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THE STATUS OF TREATIES IN AUSTRALIAN MUNICIPAL LAW: THE PRINCIPLE OF WALKER v BAIRD RECONSIDERED

INTRODUCTION

Australia, like so many other nations, sometimes speaks with a forked tongue. It negotiates and is party to international instruments recognizing certain principles, rights and obligations which it then fails to implement into Australian domestic law. Litigants relying on these instruments have generally received short shrift from the Australian courts.[1] Relying on *Walker v Baird*[2] the courts have held that international instruments (except those falling within the prerogative of the Crown)[3] require implementing legislation before they can be internally effective. Judges adopting the principle in *Walker v Baird* have done so almost as a matter of course. Because of this it has never been made entirely clear why a British constitutional prescription should form part of Australian law; or what its status is in Australian law. Nor have the courts had an opportunity to

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1 See, *Bradley v Commonwealth* (1973) 47 ALJR. 504; *Simsek v McPhee* (1982) 40 ALR 61; *Sezdirmezoglv v Acting Minister for Immigration and Ethnic Affairs* (No 2) (1983) 51 ALR 575. There are some cases where the Australian courts have been willing to look to unimplemented Australian treaties for guidance: *Wright v Cantrell* (1943) 44 SR (N.S.W.) 45 at 46; *Jagoe v District Court of NSW.* (1988) 12 NSW LR 558 at 569.

2 [1892] AC 491.

3 These are treaties affecting belligerent rights and possibly treaties relating to diplomatic and consular immunities. See McNair, *Law of Treaties* (1961) pp 89- 93 (1961);Doeker, *Treaty Making Power of the Commonwealth* Ch IV (1966). The scope of the Crown's power regarding prerogative treaties is not entirely clear. In *The Parlement Belge*, (1879) 40 LT 222 at p 232 Sir R Phillimore thought that the Crown could not affect the private rights of subjects without the sanction of the legislature. In *Attorney-General for Canada v Attorney- General for Ontario*, [1937] AC 326 at p 347, Lord Atkin thought that a treaty could not alter private law without legislation. In *Post Office v Estuary Radio Ltd*, [1968] 2 QB 740, however, the Court of Appeal held that it lay within the prerogative power of the Crown to extend its sovereignty and therefore bring a wireless transmitting station within the jurisdiction of the courts.

consider the ramifications of the principle in the Australian context. The purpose of this article is to examine these issues.

I. THE THOUGHTS OF THE FRAMERS OF THE CONSTITUTION

Early drafts of covering clause 7 of the Constitution Bill provided:

> 'The constitution established by this act, and all laws made by the parliament of the Commonwealth in pursuance of the powers conferred by the constitution, *and all treaties made by the Commonwealth*, shall according to their tenor, be binding on the courts, judges, and people, of every state, and every part of the Commonwealth, anything in the laws of any state to the contrary notwithstanding'.[4]

Article 51(xxix) of the Constitution also conferred the power on the federal government to legislate for treaties as well as external affairs[5]. These provisions were adopted at the Adelaide Session of the Convention in 1897[6] but were omitted at the Sydney Session at the suggestion of the Legislative Council of New South Wales.[7]

The New South Wales Legislative Council debated the provisions in 1897.[8] The concern was not whether treaties should be self-executing but rather whether Australia should have the power to enter into treaties at all. Dr MacLaurin, who moved the omission of treaties from clause 7, thought that, 'there was no intention . . . to erect the dominion into a sovereign state. It was to be subject to the Crown, and, therefore, it would not be a sovereign state . . . it would be impossible for the dominion to make anything in the nature of a treaty'.[9]

JM Creed, however, pointed out that the Empire made treaties to which the colonies could accede , '(t)herefore, it was essential that some provision should be made by which the agreements entered into should be upheld by the court'.[10] Dr Cullen, who thought that the provision did not make excessive claims to sovereignty, also raised the issue of the direct application of the treaties. He said:

