 2 NZLR 257.

arise if a New Zealand Court found that a piece of legislation was valid, and the Human Rights Committee found it to be in violation of our obligations.[68]

Cooke P, from being very dualistic in *Ashby*, in this case takes a much more rights-centred approach. In finding human rights treaties to be mandatory relevant considerations, he is saying that failure to pay regard to them is an error of law. This is a definite sign of strong receptiveness to human rights obligations. It is a Court of high authority giving them important status.

Acceptance of international obligations can also be found in *Simpson v Attorney-General (Baigent's Case)*[69], where it was found that even an unincorporated treaty may be used to interpret legislation. In *Nikoo v Removal Review Authority*[70] McGechan J in the High Court expressly followed *Tavita*, and said that where possible legislation should be construed so as to recognise international obligations.[71] In the very recent case of *Puli'uvea v The Removal Review Authority*[72] the Court of Appeal, now led by Richardson P, also followed *Tavita* in substance by showing the continued importance of having regard to treaty obligations.

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[68]This could occur if an individual took a claim to the Committee under the First Optional Protocol.

[69][1994] 3 NZLR 667.

[70][1994] NZAR 509.

[71]Above n70, 518.

[72](1996) 14 FRNZ 322.

As Cooke P says in *Tavita*, "[t]he law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution."[73] The evolution in New Zealand, as elsewhere in the world, has followed a steady path towards the acceptance of international human rights treaty obligations as becoming more and more legally binding. For reasons previously discussed, it is the opinion of this author that they are already legally binding obligations.

XI CONCLUSION

The Marriage Act is unclear on the issue of same-sex marriages. While it does not expressly provide for them, it does not exclude them either. In interpreting this legislation I have looked at several different interpretative tools and have not found one that would conclusively suggest that the Act should be read so as to prohibit same-sex marriages.

New Zealand is not the only jurisdiction that has been asked in recent times to consider the validity of same-sex marriages. In April of this year the Dutch Parliament voted 81 to 60 in favour of allowing same-sex marriages, with a view to having legislation drafted by August next year enabling gay and lesbian couples to marry.[74] The decision of the Supreme Court of Hawaii in *Baehr & Ors v Lewin*[75] is leading the way for the recognition of same-sex marriages in

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[73]Above n67, 40.

[74]ANP English News Bulletin, April 18 1996, 3.

[75](1993) 74 Haw 539.

Hawaii, with a final decision due in the near future. Therefore, other jurisdictions are paving the way towards legal recognition of same-sex marriages.

The issue of international human rights has become very important in the twentieth century. Jurisprudence in this area shows that traditional ideas of absolute state sovereignty are being relaxed to allow the influence of international human rights norms into the domestic legal sphere. This is particularly so in the area of interpretation of legislation. The judiciary in New Zealand has developed a willingness to accept these treaty obligations. An interpretation of the Act as prohibiting same-sex marriages is a breach of New Zealand's international human rights obligations as it constitutes a breach of the right to marry, and a breach of the right not to be discriminated against on the grounds of sexual orientation, as described in the international documents to which New Zealand is a party.

With respect to Kerr J, it is submitted that, for these reasons, the correct interpretation of the Marriage Act is that it does not prohibit same-sex marriages, and therefore a marriage between two persons of the same sex in New Zealand is legal and valid.

BIBLIOGRAPHY

BOOKS AND ARTICLES

A New Zealand Guide to International Law and its Sources Law Commission, April 1996.

ANP English News Bulletin, 18 April 1996.

Cordell R "Same-Sex Marriage : The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith Credit Clause" (1994) 26 Col HR LR 247.

Cunningham A *An Analysis of New Zealand's International Human Rights Policy* Research Paper for Degree of Master of Public Policy (Victoria University of Wellington, 1990).

Donnais B "Three Strikes and Human Rights is Out: Case Comment on Canada (Attorney-General) v Mossop" (1993) 57 Saskatchwan LR 363.

