International Law and the Protection of Human Rights in Australia: Recent Trends

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1. *Introduction*

With no express Bill of Rights in the Australian Constitution, it might be expected that international law should have some role in shaping human rights jurisprudence in this country. However, the relationship between the international legal order and Australian domestic legal order has traditionally not been close. Rather a dualist conception of the two orders as separate spheres has prevailed. In recent times, Australia has witnessed greater use of treaties as a basis for Commonwealth legislation, more use of international legal norms by the judiciary, and international scrutiny of Australia's human rights record which has had direct ramifications for Australian law. This trend has raised controversy among some sections of the Australian community. Arguments are made that legislation based on treaties is undemocratic. More particularly in the field of human rights, which might otherwise fall within the legislative authority of the states, it is argued that Commonwealth legislation based on the external affairs power is disruptive of federalism. Reliance by the judiciary on international legal norms which produces a novel understanding of Australian law, at least in the eyes of the public, may be met with charges that the judiciary is usurping the role of the legislature. And, as demonstrated by the *Tasmanian Gay Rights* case,[1] the scrutiny of Australian compliance with treaty obligations by international bodies such as the Human Rights Committee is greeted with scepticism about the quality of the supervisory body and the human rights record of the other States party to the treaties, as well as concerns that the federal structure has been bypassed.

All of these arguments centre on the idea of "sovereignty" in some shape or form, whether it is popular sovereignty, parliamentary sovereignty or the international legal concept of State sovereignty.[2] [For further discussion of sovereignty see Burmester above at 130–4] A central theme of this article is that most of the concerns regarding sovereignty are misapprehensions. The increasing reliance on

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1 United Nations Human Rights Committee, UN Doc CCPR/C/50/D/488/1992 (8 April 1994). The case is analysed in the text accompanying n41 below.

2 Sovereignty at international law is rather ill-defined, but it includes the notions of territorial integrity and equality among States.

international human rights law generally brings both benefits to the Australian community and enhances Australia's standing as a member of the international community. Talk of sovereignty in such absolute and isolationist terms as occurs in Australia runs against the trend in some other States and in international legal theory.[3] It will be demonstrated that democratic principles and internal constitutional arrangements are upheld in the acceptance and implementation of international legal norms by all three arms of government. Far from diminishing Australian sovereignty, the use of international human rights law enriches the notion of Australian nationhood. Yet it will be seen that concerns over sovereignty continue to limit effective use of international law in human rights protection in Australia. Indeed, it will be argued that talk of loss of sovereignty is used by those who fear the disturbance of their own ideas as a technique for ignoring other voices within the Australian polity.

In exploring this theme, I will visit two major sites of human rights implementation. It should be noted that reference is made to these sites merely as an organisational device since they are discrete areas and that my review of activity within these areas is not exhaustive. First, the implementation of human rights treaty obligations through the legislative process and the impact of international scrutiny of Australian compliance with those obligations will be explored. Second, the application of human rights norms by the High Court when reviewing Commonwealth legislative power and when expounding the common law will be examined. I will demonstrate that the use of international human rights norms has done much to bring the language of rights into Australian legal discourse. However, I will also show that there are severe limitations to human rights protection in both major sites of human rights activity in Australia, indicating, contrary to the views of vocal critics, that a particularly insular form of sovereignty is entrenched in Australia and needs to be revised if Australians are serious about protection of human rights. It will be seen that Australia is only just beginning to grapple with important philosophical and practical questions concerning human rights. The language of rights itself requires critical evaluation if it is to be useful for those who are disempowered and whose rights are disregarded.

Before commencing, a thumbnail sketch of the sources of international human rights law and the role of the Australian Constitution and common law in protecting human rights will be provided.

2. *The Sources of International Human Rights Law*

The international legal order is often described as a developing and incomplete system.[4] This description rests on lack of enforcement and the imprecise nature of the positive sources of international law. An important source of international law is customary international law, which is based on State practice and *opinio juris*,

3 For some of the theoretical critiques of monolithic concepts of sovereignty, see Schreuer, C, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" (1993) 4 *Eur J Int'l L* 447; Knop, K, "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 *Trans L & Cont Probs* 293; and MacCormick, N, "Beyond the Sovereign State" (1993) 56 *Mod LR* 1. MacCormick and Schreuer both point to some of the practical trends away from monolithic State sovereignty, such as the existence of European Community.

4 See, eg, Brierly, J L, *The Law of Nations* (6th edn, 1963) at 41–2.

the belief that the practice is required by law. The circularity of the concept of *opinio juris* is obvious and highlights the difficulty with which normative and non-normative conduct is distinguished at international law. A more accessible source of international law for non-international lawyers is the treaty which can be described as contractual, particularly in reference to bilateral treaties which deal with a once-off transaction, or legislative, as in the case of multilateral treaties which bind parties to legal norms of continuing import. Human rights treaties, for example, might fall within the category of legislative treaties. Clearly the effect of the so-called legislative treaty is still contractual in the sense that only parties are bound by the terms of the treaty. However, the number of parties and the continuing nature of the obligations means that such treaties often resemble domestic statutes.[5] Moreover, legislative treaties may contribute to the development of customary international law since they are likely to generate practice consistent with the treaty obligations even on the part of non-party States, thus binding non-parties to customary norms the content of which mirrors the original treaty obligations.[6] On the other side of the coin, it is accepted that States may not contract out of certain international legal obligations. Precise listing of these peremptory norms, known by their Latin name *jus cogens*, is impossible, as the notion is fairly recent and subject to vigorous debate.[7] One strong candidate is the prohibition on the use of force in international relations.[8] Some human rights obligations are also contenders, for example the prohibitions on genocide, torture and slavery.[9]

The source of most international human rights law is treaties. However, the international human rights movement began after the atrocities of World War II with the Universal Declaration of Human Rights.[10] The Declaration, being a General Assembly resolution, is not formally binding.[11] The Declaration was later implemented by the two major human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)[12] and the International Covenant on

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5 Brownlie, I, *Principles of Public International Law* (4th edn, 1990) at 11.

6 *North Sea Continental Shelf* cases *(Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3.

7 For example, see D'Amato, A, "It's a bird, it's a plane, it's jus cogens!" (1990) 6 *Conn J Int'l L* 1.

8 The prohibition is enshrined in Art 2(4) of the UN Charter and was held to constitute customary international law by the International Court of Justice in the case concerning Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v United States)* [1984] ICJ Rep 392.

9 See case concerning the *Barcelona Traction, Light and Power Co Ltd* (1964) ICJ Rep 6 at par 33, where such obligations were noted as obligations *erga omnes*, that is owed to all, which indicates their well accepted status. According to the *US Restatement (Third)* s702, the list of human rights obligations which are accepted as customary obligations and *jus cogens* includes the prohibitions on genocide, slavery, murders or disappearances, torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and consistent patterns of gross violations of internationally recognised human rights.

10 GA Res 217 (III 1948), adopted on 10 December 1948.

11 General Assembly resolutions are not listed as a source of law in Article 38 of the ICJ statute, and Articles 10–14 of the UN Charter make clear that only administrative resolutions, eg, those dealing with budgetary matters, are binding on UN members. However, it is accepted that General Assembly resolutions may contribute to the formation of customary international law. For example, in *Nicaragua* above n8, the Court accepted that resolutions may be evidence of *opinio juris*. For current arguments concerning the status of General Assembly resolutions, see Danilenko, G, *Law-Making in the International Community* (1993) at 203–10.

12 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 *UNTS* 171 (entered into force 23 March 1976).

Economic, Social and Cultural Rights (ICESCR).[13] Many of the provisions of the Universal Declaration are now accepted as binding, because the Declaration is viewed as an authoritative interpretation of the few provisions of the United Nations Charter which refer to human rights[14] or because state practice and *opinio juris* have confirmed them as customary norms.

The concept of international human rights law was revolutionary, since most international law operates only between nation States, or sometimes between States and international organisations.[15] By contrast, international human rights law imposes obligations which are owed to individuals. Moreover, some international legal norms such as the prohibition of war crimes, impose individual liability for violations. In addition, human rights is an area where the traditional requirements for customary international law have been relaxed.[16] More attention has been paid to States' expressions of *opinio juris* than to actual practice, since human rights violations continue daily everywhere. Indeed, the general acceptance of at least some human rights norms as *jus cogens* means that violations are to be treated as such, rather than as expressions of new trends in the law.[17]

3. *The Historical Place of the Constitution and Common Law in the Protection of Human Rights*

The Constitution does contain a few express provisions concerning human rights.[18] But no comprehensive Bill of Rights was enacted, as it appeared the framers thought the protection provided by parliamentary democracy and the rule of law sufficient.[19] Generally, such provisions as there are have been interpreted narrowly by the courts[20] and all constitutional referenda to augment this list of

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13 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 *UNTS* 3 (entered into force 23 March 1976).

14 Notably Arts 1, 55 and 56.

15 It was established that international organisations may have international legal personality in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep 174 at 186. Since then it has been accepted that international organisations have the capacity to enter treaties. See Menon, P K, *The Law of Treaties Between States and International Organisations* (1992) at 5. The law governing treaties to which international organisations are party has been codified in the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 25 *ILM* 543 (not in force).

