Chapter Seven
Teoh: Some Reflections

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

It is now an established principle, in our legal system, that when a treaty is ratified, although it becomes binding on Australia in international law, it does not become part of the law of Australia unless it has been given the force of law by statute. Except in the case of a treaty of peace, which obviously can affect the rights of enemy aliens, a treaty not incorporated by statute does not affect the rights or liabilities of Australian citizens.

This principle has a sound basis. Treaties are made by the Executive in the exercise of the prerogative, and to give a treaty the force of law would allow the Executive to make law, contrary to the doctrine of the separation of powers.

Although the principle has been consistently stated by courts of the highest authority,[1] it is subject to some important qualifications. In the first place, it has been held[2] that the external affairs power in the Constitution is wide enough to allow the Commonwealth Parliament to legislate to implement the terms of an international agreement. This does not mean that legal force within Australia is given to the treaties themselves, but because the Parliament has power to legislate to give effect to the provisions of treaties, the Executive is enabled to enlarge the scope of the constitutional power, with the result that the balance carefully drawn by the founders of the Constitution between State and Commonwealth powers has been radically disturbed.

Secondly, the view has been asserted that international law, which of course is often expressed in the form of international treaties, may be used to resolve ambiguities in a statute,[3] or to influence the development of the common law.[4] On this view, judges may use treaties as the justification for making far reaching changes to the common law, and I have no doubt that the courts will be called upon to decide what are the limits, if any, to the judicial discretion in this regard. However, this is not the topic of my present discussion.

A third qualification was introduced by the decision of the High Court in *Minister for Immigration and Ethnic Affairs v. Teoh*.[5] Ah Hin Teoh was a Malaysian citizen living in Australia under a temporary entry permit. He was convicted of drug offences and sentenced to six years imprisonment. Application for a permanent entry permit was refused and it was ordered that he be deported. He had children living in Australia.

The Court held (McHugh J dissenting) that the ratification of the *United Nations Convention on the Rights of the Child* gave rise to a legitimate expectation that administrators would act in conformity with the Convention, and would treat the best interests of the children as a primary consideration. It was further held that if the decision- maker proposed to make a decision inconsistent with that legitimate expectation, procedural fairness required that the person affected should be given notice and an adequate opportunity of presenting a case against such course. It was held that there was a want of procedural fairness in this case, with the result that the decision to refuse the application for the grant of resident status was set aside, and the order of deportation was stayed until the Minister had reconsidered the application.

A number of strands of reasoning in this decision may, with all respect, be regarded as of doubtful correctness. The relevant provision of the Convention on which the Court relied provided that "in all actions concerning children … the best interests of the child shall be a primary consideration". The action in question – the review of decisions to refuse Teoh permanent residence and to order his deportation – no doubt had consequences for the children, but the action did not relate to them or

involve them. It is a question whether the action was one "concerning children", and whether the terms of the Convention were applicable in the present case. If the Court had not given the Convention this wide construction, it would not have been necessary, or possible, to expand the law regarding the effects of treaties, as it did.

It was not suggested that Teoh had an actual expectation that the Minister's delegate would act in accordance with the Convention, or even that he was aware of the existence of the Convention. It was held that it was enough that objectively an expectation would arise. The Court said:

> "Ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in accordance with the Convention and treat the best interests of the children as a 'primary consideration' ".[6]

Since the government did not in fact make a positive statement that all agencies would act in accordance with the Convention, this was, I suggest, only another way of saying that the agencies of government were required to act in accordance with the Convention, or to give notice that they did not propose to do so. In other words the Court, although acknowledging that a treaty does not become part of municipal law, regarded the Convention as having legal effect, for why otherwise would government officials be required to act in a particular way, on pain of legal sanctions if they did not do so? If the decision is not to be regarded as self-contradictory, it must have created a new exception to the general rule regarding the effect of treaties that have not been incorporated by statute in the law of Australia.

Teoh's Case has been followed in the Federal Court in a number of deportation cases.[7] In one case, *Perez v. the Minister for Immigration and Multicultural* Affairs,[8] the Court set aside an order for detention pending deportation of a Cuban national who had a long record of crimes of violence. Logically, it is difficult to see why the principle in *Teoh's Case* would not entitle a person convicted of say, murder, to have a legitimate expectation that the best interests of his children would be a primary consideration in deciding upon his sentence.

Potentially, the case has a wider significance, since it would seem to follow that any executive officer making a decision may be expected to act in accordance with the provisions of any treaty that may be relevant. There are many hundreds of treaties, and it would be unlikely that government officials would be aware of their existence, let alone their contents; and even if the rule in *Teoh's Case* would probably apply only to a small number of those treaties, the decision creates uncertainty as to what treaties would be relevant, and what their effect would be.