Elkind and Shaw "The Municipal Enforcement of the Prohibition Against Racial Discrimination : A Case Study on New Zealand and the 1981 Springbok Tour" (1984) 55 BYIL 189.

Eriksson M *The Right to Marry and to Found a Family - A World-Wide Human Right* (Uppsala Studies in Law, no. 28, Sweden, 1990).

Higgins Prof R "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992) *Commonwealth Law Bulletin* 1268.

Homer S "Against Marriage" (1994) 29 Harvard

Civil Rights - Civil Liberties LR 505.

Human Rights in New Zealand - Report to the United Nations Human Rights Committee Under the International Covenant on Civil and Political Rights Ministry of Foreign Affairs and Trade Information Bulletin No. 54 (Wellington, 1995).

Human Rights - Status of International Instruments United Nations Publication (New York, 1987).

Huscroft G and Rishworth P eds. *Rights and Freedoms - The New Zealand Bill of Rights Act and 1990 and the Human Rights Act 1993* (Brookers, 1995).

Joseph S "Gay Rights Under the ICCPR - Commentary on *Toonen v Australia*" (1994) 13 No.2 University of Tasmania LR 392.

Kirby M "The Impact of International Human Rights Norms : 'A Law Undergoing Evolution'" (1995) 25 WALR 30.

Terry J "The *Quilter* Same-Sex Marriage Case: The Bill of Rights Meets Social Policy" [1996] Bill of Rights Bulletin 43.

Woolley A "Excluded by Definition : Same-Sex Couples and the Right to Marry" (19) 45 University of Toronto LJ 471.

CASES

Ashby v Minister of Immigration [1981] 1 NZLR 222.

Attorney-General v Family Court at Otahuhu [1995] NZFLR 57.

Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109.
Baehr & Ors v Lewin (1993) 74 Haw 539.
Brind [1991] 1 AC 696.
Hyde & Hyde v Woodmansee (1866) [1861-73] All ER 175.
Lindo v Belisario (1795) 1 Hag Con 215.
Mabo v Queensland (1992) 107 ALR 1.
Maynard v Hill 125 U.S. 190 (1888).
Meyer v Nebraska 262 U.S. 390 (1923).
Ming Ng Ping On v Ming Ng Choy Fung Cam [1964] NSWR 953.
Minister for Immigration & Ethnic Affairs v Teoh (1995) 128 ALR 353.
Noort v Ministry of Transport & Curran v Police (1992) 1 NZBORR 97.
Puli'uvea v The Removal Review Authority (1996) 14 FRNZ 322.
Quilter v Attorney-General [1996] NZFLR 481.
R v Secretary of State for Home Affairs, ex parte Phansopkar [1975] 3 All ER 497.
South-West African Case [1966] ICJR 5.
Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667.
Tavita v Minister of Immigration [1994] 2 NZLR 257.
Toonen v Australia UN Doc CCPR/C/50/D/488/1992.
Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 All ER 881.
Triquet v Bath (1764) 3 BURR 1480.
Waddington v Miah [1974] 1 WLR 683.
Van Gorkom v Attorney-General [1977] 1 NZLR 535.
Zabloki v Redhail 434 US 374 (1978).

NEW ZEALAND LEGISLATION

Acts Interpretation Act 1924
Homosexual Law Reform Bill 1985
Human Rights Act 1993

The Births, Deaths and Marriages Registration Act 1995
The Family Proceedings Act 1980
The Family Protection Act 1955
The Marriage Act 1955

OVERSEAS LEGISLATION

The Matrimonial Causes Act 1973 (UK)

UNITED NATIONS INTERNATIONAL TREATIES

Covenant on Economic, Social and Cultural Rights 1966
Convention Against Racial Discrimination 1965
International Covenant on Civil and Political Rights 1966
Universal Declaration on Human Rights 1948

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