16 Henkin, L, "International Law: Politics, Values and Functions — General Course on Public International Law" (1989–IV) 216 *Rec des Cours* 10 at 223–4.

17 Compare with the approach of the International Court of Justice when considering numerous violations of the prohibition on the use of force in the *Nicaragua* case above n8. When faced with practice in violation of an established rule, it is arguable that new customary international law is being formed. However, the Court in *Nicaragua* found all evidence of *opinio juris* demonstrated that States accepted the prohibition on the use of force as law. *Opinio juris* took precedence over practice.

18 They are s51(xxxi) dealing with acquisition of property on just terms; s80 on trial by jury; s92 which provides for freedom of movement between the states; s24 and 41 concerning voting rights; s116 denying federal legislative power regarding religion; and s117 prohibiting discrimination in any state against the residents of another state.

19 Charlesworth, H, "Individual Rights and the Australian High Court", (1986) 4 *Law in Context* 52 at 52–3.

20 Charlesworth, H, "The Australian Reluctance about Rights" (1993) 31 *Osgoode Hall LJ*

provisions have failed.[21] Traditionally, the judiciary has also displayed reluctance to develop human rights jurisprudence through implied constitutional guarantees or the common law. Much of this is attributable to the concept of parliamentary sovereignty. Until recently, most judges appeared content with the role of interpreter/applier of law created by the legislature.[22] However, judges are now demonstrating greater acceptance of their role as declarers of law through the interpretative process, together with a willingness to protect human rights.

The Courts have recognised that doctrines other than parliamentary sovereignty are equally fundamental to the rule of law. For example, the High Court held in *Lim*[23] that an attempt by the legislature to direct the courts not to release "boat people"[24] from custody amounted to an infringement of the judicial power. The High Court has also found that the doctrine of representative government means that there is an implied freedom of political discourse in the Constitution.[25] Moreover, the Courts have been more willing to look to international legal standards and practice concerning human rights to guide their judgments. The *Mabo* decision,[26] in which the High Court recognised native title, is the leading example of this development.

4. *Recognition of Rights through the Legislative Process*

As a result of the failure to augment the list of existing express constitutional guarantees, and the traditionally cautious approach of the judiciary, the Australian framework for human rights protection has been expanded by legislation at both the federal and state levels.[27] Federal initiatives provide the focus here, as it is the federal executive which has the power to enter international treaties,[28] binding Australia to obligations on the international plane, and the

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195 at 200–1.

21 Id at 198–9; above n19.

22 Ibid; Kirby, M D, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol — a View from the Antipodes" (1993) 16 *UNSWLJ* 363 at 371; *Dietrich v R* (1992) 109 ALR 385 at 402 per Brennan J.

23 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97.

24 The term "boat people" is widely used for persons arriving by boat who have not gained authorisation for entry under national immigration laws.

25 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80; *Theophanous v The Herald & Weekly Times Ltd* (1994) 124 ALR 1; *Cunliffe v Commonwealth* (1994) 124 ALR 120. The term "implied freedom of political discourse" is used here to encapsulate the various formulations used by members of the High Court. For a summary of the different formulations see *Theophanous* at 11 per Mason CJ, Toohey and Gaudron JJ. Note that the implied freedom is expressed as a limitation on governmental power rather than an individual right.

26 *Mabo v Queensland* (1992) 175 CLR 1.

27 For example, most states have equal opportunity or anti-discrimination legislation. See the *Anti-Discrimination Act* 1977 (NSW); the *Equal Opportunity Act* 1984 (Vic); the *Equal Opportunity Act* 1984 (SA); the *Equal Opportunity Act* 1984 (WA); the *Anti-Discrimination Act* 1991 (Qld); the *Discrimination Act* 1991 (ACT); and the *Anti-Discrimination Act* 1992 (NT). Federal measures are addressed below.

28 With the (gradual) achievement of independence, this is now generally regarded as part of the prerogative powers as conferred by s61 of the Australian Constitution. See Zines, L,

federal legislature which has complementary power to implement treaties domestically under the external affairs power.[29] Australia is party to the major international human rights treaties.[30] However, although the traditional common law position was that international legal obligations were the "law of the land",[31] the Australian position may not conform with that position any longer.[32] Australian authority has long held that treaties do not confer justiciable rights on individuals unless they are incorporated by legislation into domestic Australian law.[33] Since human rights obligations may fall within the legislative powers of the states as well as under Commonwealth heads of power (especially the external affairs power), the entry into and implementation of human rights treaties has been severely retarded by arguments revolving around sovereignty and federalism. This has occurred despite the clear confirmation of Commonwealth power by the High Court and the potential for Australia to become an "international cripple", unable to fully participate at the international level if this trend continues.[34] This debate has been fed by a perception that state governments are wrongly excluded from negotiation of treaties; that the use of federal legislation to override state legislation represents an unacceptable centralisation of power; and that international scrutiny of state laws and practices violates Australian sovereignty.

Those who argue for "states' rights" have succeeded to some extent in their aims of restricting federal implementation of legislation, since the most comprehensive Commonwealth legislation, the *Human Rights and Equal Opportunities Commission Act* 1986 (*HREOC Act*), is extremely limited. The *HREOC Act* was not intended as a full legislative incorporation of interna-

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The High Court and the Constitution (3rd edn, 1992) at 214–5.

29 The plenary nature of the Commonwealth legislative power to implement treaties under s51(xxix) (the external affairs power) was confirmed in a series of cases beginning with *R v Burgess; ex parte Henry* (1936) 55 CLR 608 and culminating in *Commonwealth v Tasmania* (1983) 158 CLR 1 (the *Tasmanian Dam* case).

30 For example, the ICCPR and ICESCR; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, annex GA Res 46 (XXXIX 1984), opened for signature 4 February 1985, entered into force 26 June 1987; the International Convention on the Elimination of all Forms of Racial Discrimination 660 *UNTS* 195, opened for signature on 7 March 1966, entered into force 4 January 1969; the Convention on the Elimination of All Forms of Discrimination against Women, annex GA Res 180 (XXXIV 1979), adopted 18 December 1979, entered into force on 3 September 1981; the Convention on the Rights of the Child, GA Res 44/25 (20 November 1989), entered into force 2 September 1990; and the Convention Relating to the Status of Refugees 189 *UNTS* 137, done on 8 July 1951, entered into force 22 April 1954, and its 1967 Protocol.

31 *Triquet v Bath* (1764) 3 Burr 1478; 97 ER 936.

32 *Chow Hung Ching v The King* (1948) 77 CLR 449. Note that this case and other Australian authorities use British precedent for conflicting propositions: Crawford, J and Edeson, W R, "International law and Australian law" in Ryan, K W (ed) *International Law in Australia* (2nd edn, 1984) 71 at 77–8. In the United Kingdom the position has swung from incorporationist to transformationist and back to incorporationist. The trend back to the incorporationist approach began with *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529.

33 *Chow Hung Ching*, id at 478 per Dixon J; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 per Barwick CJ and Gibbs J; *Simsek v Minister for Immigration and Ethnic Affairs* (1982) 40 ALR 61 at 66 per Stephen J; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 224 per Mason J; *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270 at 274 per Mason J; *Kioa v West* (1985) 159 CLR 550 at 570 per Gibbs CJ.

34 *Tasmanian Dam* case above n29; Byrnes, A and Charlesworth, H, "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 *Am J Int'l L* 622.

tional human rights treaties, but the Human Rights Bill which accompanied it lapsed.[35] A number of international treaties, including the ICCPR and the ICESCR, and resolutions or declarations of international bodies which are not formally binding at international law, are scheduled to the *HREOC Act*. Inclusion in the schedules, however, does not confer full legislative force or justiciable rights. Nicholson CJ, of the Family Court, has concluded that the presence of the treaties in the schedules is sufficient to give them some effect in domestic Australian law,[36] but the High Court has not followed this approach[37] and the powers of the six Commissioners are merely investigatory, conciliatory, educative and advisory.[38]

The present federal government is demonstrating greater willingness to use its legislative muscle with, for example: the ongoing legislative response to the *Mabo* decision; the attempt to enact racial vilification/hatred legislation in response to several national inquiries which touched on the problem of racial violence;[39] and the enactment of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) in response to the Human Rights Committee's decision in the *Tasmanian Gay Rights* case. These initiatives will be examined for their use of and effectiveness in implementing international human rights law. All of these developments, far from being imposed by "foreign influences", have grown from clear domestic imperatives. International human rights norms have simply been used to confirm the importance of these domestic imperatives and to bring international practice and experience to bear on the problems they address. However, it will be seen that the inevitable clash of interests and political compromise involved in the legislative process has often limited the effectiveness of these initiatives to the detriment of the proposed beneficiaries, highlighting flaws in the assumption that representative democracy and the rule of law are adequate guarantees of human rights. It is argued that rights language

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35 Above n20 at 209; Caleo, C, "Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 4 *Pub LR* 175 at 184.

