MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS V TEOH

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INTRODUCTION

The High Court's judgment in *Minister for Immigration and Ethnic Affairs v Teoh*[1] is perhaps the most controversial judgment handed down by the Court this year, for both legal and political reasons. On the political side it has added further fuel to the fire about the significance of the ratification of treaties and the roles of the Executive and the Parliament in the process of ratification and implementation of treaties.[2] On the legal side, it has developed the law on "legitimate expectations" and provided interesting *obiter dicta* on sleeping issues such as the use of treaties and international law in the interpretation of statutes and the development of the common law. It has also left open questions about the status of treaties which form schedules to legislation but which are not directly implemented by that legislation. This note will address the legal, rather than the political, aspects of the *Teoh* case, starting with the development of the law on "legitimate expectations", and then considering issues concerning the use of unincorporated treaties to develop and affect the law in other ways.

THE FACTS

Mr Teoh, a Malaysian citizen, entered Australia on a temporary entry permit and married an Australian citizen, Ms Jean Lim, who already had four children. Three of these children were those of his deceased brother. Mr Teoh and his Australian wife had three more children, and Mr Teoh applied for a permanent entry permit. Whilst his application was being considered, Mr Teoh was convicted of heroin importation offences and sentenced to six years' imprisonment. His application for permanent residence was later denied by the Minister's delegate, on the basis that he did not meet the character requirement. Mr Teoh applied to the Immigration Review Panel for a review of the decision. The Panel recommended that he not be granted residency, which was accepted by the Minister's delegate. Subesquently, another delegate of the

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1 (1995) 128 ALR 353.

2 See submissions made to the Senate Legal and Constitutional References Committee in relation to its inquiry into the treaty-making and external affairs powers of the Commonwealth.

Minister decided that Mr Teoh should be deported. Mr Teoh applied to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) for a review of the decision. His application was dismissed at first instance by Justice French. Mr Teoh then appealed to the Full Court of the Federal Court. During the course of the hearing the issue arose concerning the break-up of the family and the effect on the children. It was noted that that the Convention on the Rights of the Child, to which Australia is a party, requires the interests of the child to be a primary consideration in any action concerning children. A majority of the Full Court set aside the decision, remitting it to the Minister for reconsideration. Justices Lee and Carr considered that the Government's ratification of the Convention created a "legitimate expectation" that a Commonwealth decision-maker would make the best interests of the children a primary consideration. The Minister appealed to the High Court. The case was heard by five Justices. A majority of the Court[3] dismissed the appeal, with costs.

LEGITIMATE EXPECTATIONS AND TREATIES

A "legitimate expectation" is one of the tools of administrative law; it is intended to provide procedural fairness. It was first recognised (or "invented" according to Justice McHugh[4]) by Lord Denning MR in the case of *Schmidt v Secretary of State for Home Affairs*.[5] The jurisprudence on legitimate expectations has developed over the past two decades. The basic principle is that when the Government publishes a policy, or makes a representation about how it will proceed in making certain types of administrative decisions, an affected person must be given the opportunity of a hearing if the decision-maker decides to act in a manner which is contrary to the policy or other representation.[6]

In *Teoh*, the question arose as to whether the ratification of a treaty can create a legitimate expectation in the same manner as the publication of a Government policy or representation. Mason CJ and Deane J noted in their joint judgment that it had been argued by counsel for the Minister that an unincorporated treaty could not give rise to a legitimate expectation because it is not part of the law. Their Honours rejected this proposition, noting that legitimate expectations are, of their very nature, not based on laws, but on procedural rights of fairness.[7] Their Honours then went on to describe the special status of ratified treaties, which gives rise to a legitimate expectation:

> [R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the

3 Mason CJ, Deane, Toohey and Gaudron JJ; McHugh J dissenting.
4 (1995) 128 ALR 353 at 380.
5 [1969] 2 Ch 149 at 170-171.
6 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.
7 (1995) 128 ALR 353 at 365. Justice Toohey made the same point at 371.

> contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration".[8]

Similarly, Toohey J placed importance on the ratification of treaties, stating:

> [B]y ratifying the Convention Australia has given a solemn undertaking to the world at large that it will: "in all actions concerning children ..." make "the best interests of the child a primary consideration".[9]

Gaudron J took a different approach, according significance to the ratification of a treaty to the extent that it gives expression to a fundamental human right which is accepted in Australian society. She considered that ratification of the Convention confirmed the significance of the right within Australian society, and concluded:

> Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations.[10]

McHugh J, in his dissenting judgment, took a narrower view of the notion of "legitimate expectation". He considered that as long as the decision-maker has not led a person to believe that a rule will be applied in making a decision, the rules of procedural fairness do not require the decision-maker to inform that person that the rule will not be applied.[11]

Moreover, McHugh J considered that the ratification of treaties is an act directed at the international community, and should not have internal consequences:

> The ratification of a treaty is not a statement to the national community. It is, by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law, but, by ratifying the Convention, the Executive government does not give undertakings to its citizens or residents. The undertakings in the Convention are given to the other parties to the Convention. How, when or where those undertakings will be given force in Australia is a matter for the federal Parliament.[12]

Professor Margaret Allars has challenged this assumption that Australia speaks with one voice to the international community and with a different one to the Australian community. She pointed out the potential for allegations of hypocrisy in this approach, asking:

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8 Ibid at 365. Australian courts are not alone in placing such weight on the consequences of ratification of treaties. The New Zealand Court of Appeal in *Tavita v Minister for Immigration* (1994) 2 NZLR 257 at 266 described the Government's argument that it is entitled to ignore treaties to which New Zealand is a party, as "an unattractive argument" which implies that New Zealand's adherence to international instruments "has been partly window-dressing"

9 (1995) 128 ALR 353 at 373.

10 Ibid at 376.

11 Ibid at 382.

12 Ibid at 385. See also: Minister for Foreign Affairs and Trade, Senator Evans, "The Impact of Internationalisation on Australian Law: A Commentary" in "The Mason Court and Beyond", Conference, Melbourne, 10 September 1995, where he stated: "ratification is a statement to the *international* community to observe the treaty measures in question; it is not a statement to the *national* community — that is the job of the Legislature, not the Executive" (emphasis added).

> To whom does the government speak when it publishes a policy or ratifies a convention? Is a criminal deportation policy, tabled in Parliament, a statement to the Australian community, whilst an act of ratification of a convention [which is also tabled in Parliament] carried out by Australia's leaders on the international stage is not? Perhaps members of the community accept that no benefits will flow to them from ratification of any international instrument. Yet Australia is now becoming more sensitive to the danger of hypocrisy in failure to protect human rights, environmental or other standards at a domestic level whilst endorsing those standards in the international arena... The question is whether Australia can have one policy about its domestic administration for international consumption when in reality its domestic policy is very different. The majority judges impliedly rejected this view as incompatible with integrity in government.[13]

Does the legitimate expectation have to be personal to the applicant?

Toohey J pointed out that it is only necessary that the assumption of an obligation, such as a treaty, "may" give rise to legitimate expectations in the minds of those who are affected by administrative decisions. It is not necessary for the person who is affected to have personal knowledge of the ratification of the Convention, and to have formed his or her own expectation. His Honour noted that "legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned".[14] It is an objective, not a subjective, test.[15]

McHugh J, in his dissenting judgment, disagreed. He considered that for there to be a "legitimate expectation", the person affected must personally have that expectation, or otherwise no disappointment or injustice is suffered by that person if that expectation is not fulfilled. His Honour concluded:

> A person cannot lose an expectation that he or she does not hold. Fairness does not require that a person be informed about something to which the person has no right or about which that person has no expectation.[16]

The cases which have developed the concept of "legitimate expectation", however, have held that the expectation need not personally be held by the person affected. It is enough that a legitimate expectation may arise through the publication of a policy or practice. In *Haoucher v Minister for Immigration and Ethnic Affairs*,[17] Toohey J stated that a "[l]egitimate expectation does not depend upon the knowledge and state of mind of

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13 M Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government", (1995) 17 *Sydney L Rev* 204 at 235.

14 (1995) 128 ALR 353 at 373.

15 See also Mason CJ and Deane J at 365.

16 Ibid at 383. The Minister for Foreign Affairs and Trade, Senator Evans, in his address (above n 12), agreed, noting that the expectation has to have a "whiff of objective reality about it". However, Professor Allars, above n 13 at 241, has queried how the Government could then assert that it has repudiated such legitimate expectations by way of a Press Release issued by the Minister for Foreign Affairs and Trade and the Attorney-General on 10 May 1995, when it is even less likely that an affected person would know of the Press Release than of the ratification of the treaty. Would a person who holds a legitimate expectation have to have personal knowledge of the repudiation of this expectation by way of Press Release for the repudiation to have any effect?

