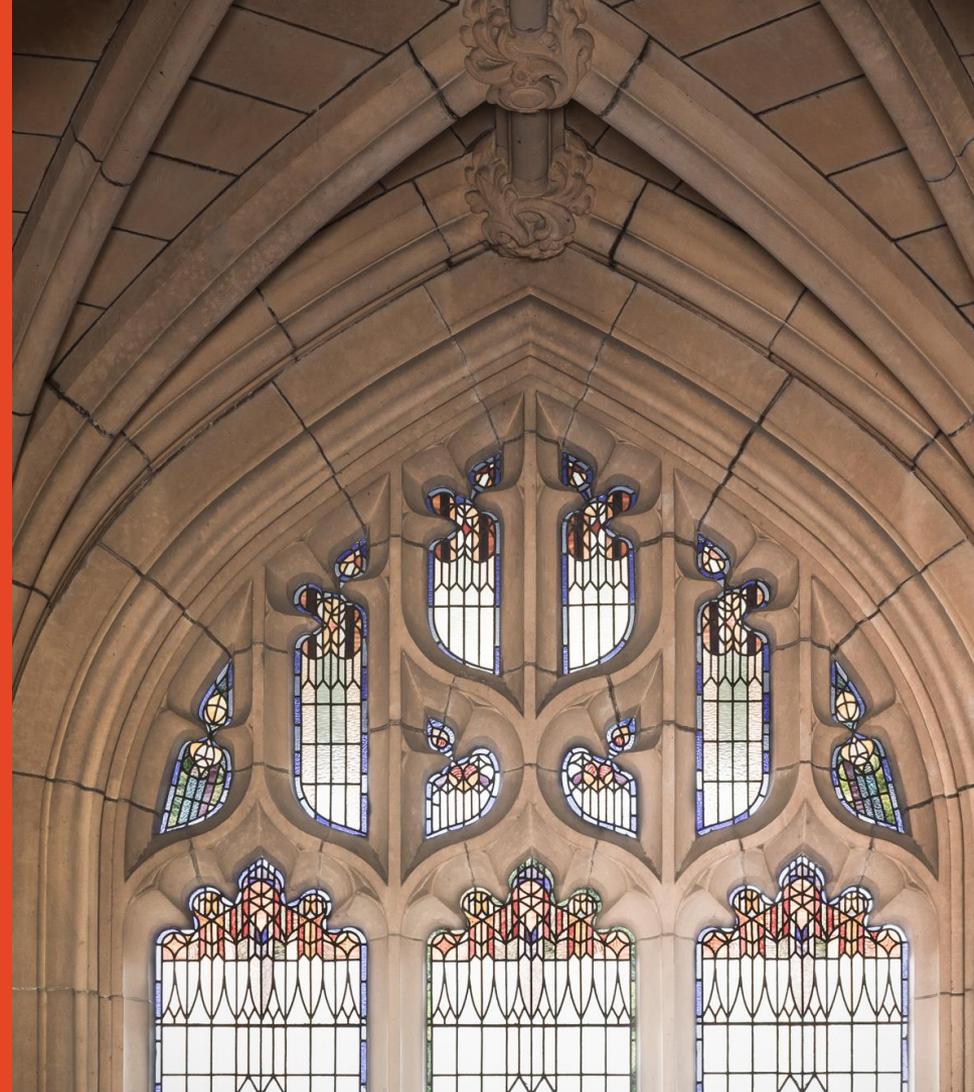


International Law and Municipal Law



International law and Australian law

- International law in municipal law
 - What impact does international law have on Australian law?
 - Must international law be received? How does this reception occur?
 - Executive act of ratification?
 - By way of legislation passed by Parliament?
 - By decisions of the courts?
 - Is the process of receiving international law into domestic law different depending on the source (ie, custom v treaty?)

Transformation

- Transformation
 - A rule of IL will not become part of ML unless expressly adopted by the local courts or, more usually, the legislature; IL is not ipso facto part of ML, requires a deliberate act by the state
- Often a distinction between custom and treaty rules
 - UK and Australia follow transformation approach to treaties
 - Australia (probably) follows transformation approach to customary rules eg *Nulyarimma v Thompson* (1999, Federal Court)

Customary international law and Australian law

- *Nulyarimma v Thompson* (1999) 165 ALR 621
- Concerned whether crime of genocide part of Australian common law; *Genocide Act 1949* (Cth) merely approved 1949 Genocide Convention but did not implement Convention (but see now *Criminal Code 1995*)
- FFCA held that crime of genocide not part of Australian law:
 - Per Wilcox J – as a matter of municipal policy a norm of customary international law which criminalises conduct does not become part of Australian law in the absence of implementing or adopting legislation
 - Per Whitlam J – existence of universal jurisdiction does not itself constitute a source of jurisdiction for Australian court, as statutory vesting essential. In any event common law offences abolished by statute
 - Per Merkel J (dissenting) – custom will be a source where rule has attracted general acceptance in international community; rule is consistent with statute or with general policies or principles of common law; rule once adopted or received into domestic law has the “force of law” in having modified or altered the common law