36 *Re Marion* (1990) 14 Fam LR 427 at 449 per Nicholson CJ. His comments are only dicta however, since he did not find his conclusions regarding the *HREOC Act* necessary to his decision. Compare with *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 in which the Federal Court held that Australian ratification of the Convention on the Rights of the Child created a legitimate expectation that the immigration decision-makers would abide by the provisions of the Convention. See Postscript to this article. See also Bayne, P, "Administrative Law, Human Rights and International Humanitarian Law" (1990) 64 *ALJ* 203.

37 In the appeal of *Re Marion* the High Court made little or no reference to either the *HREOC Act* or international human rights instruments. See *Secretary, Department of Health and Community Services (NT) v JWB & SMB* (1992) 175 CLR 218. The High Court's position in *Dietrich* above n22 and *Mabo* above n26, which are analysed below, also demonstrates that the High Court has not followed the approach suggested by Nicholson CJ.

38 Recent amendments provided for decisions relating to the *Sex Discrimination Act* 1984 (Cth) and the *Racial Discrimination Act* 1975 (Cth) to be registrable with the Federal Court, meaning that they would have the effect of Federal Court decisions. See *Sex Discrimination and Other Legislation Amendment Act* 1992 (Cth). The legislation was declared unconstitutional in *Brandy v Human Rights and Equal Opportunity Commission* 127 ALR 1.

39 The three reports are the Australian Law Reform Commission, Multiculturalism and the Law (1992) 57 ALRC; Royal Commission into Aboriginal Deaths in Custody, *National Report: Overview and Recommendations* (1991); and Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence* (1991).

will only be effective when the problem of power imbalances in society which belie the promise of formal equality are grappled with.

The *Tasmanian Gay Rights* case involved a decision by the Human Rights Committee, the international body which administers the ICCPR, that Tasmanian laws which outlaw sexual activity between men[40] are in violation of the ICCPR, particularly the protection of privacy contained in Article 17.[41] It was the first successful individual communication concerning Australian human rights practices to the Human Rights Committee. There are now a number of Australian communications either before the Human Rights Committee or in preparation, including one by a Cambodian asylum-seeker and another by an environmentalist enjoined from protesting at the Hindmarsh Bridge development site.[42] The procedure for application to the Committee is described as a "postcard" procedure — it involves merely a written application by the victim of the human rights violation — and it appears from the *Tasmanian Gay Rights* case that the lack of proper human rights implementation in Australia means that it will be somewhat easier to exhaust "local remedies"[43] than in other jurisdictions.[44] Thus it seems likely that many more communications originating from Australia will be heard by the Committee.

Given the failure of the Australian Parliament to comprehensively implement Australia's international human rights obligations, the potential for individuals to obtain international scrutiny is vital. Australia has accepted three avenues for such scrutiny: the First Optional Protocol to the ICCPR (the Optional Protocol), which allows complaints to be heard by the Human Rights Committee; Article 14 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD), which permits scrutiny by the Committee on the Elimination of Racial Discrimination; and Articles 21 and 22 of the Torture Convention under which the Committee against Torture hears complaints. [For further discussion of individual complaint mechanisms accepted by Australia, see Burmester above at 142–3.]

These mechanisms are no substitute for domestic implementation of treaty obligations for a number of reasons. First, as demonstrated by the *Tasmanian Gay Rights* case, these avenues are extremely limited in terms of concrete consequences unless the State concerned responds positively to the finding of the international body. Sovereignty emerges unscathed.

Second, all three mechanisms primarily relate to the civil and political status of the individual, the so-called "first generation" of rights,[45] although

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40 *Criminal Code* 1924 (Tas) s122 and 123.

41 Above n1.

42 (1994) 1 *Optional Protocol Network Newsletter* 4; (1995) 1:1 *Optional Protocol Network Newsletter* 1.

43 That is, available domestic procedures for redress.

44 For descriptions of procedure under the First Optional Protocol to the ICCPR, the instrument which allows individual complaints to the Human Rights Committee, see Charlesworth, H, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 *MULR* 428 and Chinkin, C, "Using the Optional Protocol: the Practical Issues" Conference Proceedings, *Internationalising Human Rights Protection in Australia: Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights*, 10 December 1991 (copy on file with author).

45 The designation "generations" merely refers to the chronological conceptualisation or accep-

CERD does deal with discrimination on the basis of race in relation to "second generation" economic, social and cultural rights[46] and the provision for equality before the law in Article 26 of the ICCPR may include equality in relation to laws concerning economic, social and cultural rights.[47] In contrast to the Human Rights Committee, the committee which scrutinises the ICESCR has no power to hear individual complaints regarding violations of the rights over which it has jurisdiction. The collective or group rights of the "third generation", such as the right to development, have often failed to find their way into formally binding international instruments at all, despite being the subject of a plethora of non-binding declarations. One third generation right which has received formally binding expression, the right to self-determination, found in common Article 1 of the ICCPR and the ICESCR, has been declared unenforceable by the Human Rights Committee on the basis that the Optional Protocol applies only to violations of individual rights.[48] Once again, State sovereignty has taken precedence over human rights because self-determination, with its secessionist potential, is a threat to territorial integrity.

This privileging of the normative status and strength of enforcement of the civil and political rights traditionally associated with liberal philosophy hints at a third problem. Does human rights language, which is claimed to be universal, really allow the full expression of human dignity in all its diversity?

The *Tasmanian Gay Rights* case decision has been extensively analysed with this question in mind by Wayne Morgan, the legal adviser to the Tasmanian Gay and Lesbian Rights Group (TGLRG) which initiated the communication to the Human Rights Committee.[49] Morgan's analysis demonstrates convincingly that while the decision is important for lesbians and gay men, its roots in privacy jurisprudence restrict the possibilities for full expression of gay and lesbian sexuality, and thus their humanity. In particular, Morgan charges the Committee with failure to consider whether the right to equality in Article 26 had also been violated. This, he argues, and I agree, has the effect of allowing gay men and lesbians only the "freedom" of a closeted human identity and masks the very public violence and discrimination which attends governmental failure to ensure that gay men and lesbians are allowed to publicly self-identify safely.

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tance of particular categories of rights as "rights". The first generation of civil and political rights refers to those rights conceptualised during the development of liberal philosophy.

46 See Art 5.

47 *Broeks v Netherlands* 2 Selected Decisions HRC 196 (1987); *Danning v Netherlands* 2 Selected Decisions HRC 205 (1987); *Zwaan de Vries v Netherlands* 2 Selected Decisions HRC 209 (1987).

48 Communication No 167/1984, *Bernard Ominiyak, Chief of the Lubicon Lake Band v Canada*, Report of the Human Rights Committee, vol II, UNGAOR Supp 40A/45/40 at 1. This approach has been confirmed with the most recent general comment on the rights of minorities under Art 27: General Comment 23 [50] CCPR/C/21/Rev1/Add 5.

49 In particular, see Morgan, W, "Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights" (1993) 14 *Aust Ybk Int'l L* 277; "Identifying Evil for what it is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 *MULR* 740. Note that since the author of any communication must be an individual who has suffered a violation of his or her individual rights, the communication in the *Tasmanian Gay Rights* case was "authored" in the formal sense by Nick Toonen.

Feminists have also demonstrated how the public/private divide, particularly as reflected in the sanctity of the family, may permit abuses of women to be treated as something other than human rights abuse since the state is absolved from action.[50] Since human rights are supposed to represent protections of the inherent human essence, the repression of humanity resulting from the public/private dichotomy is worrying indeed. Paradoxically, critics of liberal philosophy, particularly postmodernists or poststructuralists, argue that it is the very setting of universal and "essential" standards which denies both the realities of power and human diversity, thus helping to feed prejudice and abuse. Such critical streams of thought are returned to throughout this article, but while heeding their valuable criticisms, for the moment I follow the advice of Patricia Williams. Williams, who employs poststructuralist techniques and is an African-American alive to the potential of even critical thinkers to set up their own essentialist categories, states: "rights are to law what conscious commitments are to the psyche. This country's worst historical moments have not been attributable to rights *assertion* but to a failure of rights commitment."[51]

The setting of human rights standards can encourage debate. Morgan shows that the communication to the Committee was able to shape the debate, acting to some extent as a "site of cultural intervention"[52] where gay and lesbian voices were heard. Unfortunately, as the TGLRG attempted to entrench the Human Rights Committee's decision in federal legislation, and perhaps create more opportunities for cultural intervention, their voices were met with a deluge of antithetical voices who used the sovereignty banner as their rallying point.