17 (1990) 169 CLR 648.

the individual concerned", unless, of course, it arose out of statements made specifically to the individual.[18] Mr Neil Williams has summarised the situation thus:

> A legitimate expectation according to *Teoh* (in this respect it is consistent with *Quin*[19] and *Ng*[20]) is objective. It is something that exists in the ether. It is something that no person need hold. Indeed, I think *Ng* was not personally aware of the statement, and in all the Australian decisions it has been observed that there is no need for a person to be aware of the statement for an expectation to arise.[21]

Does a "legitimate expectation" effectively bind the decision-maker?

Mason CJ and Deane J stressed that a legitimate expectation does not bind the decision-maker to act in that manner. If it did so, it would be a binding rule of law, and a treaty would be incorporated into domestic law by the back door.[22] Their Honours criticised Justices Carr and Lee in the Full Federal Court for apparently taking this approach. Mason CJ and Deane J considered that the consequence of the creation of a legitimate expectation was that procedural fairness applies and requires that the person affected be given notice if the decision-maker proposes to make a decision inconsistent with that legitimate expectation, and also be given an opportunity to present a case against making such a decision.[23] Justice Toohey agreed that the consequence of ratification of a treaty is not to incorporate it in law, but to require decision-makers to take treaty obligations into account, or inform the people affected if they do not intend to do so, and give them an opportunity to argue against such a course.[24]

Other commentators, however, have considered that the practical effect of *Teoh* is to oblige the decision-maker to consider the treaty and give reasons for departing from its requirements, thereby effectively imposing an obligation on the decision-maker to comply with the treaty unless an adequate reason can be found not to do so. Mr Peter Bayne gave the following evidence on this point to the Senate Legal and Constitutional References Committee:

> [I]n practical effect, the Court was coming very close to saying that decision-makers must have regard to the terms of a convention when they exercise an administrative power. If there is no act of the legislature or the executive or if there is no action of the executive which displaces the convention, then as a matter of practical effect decision-makers will have to have regard to the terms of the convention in order to determine whether they should give a hearing to a person in respect of whom they propose not to apply the convention...
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> That comes very close to a rejection of the basic legal principle that conventions do not have the force of law in Australia unless adopted by relevant local legislation.[25]

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18 (1990) 169 CLR 648 at 670. See also P Tate, "The Coherence of 'legitimate expectations' and the foundations of natural justice" (1988) 14 *Monash L Rev* 49 at 50.

19 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

20 *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

21 N Williams, "*Teoh* — A Perspective from the Bar", June 1995, *AIAL Forum No 5*, 1 at 5.

22 (1995) 128 ALR 353 at 365. The Minister for Foreign Affairs and Trade, Senator Evans, stated in his address (above n 12), that if *Teoh* did not incorporate treaties through the back door, it had certainly brought them "through a back gate as far as the back garden".

23 (1995) 128 ALR 353 at 365.

24 (1995) 128 ALR 353 at 374.

25 *Hansard*, Senate Legal and Constitutional References Committee (SLCRC) 1 May 1995, at 110.

Does this then mean that the effect of the ratification of a treaty by the Executive is to change domestic law, thus breaching the traditional separation between the Executive and the Legislature? Ms Kris Walker has asserted that this is not the case:

> The legitimate expectation doctrine no more involves the executive in amending the law than does the formulation of governmental policy or the entry into contracts by the executive. Both these events can have legal effects, but do not involve amending the law, just as ratification leading to a legitimate expectation can have legal effects but does not involve any amendment of Australian law.[26]

Is the *Teoh* decision a radical departure from precedent on "legitimate expectations"?

In order to determine whether *Teoh* is such a radical departure from precedent, as has been claimed, it is necessary to consider some earlier cases on "legitimate expectation". In 1985 the Privy Council applied the concept of "legitimate expectation" in *Attorney-General of Hong Kong v Ng Yuen Shiu*.[27] The Privy Council held that a legitimate expectation arose because there was a publicly announced policy that illegal immigrants applying for residency would be treated in a certain manner. If it were intended that the policy were to be departed from, the Privy Council held that the applicant was entitled to a hearing on the issue prior to such a departure. The High Court adopted a similar argument in *Haoucher v Minister for Immigration and Ethnic Affairs*,[28] where it held that a "published, considered statement of government policy" that a decision of the Administrative Appeals Tribunal will only be overturned on a deportation issue in "exceptional circumstances", gave rise to a legitimate expectation that the person subject to deportation be given a hearing on the point before the Minister makes his or her decision.