Treaties and Australian law

- Power to enter into treaties an Executive prerogative power (s.61 of the Constitution)
 - Power inherited from the Imperial government as Australia acquired independence
- Power to implement treaties through legislation is an exclusively Legislative power (see, especially, s 51(xxix) of the Constitution)
- Transformation approach applies: the provisions of a treaty do not form part of Australian law unless incorporated into Australian law by statute
 - An implication from separation of powers doctrine (the Executive enters into the treaty but law-making is for the Parliament; and the judiciary merely interpret and apply the law)
 - Recognised exceptions for eg peace treaties and maritime boundary agreements

Treaties in Australian Law

***Bradley v Commonwealth* (1973) 128 CLR 557**

- Direction by Commonwealth Postmaster General that all postal and telephone services for the Rhodesia Information Centre in Sydney should be withdrawn
- UNSC resolutions had described regime in Rhodesia (which is now Zimbabwe) as illegal, and called on member states to take measures to ensure that acts performed by the officials of the illegal regime should not be accorded any recognition
- Held that P-G direction not authorised by Post and Telegraph Act 1901 (Cth)
- Barwick CJ and Gibbs J – ‘the Charter of the United Nations Act 1945...does not reveal any intention to make the Charter binding upon persons within Australia as part of the municipal law of this country...Since the Charter...and [SC] resolutions...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.’

The Treaty Making Process

Process and Parliamentary Involvement

- Bilateral treaties
 - enter into force (for Australia) after (1) signature and (2) subsequent exchange of notes stating required constitutional processes complete
- Multilateral treaties
 - normally enter into force (for Australia) after (1) signature and (2) subsequent ratification (accession if no previous signature)
- No constitutional requirement for Parliamentary approval of treaty-making
 - However, only Parliament may pass legislation implementing treaties in Australia

The Treaty Making Process

Parliamentary Involvement

- Tabling of treaties
 - From 1961, Government began tabling treaties in Parliament at least 12 sitting days before ratification or accession (similar to UK ‘Ponsonby Rule’ – 21 days)
 - Designed to give Parliament opportunity to discuss treaties of significance prior to binding treaty action; Initially treaties tabled individually or in small groups; by 1970s treaties tabled in bulk, biannually

The Treaty Making Process

Parliamentary Involvement

- *Trick or Treaty?: Commonwealth Power to Make and Implement Treaties*
 - 1995 report of the Senate Legal and Constitutional References Committee
 - Response to perceived ‘democratic deficit’ in treaty-making
 - 11 recommendations to increase public information, consultation with states, public, industry, strengthened role for parliament, and accommodating federal system
 - The ‘decision [to enter into a treaty] is made by a govt. that has been democratically elected...and is accountable. Any action taken to change the law in order to implement the treaty must be taken by the Cth. Parliament, or the parliaments of the States and Territories. Hence, the process of entering into and implementing treaties is democratic, but the process could be improved...by improving consultation.’

The Treaty Making Process

1996 Government Response to Trick or Treaty?

- Tabling of all proposed treaty actions in Parliament at least 15 sitting days prior to binding action (exemption for urgent or sensitive treaties)
- Preparation of National Interest Analysis (NIA)
- Establishment of Joint Standing Committee on Treaties (JSCOT)
- Establishment of Treaties Council (comprising PM, Premiers and Chief Ministers)
- Establishment of Australian Treaties Library
<http://www.austlii.edu.au/au/other/dfat/>

Constitutional and Legislative Considerations

Constitutional Issues

- Importance of the ‘external affairs’ power in s 51(xxix) of the Australian Constitution in enabling legislation with respect to international law (but not the only relevant power in s 51)
- Main components of the external affairs power
 - Relations between Australia and other countries
 - Matters external to Australia
 - **Implementing international law** (custom, treaties, international recommendations)

Constitutional and Legislative Considerations

Components of the External Affairs Power

- External affairs power will support legislation applicable to matters geographically external to Australia
- *Horta v Commonwealth* (1994) 181 CLR 183
 - Legislation to implement 1989 Timor Gap Treaty held valid (unanimous decision)
 - Plaintiffs argued that law invalid because treaty implementing law void because of illegal Indonesian occupation of East Timor
 - Per Curiam – ‘the area of the Timor Gap and the exploration...and exploitation of, petroleum resources...[are] matters...geographically external to Australia. There is an obvious and substantial nexus between each of them and Australia’ ‘[E]ven if the Treaty were void or unlawful under international law...the [impugned Acts] would not thereby be deprived of their character as laws with respect to “External Affairs”’