These voices are typified by Senator Abetz' statement: "Labor has decided to act against Tasmania's democratically instituted laws on the strength of the pontifications of the United Nations rabble sitting on the other side of the world."[53] In fact, the Human Rights Committee is composed of 18 independent experts, including Australian Elizabeth Evatt J. Attorney-General Michael Lavarch's second reading speech dealt with all such concerns over sovereignty. He noted that Australia's ratification of the ICCPR and accession to the Optional Protocol was voluntary and had taken place after long periods of negotiation with the states. He also pointed out that the Human Rights Committee's decisions are not formally binding on state parties: the only weapon the Committee has is bad publicity.[54] Although the Opposition agreed not to oppose the bill, it put the government on notice that it wanted changes in the processes of

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50 For an analysis of this phenomenon at international law, see Charlesworth, H, Chinkin, C and Wright, S, "Feminist Approaches to International Law" (1991) 185 *Am J Int'l L* 613. For examples of feminist writing concerning the operation of the public/private dichotomy in the domestic arena, see Olsen, F, "The Myth of State Intervention in the Family" (1985) 18 *U Mich JL* 835 and Okin, S M, *Justice, Gender and the Family* (1989). It is only in recent times that this paradigm has been challenged at the domestic level (for example with the growing attention to domestic violence) and at the international level (eg, with the Declaration on the Elimination of Violence against Women, GA Res 48/104, (1993)).

51 Williams, P J, *The Alchemy of Race and Rights* (1991) at 159.

52 Above n49 "Identifying Evil for what it is: Tasmania, Sexual Perversity and the United Nations" at 741.

53 Abetz, E, *Senate Deb*, 8 December 1994 at 4293.

54 Lavarch, M, *H Rep Deb*, 12 October 1994 at 1775.

treaty negotiation so as to involve the states in a more systematic way than is currently the case.[55]

Perhaps even more interesting is the way in which Morgan's concerns about the value of law reform as a site for cultural intervention[56] ring true in the debates following the second reading speech. The debate on the passage of the Act zeroed in on privacy. Only fleeting references were made to the public violence committed against gay men and lesbians while references to equality and diversity were limited to tolerance of what occurs in the private sphere of the bedroom. No doubt this is partly because of the focus of the Human Rights Committee on Article 17 rather than Article 26. It may also be, as Morgan says, that the mainstream is frightened of dealing with the public consequences of homosexual identity:

> In Foucauldian terms, privacy jurisprudence is part of the explosion of institutional discourses about sex, which defines, scrutinises and controls those who are labelled with a gay or lesbian identity.[57]

At the very least, the deafening silence on this issue is due to the fact that focussing on privacy is one way for the mainstream to skirt the concerns of a very vocal group of homophobes who feel entitled and determined to exercise their right to freedom of expression, no matter how distressing it is to gays and lesbians. The silence illustrates the way in which those who are members of minorities or relatively powerless groups in our society cannot hope to have full input into the legislative process which is, in the absence of an entrenched Bill of Rights, supposed to be the ultimate protector of their rights.[58]

This is precisely the issue at stake in the government's Racial Hatred Bill 1994 (Cth). The right to freedom of expression is one of the most exalted in the liberal lexicon of civil and political rights. It is not unlimited and the relevant international legal norms provide that racial hatred should be outlawed.[59] However, the fact that positive international law provides for restrictions should not and cannot prevent thought about the theoretical underpinnings of freedom of expression.

One of the most pervasive theories underpinning the right is the theory that "truth" may be found in the market-place of ideas. This theory, which seems to have been adopted by the High Court (of which, more later), has been at the centre of the parliamentary debates, with National Party leader, Tim Fischer, citing Thomas Jefferson: "We have nothing to fear from the demoralised reasonings of some people, if others are left free to demonstrate their errors."[60] Jefferson's statement is a classic formulation of laissez-faire liberalism and such libertarianism has led to a uniquely privileged position for freedom of

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55 Ruddock, P, *H Rep Deb*, 12 October 1994 at 1780.

56 Above n49 "Identifying Evil for what it is: Tasmania, Sexual Perversity and the United Nations" at 756–7.

57 Id at 754.

58 The hearings of the Senate Legal and Constitutional Legislative Committee concerning the Human Rights (Sexual Conduct) Bill are a good illustration of this point. See Morgan, W, "Senate Inquiry into the Human Rights (Sexual Conduct) Bill 1994" (1995) 1:1 *Optional Protocol Network Newsletter* 1.

59 See Art 4 of CERD and Art 20(2) of the ICCPR.

60 Fischer, T, *H Rep Deb*, 15 November 1994 at 3352.

speech in the United States. However, as is always and obviously the case with laissez-faire doctrine, it fails to take account of power relations, particularly the inability of the powerless to properly exercise their right to speech if the only protection guaranteed is a negative immunity from governmental power.[61]

Similar issues relating to the validity of rights language arise in the Federal Government's ongoing response to the *Mabo* decision. Here, the question of diversity arises squarely in the form of that hoary human rights question "cultural relativism" — whether rights are universal or, alternatively, can be reflected differently according to peoples' cultures. Associated with this is the question of recognition of group or collective rights.

The *Mabo* decision which recognised native title was an important breakthrough for race relations in this country. Yet the very fact that indigenous laws and customs relating to land had to go through the process of recognition by the dominant and (in structural terms) more powerful Anglo-Australian legal system indicates that the two cultures are not on an equal footing. For example, a particular aspect of the Court's judgment which has been criticised is the statements comparing the nature of the rights under indigenous laws unfavourably with the traditional Anglo-Australian proprietary interests.[62] The developments following *Mabo* will continue to be fraught with these problems. The public debate surrounding the decision and the subsequent *Native Title Act* 1993 (Cth) was strained by the tension between sameness and difference, a problem which has long preoccupied feminists and postmodernist scholars. Does equality necessitate exactly the same treatment? How do we determine what is like or unlike?[63] Recognition of native title is recognition of a right to land which non-Aboriginal Australians cannot have, but to deny recognition of this "different" right would be to deny them the broad kind of right which non-Aboriginal Australians have to own land.[64] Similarly, the question of further recognition of Aboriginal laws, for example in relation to the Anglo-Australian criminal law, has met resistance because of the idea that all Australian citizens must be subject to "one law" which is perceived as a fundamental aspect of the rule of law and a reflection of sovereignty.[65] Correlative to this, questions have been raised over some forms of Aboriginal punishment which may infringe international human rights standards.[66] This is despite moves internationally to recognise at least an internal form of self-determination for indigenous peoples in the final Draft Declaration on the Rights of Indigenous Peoples.[67] This may explain why the Opposition is reported to have insisted that the states be

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61 See generally Jones, M, "Empowering Victims of Racial Hatred by Outlawing Spirit-Murder" (1994) 1 *Aust J Hum Rts* 299.

62 Mansell, M, "The High Court gives an Inch but Takes a Mile" (1992) 2/57 *ALB* 4.

63 For an example of postmodern scholarship which highlights this problem, see Judith Greenberg's introduction to Frug, M-J, *Postmodern Legal Feminism* (1992).

64 Mathew, P, Hunter, R and Charlesworth, H, "Law and History in Black and White", Hunter, R, Ingleby, R and Johnstone, R (eds), *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law* 1 (1995).

65 See eg, *Walker v New South Wales* (High Court of Australia, unreported, Mason CJ, 16 December 1994).

66 See eg, Zdenkowski, G, "Customary Punishment and Pragmatism: Some Unresolved Dilemmas: *The Queen v Wilson Jagamara Walker*" (1994) 3/68 *ALB* 26–7.

67 See Iorns, C, "The Draft Declaration on the Rights of Indigenous Peoples" (1994) *ANZSIL Proceedings, 2nd Annual Meeting* 285.

consulted before the Declaration is responded to by the Australian Government,[68] despite the fact that the Declaration once adopted by the General Assembly is not a treaty and will not be formally binding.

5. *Judicial Activity: A Constitutionally Confined Space for Human Rights Protection?*

> The reluctance of the courts in earlier times to acknowledge [the law-creative] function was due in part to the theory that it was the exclusive function of the Legislature to keep the law in a serviceable state. But Legislatures have disappointed the theorists and the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state.[69]

Having explored the legislative process with all its flaws, I turn to the role of the High Court in the protection of human rights. Two ways in which the Court may deal with international law in the protection of human rights in Australia are examined here. The first is through scrutiny of federal legislation, particularly legislation based on the external affairs power. The second is the use of international law, whether treaty or custom-based, as an aid to the development of the common law.

A. *The High Court, Commonwealth Legislative Power and Human Rights: Protection of Human Rights Everywhere?*

Since the *Tasmanian Dams* case,[70] it has been clear that the Commonwealth has power to enact legislation based on the external affairs power even where the subject matter of any international obligation so implemented might otherwise fall outside the legislative power of the Commonwealth. [For further discussion of the external affairs power see Saunders above at 157–61.] Moreover, High Court authority supports the proposition that the external affairs power is not limited to international obligations in the strict sense.[71] For example, Murphy J explicitly suggested that non-binding resolutions or declarations of international bodies could fall within the "international concern" limb of the external affairs power.[72] In addition, the external affairs power extends quite literally to any matter geographically external to Australia. While this might be thought of as a boon to those advocating the implementation of international norms, the recent cases of *Polyukhovich*[73] and *Horta*[74] demonstrate the scope for adverse impact on human rights protection. It appears from these cases, and the *Lim* case[75] which involved section 51(xix) (the aliens power), that the tendency towards literalism which has allowed expansion of Commonwealth

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68 Burstin, F, "State Victory on Treaty Law" *Herald Sun*, 4 February 1995 at 7.
69 Brennan J, in *Dietrich v R* above n22.
70 Above n29.
71 *Burgess* above n29 at 687 per Evatt and McTiernan JJ; *Koowarta* above n33; *Tasmanian Dam* above n29 at 130–2 per Mason J, at 171 per Murphy J, at 220 per Brennan J, at 258–9 per Deane J.
72 *Tasmanian Dam* above n29 at 171–2.
73 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
74 *Horta v Commonwealth* (1994) 123 ALR 1.
75 Above n23.

powers generally[76] appears to be engendered not simply by the irrelevance of federalism as a constraint on Commonwealth power,[77] but by considerations of separation of powers. In particular, the courts appear to defer to the primacy of the executive and legislature in foreign affairs or, perhaps, in matters which superficially do not involve the Australian community. This deference is a double-edged sword for human rights activists as Parliament may be permitted either to legislate to catch human rights abusers, no matter how tenuous the connection to Australia (*Polyukhovich*), or to exclude consideration of human rights abuses in our backyard (*Horta*) and at our borders (*Lim*).