> 'This clause did not say that these colonies should have power to make treaties with any country they liked, on any subject they liked. But provided that, insofar as the power of making treaties should be conferred upon us, they should be binding on our courts . . . (the clause) prevented the will of the federal legislature from being set at naught by the courts of a particular colony . . . (I)f the dominion parliament exceeded its powers to make arrangement with outsiders it would not be binding on any party; but any treaty lawfully made would be binding on all the states'.[11]

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4 *Official Record of the Debates of the Australasian Federal Convention* (Sydney, 1891), Appendix. (Emphasis supplied).
5 Ibid Appendix.
6 See *Official Record of the National Australasian Convention Debates* (Adelaide 1897) at pp 626-628.
7 See, *Official Record of the Debates of the Australasian Federal Convention* (2nd session Sydney,1897) 239ff; for the debate on s52(xxix) see *Official Record of the Debates of the Australasian Federal Convention* (Melbourne, 1898) 30.
8 NSW Parl Debates (1897) 17th Parl 3rd Session (60&61 Vic) 1st Series Vol LXXXIX.
9 Ibid at 3007.
10 Ibid.
11 Ibid at 3010.

Edmund Barton agreed that the intention of Sir Samuel Griffith, the drafter of the provision, was that those arrangements that the colonies could enter into 'might operate in all parts of the dominion, in order that no court in any part of the dominion should say that they had no validity'.[3]

The members, however, were more concerned that a claim to a treaty making power could stall the passage of the bill:

> 'The Imperial Parliament will say, 'We cannot give our colonies the power of making treaties with foreign countries antagonistic to our own treaties; and, more than that, give to their courts the power to give effect to those treaties against our treaties.' As the law now stood, there was no doubt that, if we made an arrangement with any foreign country which arrangement was antagonistic to any treaty (of Great Britain) the Imperial Parliament would simply wipe us out and say, 'It is all very well for you boys to play up like this, but we cannot have it' . . . Therefore, this provision would be a stumbling-block in the way of the bill'.[13]

Some members thought that the Imperial government might grant the colonies a limited treaty-making power but that it was not decent to ask for full treaty-making power even by implication.[14] No one dissented from the view, however, that treaties entered with permission of the Imperial parliament should have direct effect within Australia.

At the Sydney Session of the Convention the focus of the debate was the same. It was thought that the claim to treaty-making power might jeopardize the bill and that such a power was inconsistent with the Imperial form of government. Barton, who led the discussion, thought that the Commonwealth was entitled to make certain trading agreements which would have force if ratified by the Imperial government.[15]

The historical record reveals, therefore, that the drafters of the Constitution, to the extent that they thought about it, were not troubled by the concept of self-executing treaties. Rather their concern was whether an implied claim to a treaty-making power would jeopardize the bill. This was what prevented them from fully addressing the issue.

II. THE INCORPORATION AND STATUS OF WALKER v BAIRD IN AUSTRALIAN LAW

(a) High Court authority adopting Walker v Baird

Walker v Baird was first referred to by the High Court in *Brown v Lizars*.[16] The plaintiff brought an action for malicious arrest and false imprisonment after the defendant police officer had arrested him on suspicion of having 'nicked' £400 in South Africa. Under the Fugitive Offenders Act of 1881[17] the arrest had to be by warrant. One of the issues before the court was whether the Crown could extradite by virtue of its own prerogative. Citing *Walker v Baird* and the Fugitive Offenders Act, Griffith C J held that it was impossible to hold that the liberty of the individual could be interfered

12 Ibid at 3011.
13 Ibid at 3009 per Hon CE Pilcher. See also the comments by Sir Julian Salomons at 3008.
14 Ibid comment by L F Heydon at 3013.
15 Supra n 5.
16 (1905) 2 CLR 837.
17 44&45 Vict c 69.

with without sanction of municipal law.[17] Barton J, also citing *Walker v Baird*, held that 'the *constitutional law of England* admits indeed the treaty-making power of the Crown, but denies the treaty any extra-territorial validity without parliamentary sanction'.[19] O'Connor J thought that the Act should be followed.[20]

The principle of *Walker v Baird* was next discussed by Dixon J. in *Chow Hung Ching v The King*.[21] The issue was whether the defendants, who claimed to be members of the military forces of the Republic of China, were as such immune from the jurisdiction of the local courts. His Honor said that '(a) treaty, at all events one that does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty'.[22]

In both of these cases the adoption of *Walker v Baird* was by way of *obiter* as neither dealt with the internal effect of a treaty that had not been incorporated into Australian municipal law by legislation.