In both cases, it was the existence of a published government policy which gave rise to a legitimate expectation that it would be complied with, and a requirement that the person affected be given the procedural right to a hearing if it was intended to depart from the policy. The step from this position to the one taken by the majority of the High Court in *Teoh* is not large.[29] There are close similarities between the representation made publicly by the Executive in entering into a treaty, and the representation made in a publicly issued Government policy. It is arguable that the representation made when entering into a treaty is stronger than that made in publishing a policy, because a treaty gives rise to obligations under international law to comply with its terms,[30] whereas a policy gives rise to no legal obligations, except, of course, those incurred by creating a legitimate expectation.

The question, ultimately, is whether the Executive commits itself when ratifying a treaty, or whether it commits Australia but excludes itself from any obligation to

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26 K Walker, "Treaties and the Internationalisation of Australian Law", paper delivered at "The Mason Court and Beyond" (above n 12).

27 [1983] 2 AC 629.

28 (1990) 169 CLR 648.

29 See M Allars, above n 13 at 222-225. See also the submissions to the Senate Legal and Constitutional Legislation Committee's inquiry into the Administrative Decisions (Effect of International Instruments) Bill 1995 by the New South Wales Bar Association (Submission No 5), the Law Council of Australia (Submission No 8) and the Australian Law Reform Commission (Submission No 17) stating that the *Teoh* judgment was well founded in law and does not constitute a radical departure from precedent.

30 *Pacta sunt servanda*: Vienna Convention on the Law of Treaties: art 26.

comply with the treaty? The Government has argued that treaties may only be incorporated into domestic law by Parliament,[31] and that ratification of treaties, therefore, cannot give rise to domestic obligations without legislation. This misses the point that most treaties are intended to be implemented, and are in fact implemented, by way of Executive action, rather than by legislation. What meaning, then, can international treaty obligations have, in those cases where the treaty requires Executive action in order to be implemented? Is the ratification of such treaties by Australia merely "window-dressing" or a "platitudinous or ineffectual" act? A majority of the High Court thought not. Moreover, the allegation that the *Teoh* case has undermined the principle that a treaty does not become a part of domestic law until it is expressly enacted in legislation by the Parliament,[32] to some extent misconstrues the concept of "legitimate expectations". As Professor Margaret Allars has stated:

> Like non-incorporated conventions, published considered statements of government policy do not have the force of municipal law. Yet policies may generate legitimate expectations. There is no logical reason why non-incorporated conventions may not also generate legitimate expectations.[33]

STATUTORY INTERPRETATION

One of the important *obiter dicta* which arose in the *Teoh* case concerned the extent to which treaties can affect the interpretation of statutes. Mason CJ and Deane J, in their joint judgment, took a broad approach to this issue, in contrast to the House of Lords, which has taken a narrower view of the extent to which treaties can affect the interpretation of legislation. Mason CJ and Deane J[34] observed that even though a treaty may not be incorporated in legislation, it may still have effect upon domestic law. Their Honours noted that it is a principle of statutory interpretation that if a statute or legislative instrument is ambiguous, the courts should interpret it in a manner that is consistent with Australia's international obligations.[35] This rule, they noted, is based on the principle that "Parliament, prima facie, intends to give effect to Australia's obligations under international law". They went on to explain how this principle must lead to a broad reading of the concept of ambiguity, stating:

> It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.[36] The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph [that ambiguous statutes should be interpreted in accordance with Australia's international obligations] should be stated so as to require the courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the

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31 Administrative Decisions (Effect of International Instruments) Bill 1995: preamble.

32 H Burmester, "The *Teoh* Decision — A Perspective From the Government Service" June 1995 *AIAL Forum No 5*, 6 at 7.

33 M Allars, above n 13 at 231.

34 With whom Gaudron J agreed on this point.

35 (1995) 128 ALR 353 at 362, and McHugh J at 384. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J; *Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; and *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 283 per Lord Goff of Chievely.

36 *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69, 77 and 80-81.

> proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.[37]

Their Honours cited the English decision of *R v Secretary of State for the Home Department; Ex parte Brind*[38] in referring to this last proposition. In the *Brind* case, however, the English Court of Appeal and the House of Lords took a far narrower view of the concept of ambiguity than did Mason CJ and Deane J in *Teoh.* In *Brind*, the English courts considered the question of whether the Minister's directives, which restricted the reporting of statements made by members of proscribed organisations under the Prevention of Terrorism (Temporary Provisions) Act 1984 (UK) or the Northern Ireland (Emergency Provisions) Act 1978 (UK), were invalid. It was argued that they were invalid because the legislative power to make the directives must be read as being limited to the making of directives which are consistent with the right to freedom of speech in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The power to make the directives was contained in s 29(3) of the Broadcasting Act 1981 (UK) which provided:

> [T]he Secretary of State may at any time by notice in writing require the Authority to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice.

Mr Anthony Lester QC, counsel for the applicants, noted that successive governments had not expressly incorporated the Convention by statute. He concluded that these governments must, therefore, have assumed "that the existing arrangements within our domestic legal order comply with those obligations so that the Convention rights and remedies are directly secured and so that there are effective national remedies".[39] Mr Lester then went on to argue that this assumption is given effect by the general common law principle that statutes are to be construed as being consistent with international treaty obligations, if they are reasonably capable of bearing such a meaning.[40] He concluded that, where possible, a statute must be construed in a manner which is consistent with the obligations imposed by the Convention.

This argument was not successful. In the Court of Appeal, Lord Donaldson of Lymington MR responded to it by stating:

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37 (1995) 128 ALR 353 at 362. For a similar English view, see the dissenting judgment of Scarman LJ in *Ahmad v Inner London Education Authority* [1978] QB 36 at 48, where he refers to the interpretation of statutory language "so as to reach a conclusion consistent with our international obligations".

38 [1991] 1 AC 696.

39 [1991] 1 AC 696, summarised by Ralph Gibson LJ at 725.

40 Lester relied on the authority of *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771 per Lord Diplock: "[I]t is a principle of construction of United Kingdom statutes ... that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

> This I unhesitatingly and unreservedly reject, because it involves imputing to Parliament an intention to import the Convention into domestic law by the back door, when it has quite clearly refrained from doing so by the front door.[41]

Ralph Gibson LJ drew a distinction between the role of a court in determining the meaning of legislation passed by Parliament, and in actually importing treaties into domestic law. He accepted the argument of Mr Laws, counsel for the Secretary of State, that it is "not within the power of the court, by application of a rule of statutory construction, to import into the laws of this country provisions of a treaty for direct application by the court".[42] McCowan LJ agreed that a treaty could only be used to interpret legislation where there was some ambiguity in the legislation. He did not accept the argument made by Mr Lester that the breadth of s 29(3) makes it ambiguous, and therefore subject to interpretation in a manner which is consistent with the Convention. He considered that s 29(3) was clearly a power without limit, and was therefore not ambiguous.[43]

In the House of Lords, the argument did not meet with greater success. Although Lord Bridge of Harwich[44] found "considerable persuasive force" in Mr Lester's submission, he was finally convinced that it was flawed. He concluded:

> When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it.[45]

Lord Ackner rejected the contention that s 29(3) was ambiguous or uncertain. He concluded that the subsection "is not open to two or more different constructions" and that no question of ambiguity or interpretation arises.[46]

While, to some extent, the judgments of both the Court of Appeal and the House of Lords were influenced by the fact that it was a delegation of executive power which was under consideration,[47] rather than an ordinary legislative provision, the position both courts took on "ambiguity" and whether a broad provision should be read in a manner consistent with treaty obligations was quite narrow. In contrast, Mason CJ and Deane J in *Teoh* considered that it is enough that the legislation is susceptible to

41 [1991] 1 AC 696 at 718.
42 Ibid at 726.
43 Ibid at 728.
44 With whom Lord Roskill agreed.
45 [1991] 1 AC 696 at 748.
46 Ibid at 761.
47 See also *Ashby v Minister for Immigration* [1981] 1 NZLR 222, where the New Zealand Court of Appeal refused to read down a broad delegation of power to a Minister in a manner which would limit the Minister's power to the making of decisions which comply with the Convention on the Elimination of All Forms of Racial Discrimination.

interpretation in a manner which is consistent with treaty obligations. As noted above, they based this broad view of the rule of statutory interpretation on the assumption that "Parliament, prima facie, intends to give effect to Australia's obligations under international law".[48]