Polyukhovich was charged under the 1988 Commonwealth war crimes legislation[78] with committing war crimes in the Ukraine during World War II. Contrary to the usual requirements at international law of some nexus between the individual and any state wishing to exert criminal jurisdiction over that individual, war crimes attract universal jurisdiction, meaning that the crime, perpetrator and victim may have no connection with the state exercising jurisdiction other than the fact that the state has custody of the alleged perpetrator. This was the case with Polyukhovich who came to Australia after the war. There is no doubt at international law that Australian legislative and adjudicative jurisdiction could be asserted in this case. However, given the lapse of time and the resulting poor quality of evidence the prosecution raised controversy, even in the minds of those otherwise sympathetic to the idea that such heinous abuses of human rights deserve punishment no matter how tardy the prosecution.

The legislation was challenged on two bases. The first ground of challenge was that the legislation was not validly based on a constitutional head of power. None of the judges required the legislation to be validly based on the international concept of war crimes or the concept of universal jurisdiction in order for it to be a valid invocation of the external affairs power. Brennan J, in dissent, could not find the legislation valid on the basis of the international obligation limb of the external affairs power though, because he did not regard the legislation as based on international legal concepts.[79] Indeed, while the legislation obviously has its foundations in the international legal concept of a war crime, war crimes are defined in terms of municipal law applicable at the time.[80] However, the majority found the legislation valid under the "matters external to Australia" limb of section 51(xxix). Five of the judges held that simple geographic externality is sufficient,[81] with only Brennan J[82] and Toohey J[83] requiring some nexus to Australia.

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76 See generally Lindell, G, "Recent Developments in the Judicial Interpretation of the Australian Constitution", Lindell, G (ed), *Future Directions in Australian Constitutional Law* (1994) 1.

77 Id at 3.

78 *War Crimes (Amendment) Act* 1988 (Cth). In fact the 1988 legislation was a wholesale repeal and replacement of the *War Crimes Act* 1945 (Cth) which differed markedly in many respects.

79 Above n73 at 572 per Brennan J.

80 *War Crimes (Amendment) Act* s6, 7, 8 and 9, above n78.

81 Above n73 at 528–31 per Mason CJ, at 599–604 per Deane J, at 632–4 per Dawson J, at 696 per Gaudron J and at 712–4 per McHugh J.

82 Id at 552 per Brennan J.

83 Id at 654 per Toohey J.

Interesting possibilities for human rights protection in relation to abuses occurring abroad follow from the Court's treatment of the external affairs power. Given the atrocities which have been occurring in the former Yugoslavia and in Rwanda, and the fact that the 1988 war crimes legislation only applies to events occurring during World War II in Europe, it may be desirable for Australia to ensure that any perpetrators of human rights abuse from those places could be prosecuted if present in Australia (as well as ensuring that Australia can cooperate with any relevant international tribunal). The *Geneva Conventions Act* 1957 (Cth) could be useful to that end where the atrocities have occurred during war time. Generally, though, Australia has not followed the United States tendency towards litigation based on legislation with extra-territorial effect (such as the recent *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth)) or legislation asserting jurisdiction simply on the basis of custody (such as the *Crimes (Torture) Act* 1988 (Cth)). In the Unted States the Alien Tort Statute 1789 and the *Torture Victim Protection Act* 1991 have permitted spectacular exercises of jurisdiction over foreign human rights abusers, such as the recent suit against an Indonesian general accused of involvement in the Dili massacre.[84]

The second basis of challenge in *Polyukhovich*[85] was that the legislation created crimes retrospectively and was a usurpation of the judicial power. Article 14 of the ICCPR prohibits retrospective criminal punishment and this right is probably a strong candidate for customary law status. One safe way of ensuring that the legislation did not violate the prohibition on retrospective punishment was to base the legislation on international law since it is accepted that international law did prohibit war crimes at the relevant time. Only Deane J referred to this possibility. He found that since the legislation was not based on international law but on municipal legal concepts, this justification was not applicable.[86] Surprisingly perhaps, given his analysis of the first step of the challenge where he found that the legislation was clearly based on the international concept of war crimes, Toohey J did not rely on this rationale but found that the morally egregious nature of the offences would mean that retroactive laws were justified.[87] Mason CJ, Dawson and McHugh JJ held that no usurpation of judicial power was involved because the courts still have the duty of finding guilt, thus retrospective laws are permitted under the Constitution.[88] Only Gaudron and Deane JJ found the laws to be retroactive and a usurpation of the judicial power.[89] This is disappointing for human rights lawyers, although the range of decisional bases indicates that the question is not closed.

Another interesting case with ramifications for human rights outside Australia in which potential conflict between Commonwealth legislative jurisdiction and international law was raised is the *Horta* case.[90] This action was

84 McGrory, B, "Indonesian General, Facing Suit, Flees Boston", *The Boston Globe* 12 November 1992 (available on lexis, nexis US news file).
85 Above n73.
86 Above n73 at 627–9. Compare with the comments by Brennan J noted in the text accompanying n79 above.
87 Id at 689.
88 Id at 540 per Mason CJ, at 649–51 per Dawson J, at 721–2 per McHugh J.
89 Id at 631–2 per Deane J, at 704–8 per Gaudron J.
90 Above n74.

brought by three Timorese in an attempt to halt the collaboration between Australia and Indonesia concerning oil exploration under the Timor Gap Treaty.[91] The term "Timor Gap" describes an area of overlap between the Australian and Indonesian claims to the continental shelf between the coast of East Timor and mainland Australia. Sovereignty over East Timor was claimed by Indonesia after it invaded the island in 1975, but the territory is still listed by the United Nations as a non-self-governing territory and the United Nations has never terminated Portugal's status as administering power of East Timor. The plaintiffs' argument was that the Timor Gap Treaty is void at international law owing to illegal occupation of Timor by Indonesia and that Australian legislation which implements the treaty, or at least for which the treaty is a practical prerequisite, is an invalid exercise of the external affairs power.[92]

The Court, in a unanimous eight page judgment, gave the plaintiffs' argument short shrift. The Court recalled the decision in *Polyukhovich* and stated that whether the approach requiring simple territorial externality or the approach requiring some connection to Australia was adopted, the legislation met either test and was therefore a valid use of the external affairs power.[93] The Court added that this was true whether or not the legislation implemented the treaty, that it would be true if there was no treaty at all,[94] and that the possible invalidity of the treaty was irrelevant.[95] This is a clear illustration of the rule that statutes may be interpreted where possible so as to be in harmony with international law, but that if the statute is clearly contrary to international law, the courts will apply the local rule. The Court in *Horta* goes on to say that "the propriety of the recognition by the Commonwealth Executive of the sovereignty of a foreign nation [cannot] be raised in the courts of this country".[96] This is an illustration of the doctrine familiar to the area of sovereign claims in national courts that the three arms of government should speak with one voice on matters concerning foreign affairs.[97]

It appears that the Court is concerned not to usurp the role of executive or legislature, particularly when the Australian community can be considered as not directly affected. Unfortunately, the consequences for human rights protection in East Timor are severe, since Australia continues to collaborate with Indonesia for its own economic gain despite the fact that the human rights record in Timor has come under increasing scrutiny and criticism after the Dili massacre. Of course, it is arguable that this matter is best left to the international plane and political fora such as the United Nations General Assembly and Security Council or the judicial arm of the United Nations, the International Court of Justice, in which Portugal has initiated a claim against Australia.[98] But it must be admitted that there is a tendency for human rights issues to be lost in the political conflict of the international arena leaving the abused with little or no

91 Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, 1989.
92 Walker, K, "Casenote: *Horta v Commonwealth*" (1994) 19 *MULR* 1114 at 1118.
93 Above n74 at 6–7.
94 Id at 5.
95 Id at 6.
96 Id at 6–7.
97 See, eg, *Gur Corporation v Trust Bank of Africa Ltd* [1987] QB 599 (CA).
98 Case concerning East Timor, *Portugal v Australia* (1991) ICJ Rep 9.

remedy, unless, as with the Timorese and Portugal, there is a State willing to champion their cause.