Constitutional and Legislative Considerations

Components of the External Affairs Power

- Implementing treaties in Australian law
 - *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1
 - Concerned validity of the World Heritage Properties Conservation Act 1983 (Cth) which implemented Australia's obligations under 1972 World Heritage Convention to protect South West Tasmanian wilderness
 - Majority held that most of legislation was a valid law with respect to external affairs
 - Majority (Mason J, Murphy J, Brennan J and Deane J) did not see need for requirement of 'international concern'
 - Mason J – 'the Court would undertake an invidious task if it were to decide whether the subject-matter of a convention is of international character or concern. On a question of this kind the Court cannot substitute its judgment for that of the executive government and Parliament'

Constitutional and Legislative Considerations

Legislative Issues

- Generally Cth will not become party to treaty until legislation in place
 - To ensure that Australia not in breach of treaty obligations
- Ascertaining the need (or not) for legislation
 - Legislation will be needed if treaty creates rights for or imposes obligations upon individuals
 - Appropriate legislation will often be in place at Cth or state level, especially in combination with the common law
 - Existing legislation can often be used to make necessary regulations (e.g. Charter of the United Nations Act 1945 (Cth) – implementing UNSC Resolutions dealing with sanctions or listing terrorist organisations and freezing assets)

Constitutional and Legislative Considerations

Legislative Issues

- Giving treaty the force of law
 - Where treaty has been drafted with view to incorporation of its terms into domestic law (eg. Diplomatic Privileges and Immunities Act 1967 (Cth), s 7)
 - Advantages: legislative provisions have same meaning as treaty provisions; disadvantages: language of many treaties not suitable for simple adoption in legislation (eg, broad; aspirational)
- ‘Approving’ treaties
 - Mere approval of ratification by Parlt. does not give treaty force of law (eg Charter of UN Act 1945 (Cth); Genocide Convention Act 1949 (Cth))
 - Practice has lapsed, as formal Parliamentary approval not required and Parliament now involved in other ways in treaty-making process
- Translation of treaty provision into domestic law
 - Most common practice; designed to avoid uncertainty
 - May refer to treaty terms (eg Migration Act, s 4 (def. of refugee))

International Law as an influence on Australian law: Custom

- Custom relevant for purposes of treaty interpretation
- Custom as a “source” for development of the common law
 - Clear rejection of automatic incorporation approach
 - Not a clear embracing of transformation approach
 - “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” *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J

International Law as an influence on Australian law: Treaties

- An unincorporated treaty (ie a treaty not made part of Australian law) may be relevant for
 - Developing the common law
 - Interpreting legislation
 - What about interpreting the Constitution?

International Law as an influence on Australian law: Statutory Interpretation

- Statutory interpretation
 - In the absence of express words to the contrary, legislation should be interpreted subject to Australia's international legal obligations
 - *Polites v Commonwealth* (1945) 70 CLR 60
 - Courts will not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless intention clearly manifested by unmistakable and unambiguous language

International Law and Statutory Interpretation

'Polites Principle'

- *Polites v Cth* (1945) 70 CLR 60
 - Mr Polites, a Greek national, served with notice in 1942 under regulations requiring service in Australian defence forces. Argued that delegating legislation invalid
 - HCA held that legislation valid, although there was a rule of international law preventing state from requiring aliens to serve in armed forces
 - Per Latham CJ – 'It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity.'

International Law as an influence on Australian law: Constitutional Interpretation

- *Al Kateb v Godwin* [2004] HCA 37
 - Whether lawful for stateless person with no prospect of removal in reasonably foreseeable future to remain indefinitely in immigration detention
 - Majority held that Migration Act 1958 (Cth) required indefinite detention
 - Kirby J and McHugh J took opposing views on relevance of international law
 - Per Kirby J – “the complete isolation of constitutional law from the dynamic influence of international law is neither possible nor desirable today. That is why national courts, and especially constitutional courts...have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental principle”

International Law as an influence on Australian law: Constitutional Interpretation

- Per McHugh J – “Most of the rules now recognised as rules of international law are of recent origin. If Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be amending the Constitution in disregard of the direction in s.128 of the Constitution. Section 128 declares that the Constitution is to be amended only by legislation that is approved by a majority of the States and ‘a majority of all the electors voting’. Attempts to suggest that a rule of international law is merely a factor that can be taken into account in interpreting the Constitution cannot hide the fact that, if that is done, the meaning of the Constitution is changed whenever that rule changes what would otherwise be the result of the case.”

International law in Australian law: summary

- Australia follows dualist, transformation approach: international law and domestic law are separate
- Treaties do not form part of Australian law unless made part of that law by legislation
- CIL is not part of Australian law automatically, but influences Australian law through statutory interpretation and (probably) the development of the common law
 - However, international crimes recognised at customary international law **do not** become part of Australian law in the absence of implementing legislation.