The applicability of this principle in Australia, as opposed to the United Kingdom, must surely be the subject of doubt. In the United Kingdom, treaties are entered into by an Executive, which, in effect, controls the Parliament. It is therefore a reasonable assumption that when legislation is enacted, it is intended to comply with treaty obligations to which the Executive has committed the United Kingdom. In contrast, in Australia, treaties are entered into by an Executive which usually does not control the Parliament (because it does not control the Senate), and the act of entering into the treaty is usually done without seeking the approval or consent of the Parliament. Why should it be assumed that Parliament intends to legislate consistently with obligations to which it has not consented, or about which it may not even be aware? To do so would appear to undermine the separation of powers between the Executive and the Legislature, to the extent that it exists within a Westminster structure of responsible government.

TREATIES, CUSTOMARY INTERNATIONAL LAW AND THE COMMON LAW

The *Teoh* case is also important for what it said, and did not say, about the role of treaties and international law generally, in shaping the common law. Mason CJ and Deane J reiterated the point that the provisions of treaties to which Australia is a party, "especially ones which declare universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law".[49] They expressed caution, however, that this method should not be used as a "backdoor means of importing an unincorporated convention into Australian law".[50] Justice McHugh also noted that international conventions may play a part in the development of the common law.[51] Justice Gaudron took a broader view in her judgment. She identified a common law right to have the best interests of the child taken into account, at least as a primary consideration, in all discretionary decisions by governments and their agencies, which directly affect the child's individual welfare.[52] She concluded:

> The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries. And if there were any doubt whether that were so, ratification would tend to confirm the significance of the right within our society.[53]

Although it is not clear from Justice Gaudron's judgment, one interpretation of it is that she has identified a fundamental principle in the Convention, which has become part

48 (1995) 128 ALR 353 at 362.
49 Ibid at 362. See also *Mabo v Queensland [No 2]* 175 CLR 1 at 42 per Brennan J; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 68 ALJR 127 at 135 per Mason CJ and Toohey J; and *Western Australia v The Commonwealth* (1995) 128 ALR 1 at 64.
50 (1995) 128 ALR 353 at 362.
51 Ibid at 384.
52 Ibid at 375.
53 Ibid at 376.

of customary international law, and has recognised it as forming part of the common law.

The Honourable Elizabeth Evatt, former Chief Justice of the Family Court, and a current member of the United Nations Human Rights Committee, has made the connection between treaties, customary international law and the common law of Australia. She explained the general principle to the Senate Legal and Constitutional References Committee in the following terms:

> Quite apart from conventions that Australia ratifies, some parts of that international law can, as a matter of common law, apply in Australia without any further action on the part of anyone. I think the recent High Court case of Teoh may have referred obliquely to this, but it could have said more about the fact that under common law, customary rules, and particularly principles of human rights, such as the principle against genocide and so on, are part of customary international law. As such, they would be accepted as part of our common law. Naturally as such, they can be overruled by legislation, as any part of the common law can. But we should not think of international law as being an entirely separate thing from the law of Australia. Some parts of it we would recognise.[54]

She noted that treaties often codify principles of customary international law, so the mere fact that Australia has not implemented a treaty by legislation does not mean that it cannot have legal effect in Australia's courts. She also observed that the principle that the interests of the child must be a primary consideration, may well have become part of customary international law because it has been accepted in many international conventions and in the "laws of civilised countries".[55]

This raises the vexed issue of the relationship between customary international law and the common law. Blackstone, in his classic *Commentaries on the Laws of England* stated that "the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land."[56] The same point has been made in numerous cases in the eighteenth and nineteenth centuries.[57] More recent English cases on the subject have been inconsistent in their conclusions. The difficulty which arises is how to assimilate two separately developing systems of law. If a court of common law recognises a principle of customary international law as forming part of the common law, it then becomes part of the common law system of precedent. How then does a court subsequently deal with changes to customary international law, in the face of an existing court precedent? Which rule does the court apply? In *Thai-Europe Tapioca Service v Government of Pakistan*,[58] this question arose, and a majority of the Court of Appeal held that once a rule of international law becomes part of the common law, the doctrine of *stare decisis* applies and it is not open to the court to apply a new rule based on changing international law, when it is subject to a binding precedent. When a similar issue arose in *Trendtex Trading Corporation v Central Bank of Nigeria*[59] a majority

54 *Hansard*, SLCRC, 16 May 1995 at 379.