A final case demonstrating the Court's restrained attitude to review of Commonwealth legislative power in a situation involving an element of foreign affairs, as opposed to an issue intrinsically concerning the Australian community, is the *Lim* case.[99] The plaintiffs, Cambodian asylum-seekers, challenged amendments to the *Migration Act* 1958 (Cth) which provided for mandatory detention of "boat people" who had not obtained a visa for entry into Australia.[100] Most controversial was the inclusion in the amending legislation of section 54R (now section 183) which provided that "courts shall not order the release of [detained boat people]".

The constitutional challenge was mounted on two grounds. First, that the legislation, particularly section 183, amounted to a usurpation of the judicial power. Second, that the legislation conflicted with Australia's international legal obligations, specifically the 1951 Convention Relating to the Status of Refugees and the ICCPR. The Court did not reach the second question because section 54T of the amending legislation (now section 186) provided that the amendments overrode all other laws operating in Australia, other than the Constitution. The Court found that this section precluded any reference to Australia's international obligations.

On the first question also, the Court's finding was a disappointment to human rights lawyers. While the Court noted that normally administrative detention of Australian citizens would not be allowed for a moment, detention of aliens for the purposes of deportation or exclusion was permitted since Australia has a sovereign right to protect its borders. The Court was satisfied for the purposes of judicial review that the legislation was generally not disproportionate to meeting this aim since there was a time limit of nine months imposed on detention, although it was extendable.[101] Even in the cases of the plaintiffs who had been detained for over two years, detention was found not disproportionate since the detainees could elect to return to Cambodia.[102] I have analysed the case elsewhere[103] but suffice it to say, like *Polyukhovich* and *Horta*, the case demonstrates that the Court may be reluctant to interfere with matters not intrinsically concerning the Australian community and in relation to which the legislature and executive have acted within their constitutional province. As a result, Australia may be in violation of human rights which suggests that Australia has a rather impoverished notion of community.

By contrast, it seems that where the Court can show that the matter at hand is clearly within its province, for example because it concerns the common law or because it can find firm constitutional ground, perhaps with the proviso that the matter clearly does involve the Australian community, it will act to preserve human rights. Sometimes this extends to overruling legislation otherwise

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99 Above n23.

100 *Migration (Amendment) Act No 4* 1992 (Cth).

101 Id s182.

102 Above n23, at 119 per Brennan, Dawson and Deane JJ (Mason CJ and Gaudron J concurring), at 150 per McHugh J.

103 Mathew, P, "Sovereignty and the Right to Seek Asylum: the Case of Cambodian Asylum-seekers in Australia" (1994, forthcoming) 15 *Aust Ybk Int'l L* 35.

validly within a constitutional head of legislative power. In the next section, three more recent High Court cases will be used to illustrate this trend in the jurisprudence of the High Court. It will be shown that the Court still prefers to use international human rights law in an indirect manner and to legitimise use of international obligations by reference to traditional common law and constitutional rubrics. It will also be demonstrated that the trend has only just begun and is in need of critical evaluation.

B. *International Human Rights Law as a "Legitimate Influence" on the Common Law*

The preference for placing reliance on international law indirectly is not all that surprising since the relationship between international law and the common law in Australia is far from clear. As previously stated, unincorporated treaties are generally not part of the law of the land. The situation with respect to customary international law is somewhat ambiguous. Two approaches are argued for by jurists. One, unhelpfully termed the "incorporationist" approach, is that customary international law is automatically part of the common law to the extent it is not overridden by statute. The other "transformationist" approach requires some governmental action to bring international law into the common law. The line between these approaches may be blurred since the governmental action required by a transformationist might not be legislation but executive action, or perhaps even a judicial decision. Thus the difference between the two schools has been described as more apparent than real.[104]

In practice, while British courts in recent years[105] have tended towards an incorporationist approach, the Australian judiciary has leant towards transformation. Writing in 1989, Gillian Triggs concluded that the Australian position was undeclared;[106] that the problem was often exacerbated by the difficulty in finding international law with any certainty;[107] and that there was great potential for Australian courts to make more use of customary international law in the areas of prisoners' rights, environmental protection, rights of indigenous peoples and rights of refugees.[108] She cautioned, however, that given the reaction to the High Court's decisions regarding the external affairs power, the judiciary would be disinclined to invoke international law if it would appear that judges were exceeding their constitutionally defined roles.[109]

In the last five years, the High Court has made much greater reference to international law in some of the areas listed by Triggs. However, the Court has exhibited a tendency to be circumspect about identifying which approach has been adopted or even identifying whether customary international law is

104 Stephenson LJ, *Trendtex* above n32 at 569, as cited in Triggs, G, "Customary International Law and Australian Law", Ellinghaus, M P, Bradbrook, A J and Duggan, A J (eds), *The Emergence of Australian Law* (1989) 376 at 384. [Compare with Shearer above at 124.]

105 *Trendtex* ibid; *Maclaine Watson v Department of Trade* [1988] 3 All ER 257; [1989] 3 All ER 523.

106 Triggs above n104 at 392. See also the earlier influential contribution of Crawford and Edeson above n32 at 77.

107 Triggs above n104 at 384, 393.

108 Ibid.

109 Id at 384.

in issue. Indeed, it has been argued by Roslyn Higgins QC that the approach of the High Court, among other national courts, has demonstrated a lack of intellectual rigour regarding the question of the relationship between international law and domestic law.[110]

It is not the purpose of this article to resolve the incorporation/transformation riddle. Rather the position assumed is that the debate is concerned with form over substance and that Australian courts have demonstrated a related preoccupation with form, connected with a desire not to be seen as violating sovereignty in any of its guises.[111] Thus Australian courts have shown a strong preference to legitimise the development of a substantive human rights jurisprudence by reference to traditional domestic sources of law and established common law interpretative techniques rather than through overt application of international legal norms. Take, for example, the following comments of Brennan J in *Mabo*, in which international law norms concerning the doctrine of *terra nullius* (a customary law doctrine) and human rights (generally treaty-based with a small corpus of well accepted customary norms) were clearly an important factor in the judgment:

> If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organisation" that it is "idle to impute to such people some shadow of the rights known to our law" can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. ... 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 universal human rights.[112]

The fact that customary international norms are in issue is not referred to and the question of incorporation versus transformation is left ambiguous and unresolved. Indeed, it has been argued that in determining the basis of the acquisition of Australia, the High Court rejected international law, inventing a new category of title based on peaceful occupation of a territory which is not *terra nullius*.[113] Certainly, Brennan J stressed that in bringing the common law into line with today's values as reflected in current international law, the "skeletal principles" of the common law cannot be broken.[114] International

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110 Higgins, R, "The Relationship Between International Law and Regional Human Rights Norms and Domestic Law" (1992) 18 *CL Bull* 1268 at 1273.

111 See above n2 and accompanying text. (See also Edeson above.)

112 Above n26 at 41–2.

113 Simpson, G, "*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: an Unresolved Jurisprudence" (1993) 19 *MULR* 195 at 208. Simpson argues that the logical corollary of the rejection of *terra nullius* is that Australia was acquired by conquest.

114 Above n26 at 30.

law is used as an influential factor, particularly as a reflection of current community values, but it is not applied wholesale.

The opportunity to reapply the approach adopted in *Mabo* occurred in the case of *Dietrich*[115] concerning the right to a fair trial. Dietrich was convicted on drug charges after a trial for which, poverty-stricken, he had been unable to secure legal representation. On appeal, he attempted to rely on Article 14 of the ICCPR which provides for legal representation to be assigned "in any case where the interests of justice so require" and provided at public expense if necessary.[116] The Court noted that the ICCPR had not been incorporated into Australian domestic law. Toohey J specifically stated that the inclusion of the ICCPR in the schedules to the *HREOC Act* does not confer justiciable rights for individuals, which ended consideration of international legal principles as far as he was concerned.[117] There was no explicit discussion of the possibility that the rights contained in Article 14 have obtained the status of customary law with the attendant possibility that the rights might form the basis for a common law rule. Moreover, the Court found that the common law does not know any right to legal representation, but that it does comprehend a right to a fair trial.[118] Given the clear state of the common law on the issue of a right to legal representation, the role of international law was limited, at best, to an interpretative device.