The decision in *Teoh's Case* was given on 7 April, 1995 and the government acted promptly in response to it. On 10 May, 1995 a joint statement was issued by the Minister for Foreign Affairs, Mr Gareth Evans, and the Attorney-General, Mr Michael Lavarch, stating (amongst other things) that entry into a treaty was no reason for raising any expectation that government decision-makers would act in accordance with the treaty. This was designed to take advantage of the words in the judgment which I have quoted, that ratification of the treaty is "an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary". After a change of government, Mr Downer and Mr Daryl Williams issued a similar statement on 25 February, 1997.

Some critics have contended that executive statements of this kind are legally ineffective, but two members of the Privy Council, in a dissenting judgment, have accepted that a government could clearly announce a change of policy to prevent legitimate expectations arising in the future.[9] This result would seem to be artificial, since the person affected would in many cases have no knowledge either of the Convention or of the government's announcement. However that may be, the Ministers' statements of 1995 and 1997 do not appear to have come to the notice of the Federal Court, since the decisions of that

court which I have mentioned, were made after 1997.

Also in 1995, the government introduced a Bill designed to overturn the decision in *Teoh's Case*. The Bill was read a second time in the House of Representatives. The Senate referred the Bill to a committee which, by a majority (some Democrat Senators dissenting), recommended that it be passed. However, the Bill lapsed when Parliament was prorogued prior to the holding of the 1996 General Election.

In 1997, the Coalition Government introduced a Bill which was similar to, although not in all respects identical with, that introduced by the Labor Government in 1995. Again the Senate committee recommended, by a majority, that the Bill be passed without amendment. However, most of the Labor members recommended that the Bill be amended. They considered that circumstances had changed since Labor proposed the 1995 Bill because, they said, fears that the *Teoh* decision might create administrative uncertainty had not come to fruition. It does not appear whether they had enquired into the possibility that the Appeal Tribunals were following *Teoh's Case*.

The Labor Senators thought it unnecessary expressly to provide, as the Bill did, that the fact that a treaty was ratified did not give rise to a legitimate expectation that administrators would act in conformity with it; rather they wished to provide that Australia's international obligations are given effect in domestic law only by an enactment of the Parliament or by the operation of the common law. Senator Cooney and the Democrats were opposed to the Bill. However, the Bill was not adopted prior to the proroguing of Parliament before the 1998 election, and it too lapsed.

A Bill identical to that of 1997 was introduced in 1999. Labor again sought to amend it. It appears that since, in these circumstances, the passage of the Bill through the Senate would be likely to occupy some time, the government was not willing to give it the necessary priority. In the result, although both major political parties thought that a statute should be enacted to reverse the effect of *Teoh's Case*, no Act was ever passed.

That was not the end of the matter. *Teoh's Case* has since been considered by the courts. It was mentioned in the judgments of two cases in the Privy Council in 1998 and 1999 respectively,[10] but in neither case did the Board express a concluded view on the question whether a legitimate expectation could be founded on the provisions of a treaty which had not been incorporated by statute. In the latter of those two cases the Board said:

> "Even if a legitimate expectation founded on the provisions of an unincorporated treaty may give procedural protection, it cannot by itself, that is to say unsupported by other constitutional safeguards, give substantive protection, for this would be tantamount to the indirect enforcement of the treaty: see *Minister for Immigration and Ethnic Affairs v. Teoh*".[11]

However, their Lordships do not appear to have observed that the protection given to Teoh, although described as procedural, was in truth substantive.

The matter was considered again by the High Court in *Re Minister for Immigration and Multicultural Affairs ex parte Lam*[12] as recently as February this year. In that case, a Vietnamese citizen, who had been convicted of various offences, including trafficking in heroin, sought to quash the decision to cancel his visa and to prevent the Minister from deporting him. It was held that the applicant's argument that he was denied procedural fairness failed on the facts, but the Court did discuss at some length the principles relating to legitimate expectation and the effect of unincorporated treaties.

The expression "legitimate expectation" has been used in cases where a public authority has followed a regular practice, or has expressly or by implication promised to adopt a certain course of procedure; in such cases it has been held that the person affected has a legitimate, that is to say reasonable, expectation that the practice or course of procedure will be followed. In England, the notion has been extended beyond procedure to substantive benefits. Their Honours in *Lam's Case* indicated that a legitimate expectation can not give rise to substantive rights, and that if the doctrine is to be applied it

can have no more than a procedural effect. In any case, they said that there seems to be no need for any doctrine of legitimate expectation, since it is enough to enquire what procedural fairness requires in the particular case.