55 Ibid at 394-5. See also evidence given by Mr Brian Fitzgerald from Griffith University, *Hansard*, SLCRC, 13 June 1995 at 547-548.

56 *Commentaries on the Laws of England*, Vol IV (1769) at 67.

57 See for example: *Triquet v Bath* (1764), 3 Burr 1478 97 ER 936; *Lockwood v Coysgarne* (1765) 3 Burr 1676 97 ER 1041; *Heathfield v Chilton* (1767) 4 Burr 2015 98 ER 50; *Viveash v Becker* (1814) 3 M & S 284 105 ER 619; *Emperor of Austria v Day and Kossuth* (1861) 2 Giff 628 66 ER 263; and see generally discussion in D W Greig, *International Law*, (2nd ed 1976) at 55-60.

58 [1975] 1 WLR 1485.

59 [1977] QB 529.

of the Court of Appeal applied the new rule of international law, rather than earlier precedent. Lord Denning MR concluded:

> Seeing 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 to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.[60]

The question of the extent to which customary international law applies as part of the common law of Australia, has never been properly settled by the High Court. While Williams J appeared to accept that customary international law is recognised as part of the common law "to the extent that it is not inconsistent with rules enacted by statutes or finally declared by the courts",[61] Sir Owen Dixon viewed the principle more narrowly, concluding:

> [T]he theory of Blackstone ... that "the law of nations (whenever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land" is now regarded as without foundation. The true view, it is held, is "that international law is not a part, but is one of the sources, of English law".[62]

Although recent High Court judgments have not specifically addressed the issue of customary international law, there have been statements made to the effect that international law is an "influence" on the common law, rather than a part of common law. Brennan J (as he then was) reflected this view in *Mabo v Queensland (No 2)* where he stated in reference to two treaties:

> 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 universal human rights.[63]

Although the *Teoh* case did not advance the issue of customary international law very far, because a treaty was involved, it certainly left the door open to developments in this area. Thus, even if legislation were used to shut off legitimate expectations which may arise from treaties,[64] customary international law may emerge to fill the gap by transforming certain treaty obligations into principles of the common law.

TEOH AND HUMAN RIGHTS TREATIES

Another question which was raised, but unanswered, by the *Teoh* case is the status of the international instruments which have been scheduled to, or are subject to a declaration under, the Commonwealth's Human Rights and Equal Opportunity Commission Act 1986. The argument is that they must be given a higher status than ordinary non-incorporated treaties because they have been subject to parliamentary

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60 [1977] QB 529 at 554.

61 *Polites* (1945) 70 CLR 60 at 80-81. See also Jordan CJ in *Wright v Cantrell* (1943) 44 SR (NSW) 45 at 47, where he stated: "By the law of England and of this State, international law is recognised as part of the local law save to the extent to which it is inconsistent with that law".

62 *Chow Hung Ching v The King* (1949) 77 CLR 449 at 480-1. See also Latham CJ at 462, where he stated: "International law is not as such part of the law of Australia ... but a universally recognized principle of international law would be applied by our courts".

63 (1992) 175 CLR 1 at 42. See also *Dietrich* (1992) 177 CLR 292 at 404 per Brennan J.

64 See the Administrative Decisions (Effect of International Instruments) Bill 1995.

debate and approval, as they either formed schedules to the Act when it was first passed by the Parliament,[65] or were capable of being disallowed by either House of the Parliament if they were the subject of a declaration by the Minister. In the case of the Convention on the Rights of the Child, a declaration was made by the Attorney-General on 22 December 1992. Section 47 of the Human Rights and Equal Opportunity Commission Act 1986 provides for such a declaration to be treated as a disallowable instrument. The declaration could therefore have been disallowed by either House of the Parliament. A motion was moved in both Houses to disallow this declaration, but neither motion was successful.[66] Under the Human Rights and Equal Opportunity Commission Act 1986, once a human rights treaty is the subject of a declaration or made a schedule to the Act, the rights within it fall within the definition of "human rights" and the Commission may conciliate any complaints about a Commonwealth act or practice which breaches these "human rights". The Commission cannot make conclusive or binding findings. It only has power to make recommendations and report them to the Minister.