Members of the court made use of the international legal standards in different ways. Dawson J, in dissent, stated that international legal rules may be used as an aid to the construction of ambiguous statutes, that it is uncertain whether they may be used as an aid to the interpretation of common law rules, and that the clear state of the common law on this issue precludes reliance on the ICCPR because it would not merely resolve an ambiguity but require "a fundamental change".[119] The other dissentient, Brennan J, made reference to his statements concerning the ability of the High Court to alter the course of the common law in *Mabo* and the role of community values, and through them international law, in securing such change:

> Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this court will modify the rule provided no injustice is done thereby. And in those exceptional cases where a rule of the common law provides a manifest injustice, this court will change the rule so as to avoid perpetuating the injustice. ... As an abstract proposition, contemporary values favour steps designed to reduce the possibility of injustice and to enhance the fairness of trials, especially criminal trials. And a concrete indication of contemporary values is given by Art 14(3)(d) of the International Covenant on Civil and Political Rights, to which Australia is a party.[120]

However, Brennan J did not go on to find that the court must change the common law in this instance, because the courts cannot compel the provision of legal representation[121] and the "remedy" of adjournment is not open to the

115 *Dietrich* above n22.
116 Article 14(3)(d).
117 Above n22 at 434–5.
118 Id at 396 per Mason CJ and McHugh J, at 411 per Deane J, at 428–9 per Toohey J and at 438 per Gaudron J.
119 Id at 426.
120 Id at 402–4.
121 Id at 406.

courts because it would constitute a breach of the constitutional duty to exercise jurisdiction and an impediment to the administration of justice.[122]

It is on this point that the majority of the Court disagreed, finding that an adjournment of the trial where the absence of legal representation causes unfairness is an appropriate remedy. Within the majority, reliance on international legal standards was used in the fashion of Brennan J by two judges, Deane J using the ICCPR as an indication that community values recognise representation in serious cases as part of a fair trial[123] and Gaudron J using the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms[124] and common law precedents to demonstrate that the law in "advanced" countries requires representation to secure a fair trial in such cases.[125] By contrast, having found that the ICCPR has no direct bearing where the common law is clearly against a right to legal representation[126] and that relevant common law precedents from other jurisdictions rely on constitutional protections not found in Australia,[127] Mason CJ and McHugh J rely on explication of the common law principles concerning the right to a fair trial to conclude that legal representation was required in Dietrich's case. Thus, the Court tries to anchor its findings within the established processes of the common law, merely using international law as an aid under the rubric of "legitimate influence".

Other High Court cases concerning human rights issues have relied on constitutional foundations to the almost complete exclusion of international law. For example, in the recent decisions concerning the implied constitutional freedom of political discourse, very little reference was made to international legal standards, despite the fact that Article 19 of the ICCPR guarantees freedom of expression. In *Australian Capital Television*,[128] which involved a challenge to legislation banning political advertising and providing for compulsory free access to broadcasting time for incumbents and other candidates, only Brennan J referred to the fact that the European Commission on Human Rights rejected a challenge under Article 10 of the European Convention[129] to a British ban on political advertising.[130] McHugh J referred to similar practices in relation to political advertising prevailing in other liberal democracies. But he held that the reason for this practice "lies in the different contexts in which the guarantees of freedom of expression operate in those countries and in Australia".[131]

While the Court's approach in the cases analysed in this section demonstrates a willingness to protect human rights, it is open to criticism in terms of

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122 Ibid.

123 Id at 416–7. Deane J also refers to favourable reasoning in the jurisprudence of other common law countries: id at 414.

124 Done at Rome 4 November 1950, entered into force 3 September 1953, 213 *UNTS* 221.

125 *Dietrich* above n22 at 444.

126 Id at 392. They do note, however, that the approach taken by international human rights bodies is analogous to that which the common law must take: id at 393.

127 Id at 393.

128 Above n25.

129 Above n124.

130 *X and the Association of Z v UK*, 12 July 1971. Cited in *Australian Capital Television*, above n25 at 154 per Brennan J.

131 Id at 240.

theoretical approaches to rights, particularly where it is overly reliant on concepts of democracy and political participation of Australian citizens which perhaps do not reflect the realities of the Australian polity. For example, the High Court's approach to the freedom of political discourse has been criticised, not for the disuse of international human rights standards, but for its narrow theoretical approach to the notion of freedom of expression, particularly its assumption that truth is best found in a "market place of ideas".[132] Some of this criticism stems from the question of whether "truth" is engendered by political advertising[133] and the treatment of the issue of access to the media.[134] It should be noted that the legislation itself, though it attempted to deal with the issue of the high cost and potential for corruption which is partially due to concentrated media ownership, was hardly an affirmative action measure for media access to ordinary people. The provisions for free time did not apply to ordinary community members and were heavily biased in favour of incumbents. This was commented on particularly by Brennan J.[135] Although one member of the Court posited that "[f]ree access to the airwaves by all who wish to put a point of view during an election period is an impracticality",[136] it has to be acknowledged that the "market place" of ideas which the Court is upholding is a seller's market. Nevertheless, it has been argued by at least one commentator that the Court's reasoning, particularly the need to balance the freedom of communication against important countervailing interests, could allow protections such as racial vilification legislation for vulnerable groups in society.[137]

Of course, in the *Australian Capital Television* case, the Court was limited by the particular issue it had before it. Obviously the fact that legislation limiting speech could have a direct effect on the democratic process means the rights issue had a special significance. Paradoxically, however, the very fact that the Court found an implied freedom despite the express disavowal by the constitutional founders of the need for a Bill of Rights highlights the need for a broader theoretical framework and suggests that democracy in the form found in Australia may not always suffice to uphold human rights. The decisions in *Mabo*[138] and *Dietrich*[139] (particularly Brennan J's express disappointment with the legislature's role in updating the law)[140] indicate that the members of the Court, although they will scrupulously endeavour to remain within the constitutional boundaries allotted under the Constitution, do not believe that the other arms of government properly protect rights. The extra-curial writings of various members of the Court also demonstrate a questioning attitude to the role of democracy in upholding rights.[141] Commentators like Hilary Charlesworth

132 Barendt, E, "Free Speech in Australia: a Comparative Perspective" (1994) 16 *Syd LR* 149; Cass, D Z, "Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 *Pub LR* 229.

133 Cass, id at 240; Kennett, G, "Individual Rights, the High Court and the Constitution" (1994) 19 *MULR* 581 at 612–3.

134 Cass, id at 241–4.

135 *Australian Capital Television* above n25 at 166–7 per Brennan J.

136 Id at 191 per Dawson J.

137 Jones above n61.

138 Above n26.

139 Above n22.

140 Ibid.

141 Brennan J, "Courts, Democracy and the Law" (1991) 65 *ALJ* 32; Toohey J, "'A Govern-

have argued that the concept of democracy which prevails in Australia is too utilitarian to ensure rights, particularly when minorities' rights are at stake, and that in any event, the party system warps the system of responsible government which the Court's implied freedom of political discourse is supposed to protect.[142] This has been illustrated above in the examination of legislative implementation of international obligations.

Dietrich[143] also raises questions about the value of the language of rights. Brennan J's judgment is a conscious demonstration of its problematic nature. In denying the possibility of an adjournment, even though justice would require legal representation, Brennan J recognises that the system of administration of justice is delegitimised, since justice is not seen to be done. He states that this schism between the "comforting rhetoric" and reality simply cannot be overcome by the courts in this case.[144] Doreen McBarnett argues that in reality the legitimacy of the criminal justice system rests on the very fact that most ordinary citizens know only the rhetoric of a fair trial, and not the harsh reality described by Brennan J; that the courts are faced with an impossible tension between bureaucratic efficiency and upholding the rights of the accused; and that this contradiction is veiled by the doctrine of separation of powers which allows one arm of government to uphold the rhetoric while another arm denies it, together with judicial rhetorical techniques for manipulating the doctrine of precedent.[145] It is arguable that the dissents in *Dietrich* clearly display all these elements. On the other hand, the finding of the majority and the recognition of the split between rhetoric and reality by Brennan J can be viewed as disproving McBarnett's claims. Alternatively, is this simply the one victory which upholds the rhetoric, masking the fact that the majority of cases go against the poor and abused in our society?

In the United States, in particular, critical legal scholars who highlight the capacity of liberal legal discourse to hide and legitimise power imbalances have inclined to the latter view, maintaining that rights language is "positively dangerous".[146] There is some truth in this claim because the simple setting of standards may engender complacency that those standards are actually met. Indeed, the Australian decisions examined above display exactly the tensions which critical legal scholars assert as the downfall of rights discourse: namely that in every case, there is a choice of principle to be made and that legal doctrine alone is insufficient to govern those choices. Others, particularly people of colour, have disputed critical legal scholars' claims about rights. For example, Patricia Williams points out that the removal of rights discourse forces those whose rights are denied to rely on the assertion of need, an activity which has proved a dismal failure for African-Americans.[147] The key is to ensure that rights are given content and do not become empty rhetoric.

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ment of Laws, and Not of Men'?" (1993) 4 *Pub LR* 158, cited in Kennett above n133 at 583–4, 609–12.

142 Above n20.

143 Above n22.

144 Id at 407 per Brennan J.

145 McBarnett, D, *Conviction: Law, the State and the Construction of Justice* (1981) at 154–68.

146 Tushnet, M, "An Essay on Rights" (1982) *U Tex LR* 1386.

147 Above n51 at 151.

The members of the High Court, although they display some anxiety to rely on legal doctrine which critical legal scholars claim can never provide the answer, do demonstrate that they are aware of the dangers of the language of rights becoming hollow. In attempting to give flesh to the rhetoric of rights, they refer to international legal standards, frequently as an indicator of "current community values". Whether this can really escape the tensions described by critical legal scholars may be dubious, particularly as community values may simply be a reflection of the status quo. At least in its reliance on international legal human rights standards, it seems that within its liberal framework the Court is looking to what may be described as "enlightened" expressions of community values: values which are argued to be "universal", rather than the lowest common denominator by which parliamentarians are unduly influenced. The Court applies a notion of sovereignty which encompasses respect for rights.