Their Honours went on to discuss the use in *Teoh's Case* of an unincorporated treaty. McHugh and Gummow JJ said:

> "If *Teoh* is to have continued significance at a general level for the principles which inform the relationship between international obligations and the domestic constitutional structure, then further attention will be required to the basis on which *Teoh* rests". [13]

They went on:

> "The judgments in *Teoh* accepted the established doctrine that [unenacted international] obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error. The curiosity is that, nevertheless, such matters are to be treated, if *Teoh* be taken as establishing any general principles in this area, as mandatory relevant considerations for that species of judicial review concerned with procedural fairness. The reasoning which as a matter of principle would sustain such an erratic application of 'invocation' doctrine remains for analysis and decision". [14]

Hayne J said:

> "It may also be that further consideration may have to be given to what was said in *Teoh* about the consequences which follow for domestic administrative decision-making from the ratification but not enactment of an international instrument".[15]

Callinan J pointed out that the non-enactment of the Convention into Australian law could well indicate parliamentary resistance to it, and said that:

> "… the view is open that for the Court to give effect to the Convention that it did [in *Teoh's Case*] was to elevate the Executive above the Parliament".[16]

These remarks indicate that the members of the High Court in *Lam's Case* entertained great doubts as to the correctness of the decision in *Teoh's Case*, and may have given the *coup de grace* to that decision, although it has not yet been formally overruled.

There are two observations which are suggested by these events. The first is that there is an obvious weakness in our parliamentary system when a law thought necessary by the major parties (that is, by a majority of members) cannot be passed. The Senate performs an essential role, not only in reviewing legislation passed by the House of Representatives, but also in providing a check on the power of the Executive, which normally can control the House and can ensure that the House passes whatever legislation the Executive wishes. The price that is paid for this valuable function, is that the Senate sometimes prevents the passage of desirable legislation for purely political reasons. The only remedy lies in the hands of the Senators themselves.

Secondly, *Teoh's Case* is only one example of the pervasive effects of international law on domestic law. Naturally, one would not wish Australia's standards of fairness and decency to fall below international norms, but it does not follow that it is necessary or desirable for every treaty to which Australia is a party to be incorporated verbatim into our municipal law.

For one thing, treaties are often expressed in terms of broad generalities, as indeed is the case of the *Convention on the Rights of the Child*. To apply their terms literally, and without appropriate qualifications, may have unfortunate consequences, as, one may be pardoned for thinking, was the result in *Teoh's Case*. Further, our law is not necessarily less fair and just than the law laid down by international treaties. Indeed, the English-speaking countries of the common law world have set a standard of liberty and democracy which most other countries have failed to attain.

Some argue that globalisation, as it is called, is a reason why Australia should make its law conform to international standards. The facts that trade has been liberalised, and communication and travel accelerated, do not mean that we should attempt to bring our law into harmony with those of every

country with which we trade and communicate and to which we travel, except, perhaps, so far as is necessary to facilitate trade, travel and communication. Perhaps the hankering for international norms indicates a lack of faith in our inherited institutions – a failing of post-modern attitudes.

It is, of course, quite another matter if Parliament, acting judiciously, considers it desirable to legislate to incorporate a treaty in our law. That would be part of the democratic process, whereas the adoption of a treaty by judicial *fiat* would encroach on the field which, in our democracy, is the province of the elected legislature.

Endnotes:

1. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, 286-7 and cases cited in note 32; *R v. Lyons* [2002], 3 WLR 1502.

2. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168; *Victoria v. Commonwealth* (1996) 187 CLR 416.

3. *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 138 and cases noted in note 88; *Reg. v. Home Secretary; Ex parte Brind* [1991] AC 696, 747-8.

4. *Mabo v. Queensland (No 2)* (1992) 175 CLR 1, 42; *Dietrich v. The Queen* (1992) 177 CLR 292, 306, 321, 360; *Azzopardi v. The Queen* (2001) 205 CLR 56, 65.

5. *Supra*, note 1.

6. 183 CLR 273, 291.

7. *Perez v. Minister for Immigration and Multicultural Affairs* (2002) 191 ALR 619 and cases there cited.

8. *Supra*, note 7.

9. *Fisher v. Minister for Public Safety (No 2)* [1990] 1 WLR 347, 363.

10. *Fisher v. Minister for Public Safety (No 2)*, *op. cit.*; *Thomas v. Baptiste* [1993] 3 WLR 249.

11. [1993] 3 WLR 249, 262-3.

12. (2003) 77 ALJR 699.

13. *Ibid.*, 716.

14. *Ibid.*, 717.

15. *Ibid.*, 720.

16. *Ibid.*, 725.