There had been some suggestion in earlier cases that the fact that these treaties have been given parliamentary recognition (if not full implementation) raises their status under Australian law. Chief Justice Nicholson of the Family Court stated in *Re Marion* that he had changed his mind from his original view that the parliamentary recognition of the treaties in the Human Rights and Equal Opportunity Commission Act 1986 made no difference. He stated:

> It seems to me that the Act and its Schedules constitute a specific recognition by the parliament of the existence of the human rights conferred by the various instruments within Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia.[67]

His Honour concluded:

> Contrary to what I said in *Re Jane* ... I now think it strongly arguable that the existence of the human rights set out in the relevant instrument, defined as they are by reference to them, have been recognised by the parliament as a source of Australian domestic law by reason of this legislation.[68]

A similar view was taken by Justice Einfeld in *Minister for Foreign Affairs and Trade v Magno*.[69] After discussing the judgments of the High Court in the case of *Dietrich v The Queen*, he concluded:

> Whilst authoritatively determining that treaties ratified only by the executive government do not per se become part of domestic law, *Dietrich* seems to make clear that the statutory approval or scheduling of treaties is not to be ignored as merely platitudinous or ineffectual, but must be given a meaning in terms of the parliamentary

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65 The schedules to the Act contain the Convention Concerning Discrimination in Respect of Employment and Occupation, the International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child and the Declaration on the Rights of Mentally Retarded Persons. Further international instruments have been given the same status by way of Ministerial Declaration, under s 47 of the Act, including the Convention on the Rights of the Child.

66 Sen Deb 1993, Vol 159 at 1473; H Reps Deb 1993, Vol 189 at 695.

67 *Re Marion*, (1990) 14 Fam L R 427 at 449.

68 *Re Marion*, (1990) 14 Fam L R 427 at 451. See also comments by Nicholson CJ and Fogarty J in *Marriage of Murray and Tam* (1993) 16 Fam L R 982 at 998, that this is still an open issue.

69 (1992) 37 FCR 298.

> will. Thus when the Australian Parliament endorses and acknowledges a treaty by legislation, there being no contrary statutory or clearly applicable common law provision in relation to the matters contained in the treaty, it approves or validates the treaty as part of the law which ought as far as possible to be applicable to and enforceable on or by Australians and others in the country to whom it is available.[70]

In *Teoh*, this point was not directly relevant, because the Convention on the Rights of the Child was not declared to be an international instrument under the Human Rights and Equal Opportunity Commission Act 1986 until after the impugned decision was made. Toohey J noted the comments by Nicholson CJ in *Re Marion* and *In the Marriage of Murray and Tam*, but stated "[w]hether this is so is a matter which does not arise in the present case".[71] The Chief Justice and Deane and Gaudron JJ did not address the argument. McHugh J, on the other hand, expressly rejected it. He concluded:

> The HREOC Act recognises that there may exist acts and practices that are inconsistent with or contrary to Australia's human rights obligations as defined by the Act. The mechanisms for remedying those inconsistencies are those provided in the Act. I find it difficult to accept that parliament intended that there should be remedies in the ordinary courts for breaches of an instrument declared for the purpose of s 47 of the HREOC Act when such remedies are not provided for by the Act.[72]

Given the absence of clear authority on the question in *Teoh*, it is still unclear whether the courts regard the international instruments which are scheduled to, or declared under, the Human Rights and Equal Opportunity Commission Act, as having a higher status than other ratified treaties which have not been directly implemented by legislation.[73]

CONCLUSION

While the *Teoh* case has added to the Australian jurisprudence on the relationship between international law and domestic law, it has not provided clear guidance on how this relationship will develop in the future. Questions still abound as to the extent to which unincorporated treaties can affect the domestic law of Australia, whether by interpretation of statutes, development of the common law, or the creation of procedural rights of fairness. Chief Justice Brennan has raised the intermingling of international and domestic law as one of the issues with which the High Court will have to deal in the future.[74] The case is indicative of the uneasy relationship between globalisation and national sovereignty and the competing pressures these place on the development of law within Australia. *Teoh* is only an early development in what promises to be a growing area of law.

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70 Ibid at 343.
71 (1995) 128 ALR 353 at 373.
72 Ibid at 386.
73 This issue may be resolved, to some extent, by Administrative Decisions (Effect of International Instruments) Bill 1995: subclause 6(2).
74 Sir Gerard Brennan, paper delivered at "The Mason Court and Beyond" (above n 12).