The Court's concern to adhere to the traditional sources of the common law and avoid direct reliance on international law certainly displays a solicitude for sovereignty. However, this is not simply a product of an unreflective positivism, but shows a desire to adhere to the liberal philosophical tenets such as democracy and the rule of law which are behind sources doctrine. Unthinking adoption of an incorporationist approach, although it could be viewed as displaying less positivistic tendencies in one sense, might only lead to the replacement of traditional Australian sources of law with traditional international sources of law, which the Court perhaps fears will delegitimise the common law in the eyes of the Australian public. In turn, this point demonstrates that the incorporation/transformation debate can be reduced to an obsession over form at the expense of the more pressing question of the theoretical underpinnings of legal regulation.

6. *Conclusion*

This article has demonstrated that the role of international law in the protection of human rights in Australia is potentially powerful but a rather indirect one. International law is used selectively in the legislative process to respond to perceived domestic imperatives. Parliamentarians are more anxious about the wishes of their constituents than ensuring that Australia abides by international legal standards. When reviewing Commonwealth legislative power, particularly where some "foreign" element is involved, the High Court tends to defer to the legislature. This may have both positive and negative ramifications for human rights. The Commonwealth can choose to cast its net widely, catching human rights abuses which have occurred abroad, or it may turn a blind eye to human rights abuses close to home. The Court is more flexible when dealing with the common law and matters inherently concerning the Australian community. Nevertheless, it is still mindful of constitutional boundaries and community perceptions, thus international law is used only as a "legitimate influence".

International human rights law has certainly helped to put human rights on the Australian political agenda. However, it can hardly be said that Australia is at the forefront of human rights jurisprudence or practice. Rather, Australians have a misplaced complacency that we are not among the States with spectacularly bad human rights records, even though the record, particularly as it relates to Aborigines and Torres Strait Islanders, shows clear evidence to the contrary. We plod along, heads down, clinging to "sovereignty" to shield

us from thinking too hard about rights. Moreover, sovereignty has been guarded so fiercely by our political institutions and heeded so closely by our judiciary in its attempt to remain true to liberal democratic ideals that this unthinking attitude may be encouraged. Nevertheless, because of Australian participation in various international fora, Australians are beginning to contemplate what rights might really mean for Australia.

Postscript

Since this article was written, the High Court has handed down its decision in the *Teoh* case,[148] confirming the trend towards greater use of international human rights law in Australia.

Mr Teoh had been living in Australia on a temporary entry permit and he and his wife, an Australian citizen, had several children who were also Australian citizens. Teoh was denied permanent resident status on the basis that he had criminal convictions relating to drug offences. In the Federal Court,[149] Teoh successfully argued that Australian ratification of the Convention on the Rights of the Child[150] created a legitimate expectation that immigration decision-makers would abide by the provisions of the Convention. In particular, Teoh relied on Article 3 of the Convention, which states that in all actions concerning children the best interests of the child shall be a primary consideration, and Article 9 which guards against separation of children and parents unless it is in the best interests of the child. The High Court upheld the Federal Court's decision by a majority of 4 to 1. Thus the High Court established a mechanism by which international law may be referred to by administrative decision-makers additional to the techniques of statutory interpretation and development of the common law which are available to the judiciary.

Like other cases explored in this article, *Teoh* raises a tension between notions of sovereignty, particularly the constitutional boundaries separating the three arms of government, and frustration with the failure of the legislature to exercise its constitutional powers to act on rights issues. As in other cases, the Court resolves any tension in favour of a notion of sovereignty which respects rights.

Compared with Brennan J's explicit comments in *Dietrich*,[151] the tension between separation of powers and concern for individual rights runs as a subtle subtext through the majority judgments, but it is certainly present. Thus, all members of the Court were at pains to confirm the rule that treaties must be implemented by legislation in order to confer rights enforceable by individuals.[152] However, Mason CJ and Deane J, together with Toohey J in a separate opinion, accepted that an unincorporated treaty has some legal effect.[153] Mason CJ and Deane J reasoned that ratification of a convention, particularly a

148 *Minister for Immigration and Ethnic Affairs v Teoh* (High Court of Australia, 7 April 1995, unreported) (available on SCALE).

149 *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* above n36.

150 Above n30.

151 Text accompanying n69 above.

152 *Teoh* above n148 at par 25 per Mason CJ and Deane J, at par 3 per Gaudron J concurring, at par 20 per Toohey J, at par 35 per McHugh J.

153 Id at par 26 per Mason CJ and Deane J, at par 22 per Toohey J.

human rights convention, could not be dismissed as "a merely platitudinous or ineffectual act".[154]

> Rather, ratification of a convention is a positive statement by the executive government of this country to the world and 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 contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration".[155]

Toohey J made more pointed reference to the power of the legislature to override any legitimate expectation created by ratification.

> It may be said that such a view of ratification will have undue consequences for decision-makers. But it is important to bear in mind that we are not concerned with enforceable obligations, but with legitimate expectations, and that there can be no legitimate expectation if the actions of the legislature or the executive are inconsistent with such an expectation.[156]

This comment might be viewed as an implicit challenge to the legislature to act on its promises.

Teoh's case is also interesting in relation to the Court's willingness to permit reference by Australian decision-makers to international human rights obligations where a foreign element, namely an alien's application for residence, is involved. The Court's readiness to act is particularly interesting when compared with the Court's restraint in *Lim*.[157] In the *Lim* case, the Court noted that aliens are not "outlaws" under Australian law.[158] This position coheres with the treatment of aliens under international human rights law which generally applies to all persons within the territory and jurisdiction of a state,[159] including aliens, and may even apply in relation to applications for entry.[160] However, the vulnerability of aliens to exclusion and deportation, buttressed by legislative foreclosure of international human rights considerations, led to the Court's decision in *Lim* that the legislative provisions requiring mandatory detention were valid.[161] The *Teoh* decision may open up possibilities for aliens to rely on Australia's international human rights obligations even in relation to exclusion and deportation decisions, at least where the legislature has not acted to exclude such reliance as in *Lim*.[162]

Of course, on the facts of the *Teoh* case the particular entitlement to a legitimate expectation, and the possibility that Teoh might be granted permission to stay in Australia as a result, depended on the fact that the matter concerned his children for the purposes of the Convention and his children happened to be Australian citizens. Indeed, Gaudron J, although she concurred with Mason CJ

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154 Id at par 34 per Mason CJ and Deane J.
155 Ibid.
156 Id at par 32 per Toohey J.
157 *Lim* above n23.
158 Id at 107 per Brennan, Deane and Dawson JJ, Mason CJ and Gaudron J concurring.
159 See, eg, Article 2 of the ICCPR.
160 General Comment 15[27] relating to the position of aliens under the ICCPR, CCPR/C/21/Rev 1, 19 May 1989.
161 See analysis at n101 above and accompanying text.
162 See analysis following n100 above.

and Deane J as to the status of the Convention in Australian law,[163] considered the Convention to be only of subsidiary significance in the case[164] as it expresses human rights valued in Australia and other "civilised" countries.[165] Of primary significance for Gaudron J was the fact that Teoh's children were Australian citizens and the consequent "obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability".[166] Similarly, Mason CJ and Deane J, relying on the Convention, reasoned that it was the children who were entitled to claim a legitimate expectation, although this entitlement was exercised on the children's behalf by their father.[167] By contrast, the lone dissentient, McHugh J, held that the Convention was not intended to apply where "an action has consequences for a child but is not directed at the child".[168]

Nevertheless, it is the act of ratification of a particular treaty which confers the legitimate expectation that Australian administrative decision-makers will abide by the treaty and human rights obligations are owed to all persons within the jurisdiction. Thus it will be interesting to see what other human rights treaties may be successfully invoked by aliens in immigration decisions and whether this can occur without triggering reactive amendments to the *Migration Act* 1958 (Cth).

Perhaps the most important feature of the *Teoh* precedent is that it may be rather unstable, given that only three judges relied primarily on the legitimate expectation created by ratification, two members of the bench did not hear the case, and Mason CJ has just retired. This serves as a reminder that while some of the trends identified in this article may make an indelible mark on Australian law, others may fail to fully emerge or may be modified or reversed.

Post Postscript

In the event, the *Teoh* precedent may prove even more unstable than first thought. The government has already sought to reverse the decision by issuing a joint Ministerial statement attempting to displace any legitimate expectation arising from the ratification of treaties and it has indicated that legislation will be introduced to clarify the position.[169]

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163 *Teoh* above n148 at par 3 per Gaudron J.
164 Ibid.
165 Id at par 6.
166 Id at par 3.
167 Id at par 35 per Mason CJ and Deane J.
168 Id at par 35 per McHugh J.
169 *Joint Statement* by the Minister for Foreign Affairs, Senator Gareth Evans and the Attorney-General, Michael Lavarch (10 May 1995). [For a more detailed consideration of *Teoh*, the *Joint Statement* and their effect on administrative decision-making see the following article by Allars.]