In *Bradley v Commonwealth*[23] the Postmaster-General had directed that all postal and telecommunication services be withdrawn from the Rhodesian Information Center. The court held that the relevant legislation did not give such powers to the Postmaster. An argument made in support of the government's action was that Article 41 of the United Nations Charter empowered the Security Council to call on member states to apply non-military sanctions (including those used by the Postmaster) to give effect to its decisions; that the Security Council had called on states not to afford recognition to the acts of the illegal Rhodesian regime; and that by Article 25 of the Charter member states were obliged to carry out the decisions of the Council. In a joint judgment Barwick C J and Gibbs J said of this argument:

> '(R)esolutions of the Security Council neither form part of the law of the Commonwealth nor by their own force confer any power of the Executive Government of the Commonwealth which it would not otherwise possess. The Parliament has passed the Charter of the United Nations Act 1945 (Cth), s 3 of which provides that 'The Charter of the United Nations (a copy of which is set out in the Schedule to the Act) is approved'. That provision does not make the Charter itself binding on individuals within Australia as part of the law of the Commonwealth . . . Section 3 (of the Act) was no doubt an effective provision for the purposes of international law, but it does not reveal any intention to make the Charter binding upon persons within Australia as part of the municipal law of this country, and it does not have that effect. Since the Charter and the resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a

18 Ibid at 851-852.
19 Ibid at 860 (emphasis supplied).
20 Ibid at 868.
21 (1949) 77 CLR 449.
22 Ibid at 478.
23 (1973) 47 ALJR 504.

> justification for executive acts that would otherwise be unjustified'.[24]

In reaching this conclusion their Honours relied primarily on the statement of Dixon J in *Chow Hung Ching* referred to above.

Again the recognition of the principle is by way of *obiter dictum*. The Commonwealth was relying primarily on a Security Council Resolution and not a treaty. The Post and Telegraph Act as amended post-dated the Resolution and the Charter. Moreover, the Charter of the United Nations Act was held by the court to indicate a legislative intention not to implement the Charter into Australian law.

The internal effect of treaties next arose before Stephen J in *Simsek v Minister for Immigration and Ethnic Affairs*.[25] The applicant was seeking refugee status and in part relied on rights he claimed were conferred upon him by the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol. Australia was a party to both instruments, but there was no implementing legislation. Rejecting a submission based on the Australian authorities that a distinction should be drawn between treaties imposing obligations and those conferring rights, His Honor said:

> 'In my view those authorities are not confined to the case of treaties which seek to impose obligations upon individuals; they rest upon a broader proposition. The reason of the matter is to be found in the fact that under our constitutional system treaties are a matter for the Executive, involving the exercise of the prerogative power, whereas it is for Parliament and not for the Executive, to make or alter municipal law'.[26]

It seems that when His Honor referred to 'our constitutional system' he was not referring to the Australian Constitution but to British constitutional convention. This is indicated by the fact that apart from *Bradley* and *Chow Hung Ching*, His Honour relied on decisions of the Judicial Committee relating to Canada[27] and more recent United Kingdom authorities.[28]

It was in *Koowarta v Bjelke Petersen*[29] that Stephen J, so far as the cases indicate, for the first time referred to the proposition that treaties require enacting legislation under the Australian Constitution when he said:

> 'Early drafts of covering cl5 of the Constitution Act, apparently taking Article VI of the U.S. Constitution as their model, contemplated that treaties made by the Commonwealth should become law of the land — but the Constitution as finally adopted attempted no such departure from settled common law doctrine; the exercise of treaty-making power was not to create municipal law. For that legislative action would be required'.[30]

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24 Ibid at 514. Stephen J concurred and the dissenting justices McTiernan and Menzies J J did not deal with the issue.

25 (1982) 40 ALR 62.

26 Ibid at 66.

27 *Attorney-General for Canada v Attorney-General for Ontario*, supra n 3.

