

TOPIC TWO: International Law and Municipal Law

Transformation vs Incorporation Approaches

1. These approaches relate to the reception of international law in the municipal level. In [Trendex Trading Corporation v Central Bank of Nigeria \(1977\)](#), Lord Denning described that 'incorporation' refers to the approach that rules of international law are believed to be automatically considered a part of municipal law unless they conflict with statute. 'Transformation' was described as the approach that rules of international law are not be considered part of the municipal law unless they have been explicitly adopted and made part by judicial decision or statute or custom.
 - i. In Australia, the transformation approach is accepted and finds favour ([Nulyarimma v Thompson](#) - 'Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted. This seems to be the position even where the ratification has received parliamentary approval, as in the case of the Genocide Convention'. In that respect, while the Commonwealth Parliament enacted the Genocide Convention Act 1949 (Cth) to indicate Australian ratification of the Genocide Convention, no laws were enacted at that time making genocide a crime under Australian law.)

Implementing Treaties

2. In some instances, it will be necessary, if a treaty is to be given full effect, that measures are taken to implement the treaty into municipal law. The power to enter

into treaties arises from s 61 prerogative power, and the power to give effect to the treaties arises from s 51(xxix) external affairs power.

3. Where no implementation occurs, in *Dietrich v R* CJ Mason and McHugh J found that ratification itself as an executive effect has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.

However, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the common law.

- i. presume that Parliament intended to legislate in accordance with its international obligations.
- ii. The decision in *Dietrich* suggested that while a treaty that had not been incorporated by way of municipal legislation had no direct effect, it was not totally irrelevant and that in line with views expressed in other decisions the treaty may have an influence upon the development of the common law.

4. Rights and Obligations under treaties which have not been implemented

i. Doctrine of Legitimate Expectation: When Australia ratifies but not implement a treaty, it means that individuals subject to a government decision have a legitimate expectation that government officials will have regard to it.

- a. In *Minister for Immigration v Teoh*, the court acknowledged that a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. But the court noted that the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the

executive government and its agencies will act in accordance with the Convention. The 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.

- b. The doctrine was heavily criticised by the court in [Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam](#), however the doctrine has not been overturned.
- c. [Minister for Immigration v SZSSJ](#): Legitimate expectation is rolled into the procedural fairness.

5. Implementing Treaties in Australia:

- i. Note: Plaintiff M70/2011 v Minister for Immigration: Where an Act is giving effect to a treaty, the wording of the Act is to be interpreted consistently with the legislation.
- ii. Method 1 - Giving the treaty force of law:
 - a. One method of implementation is simply to give the treaty the force of law in Australia. This method might be used where the treaty itself has been drafted with an eye to its incorporation into domestic law. However, giving a treaty the force of law is not a preferred method. The language of most international agreements is not suited to simple transportation into Australian law.
- iii. Method 2 - Legislation approving treaties:
 - a. While there have been many occasions on which Parliament has passed legislation approving multilateral and bilateral treaties, the practice has not been consistent.

- iv. Method 3 - Use of the language in domestic law:
 - a. The more common practice is to translate the relevant provisions of international law into traditional legislative language and thus to avoid the uncertainty inherent in the drafting of many treaty provisions.
 - v. Method 4 - A new statutory regime:
 - a. A completely new statutory regime will normally be created where the subject area covered by the treaty has not previously been the subject of Commonwealth legislation or where there is a desire to emphasise the importance of a treaty and Australia's commitment to it.
 - vi. Method 5 - No reference to a treaty:
 - a. Legislation may be enacted in order to enable Australia to join a treaty, but the legislation may make no reference to the treaty.
 - vii. Method 6 - Use of regulations rather than statute:
 - a. Reference has already been made to the use of regulations under a variety of Commonwealth Acts to give effect to sanctions imposed by the United Nations Security Council. That example illustrates the utility of regulations where the domestic action necessary to ensure compliance with an international obligation is urgent. Regulations avoid the inevitable delay in passage of a statute through Parliament and are more easily changed if the international obligation changes.
6. Challenging the Legislation that gives effect to the Treaty:
- i. Treaty implementation by way of a statute will also often raise issues as to the scope of the constitutional power of the State to enact such a statute. In Australia, the constitutional debate in this area has principally focused on the extent of the

operation of s 51(xxix) of the Commonwealth Constitution dealing with 'external affairs'.

- a. Note: **Legislative power of the Cth is not constrained by International obligations (Polites v Commonwealth)**
- ii. In the **Tasmanian Dam Case**, it was held that:
 - a. The extent of the Parliament's power to legislate so as to carry into effect a treaty will, of course, depend on the nature of the particular treaty, whether its provisions are declaratory of international law, whether they impose obligations or provide benefits and, if so, what the nature of these obligations or benefits are, and whether they are specific or general or involve significant elements of discretion and value judgment on the part of the contracting parties.
 - b. **Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.**
 - c. The fact that a subject becomes part of external affairs does not mean that the subject becomes, as it were, a separate, plenary head of legislative power.
 - d. It does not mean that there must be any rigid adherence to the terms of the treaty.

Customary law and common law

7. **Chow Hung Ching v R**: Customary international law is not as such part of the law of Australia but a universally recognised principle of international law would be applied by our courts

- i. In an outlier judgement, **Justice Dixon** said **International law is a source of domestic law**. It can be incorporated without legislation (Source View)
8. it is clear that the courts are prepared to concede that customary international law may be influential for the common law (**Mabo (No 2)**)
9. In **Nulyarimma v Thompson**, it was held that it is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court.
 - i. Justice Merkel held that the **rules of customary international law, once adopted or received into domestic law have the 'force of law' in the sense of being treated as having modified or altered the common law**. The decision of the court to adopt and receive a rule of customary international law is declaratory as to what the common law is.
 - a. **A rule will be adopted or received into, and so a source of, domestic law if it is 'not inconsistent with rules enacted by statutes or finally declared by [the courts]'**.

Treaties and Common Law

10. **Bradley v Commonwealth** - SC resolution and UN Charter is not binding in Australia
 - i. **Resolutions of the Security Council neither form part of the law of the Commonwealth nor by their own force confer any power on the Executive Government of the Commonwealth which it would not otherwise possess.**
 - ii. Since the Charter and the resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified, or as

grounds for resisting an injunction to restrain an excess of executive power, even if the acts were done with a view to complying with the resolutions of the Security Council

11. The Interpretive Principle **Justice Kirby in *Newcrest Mining v Commonwealth*:**

- i. **Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.**
- ii. International law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights.

12. ***Western Australia v Ward***

- i. **Statutes should not be construed to accord with international obligations or be read consistently with international law where there is no ambiguity in the words of legislation.** Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it.
- ii. **There is no obligation to develop the common law in accordance with international law.**