28 *Blackburn v Attorney General* [1971] 1 WLR 1037; *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643; Wade and Phillips, *Constitutional Law* (8th ed) 277; Mann, *Studies in International Law* (1973) 328.

29 (1982) 56 ALJR 625.

30 Ibid at 643. (Emphasis supplied).

In the same case Mason J (as he then was) said:

> 'It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia . . . .In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress'.[31]

Gibbs C J, to the same effect said,

> 'treaties when made are not self-executing; they do not give rights or impose duties on members of the Australian community unless their provisions are given effect by statute'.[32]

As there was legislation implementing the treaty, the statements in *Koowarta* are also by way of *dicta.*

(b) The rationale for adopting Walker v Baird

The legal basis for the rejection of self-executing treaties appears premised on an inherent restraint on the Crown to give internal effect to non-prerogative treaties. In support of this, reference is made to the fact that (a) the framers of the Australian Constitution removed treaties from the covering clause 5 of the Constitution Bill and (b) in the United States treaties are capable of self-execution because the supremacy clause[33] of the United States Constitution includes treaties as law of the land.

It is clear that there is nothing in the nature of the Australian constitutional structure that prevents treaties having direct effect. The original draft of the Constitution was to the effect that treaties would be law of the land. We have seen this provision was not removed because the framers thought that it was incompatible with the Australian constitutional structure to give treaties direct effect. On the contrary, those that thought about it thought it important that they do have direct effect. The provision was removed because Australia's position within the British Empire was thought to deprive it of the power to enter into treaties.

As to the second point, it is true that the supremacy clause of the United States Constitution provides that treaties made under the authority of the United States are supreme law of the land. The treaties referred to there, however, are those made with the advice and consent of the Senate.[34] Yet the Supreme Court has held that other international agreements, such as those made by the President on his own account (executive agreements), or those made by the President with Congressional authority, are also supreme law and may in appropriate circumstance be self-executing. These cases do not suggest that these agreements derive their internal effectiveness from the supremacy clause. In *US v Belmont*,[34] Sutherland J finds authority for the

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31 Ibid at 648-649. (Emphasis added).
32 Ibid at 635.
33 Art 6(2).
34 *Weinberger v Rossi* (1982) 456 US 25 at 28; Henkin, Foreign Affairs and the Constitution, (1972) 129 and accompanying notes 1-4, especially note 2.

internal effectiveness of executive agreements in the fact that the Constitution reposes the external affairs power in the federal government and not the States:

> 'Plainly, the external power of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning . . . .And while this rule in respect of treaties is established by the express language of clause 2, article 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government'.[36]

No doubt the inclusion of treaties made with the advice and consent of the Senate in the supremacy clause made it easier for the Supreme Court to find other international agreements also to be supreme law, and where appropriate self-executing. The reason given in *Belmont* and subsequently in *Pink*,[36] however, was that the Constitution placed external affairs of the United States in the federal government and, therefore, executive agreements representing international obligations of the United States would supersede prior inconsistent state law. This, as we have seen, was the same concern of the drafters of the Australian Constitution. Thus emphasis placed on the inclusion of treaties in the United States supremacy clause in explaining the difference in Australian and United States law may be misplaced. The reasoning in *US v Belmont* would apply equally to the Australian Constitution as it did to that of the United States.

(c) The constitutional basis of Walker v Baird in Australian law.

The reliance on the English authorities rather than the Australian Constitution tends to indicate that the principle in *Walker v. Baird* is not mandated by the Australian Constitution but rather is adopted as common law convention. Mason J (as he then was) says as much in *Koowarta*.[38]

Assuming for the moment that the need to have treaties internally implemented by legislation is not constitutionally mandated, to what extent are the decisions of the Judicial Committee and the British courts applicable to the Australian context? When *Walker v Baird* and *Attorney-General for Canada v Attorney-General for Ontario* were decided, the Imperial government entered into treaties and legislated to some extent to implement these treaties for the Empire.[39] In funnelling Australia's treaties through the English parliamentary system, it is not surprising that the Judicial Committee and the colonial courts would accept without question that a stricture of United Kingdom constitutional law should also apply to Australia. This is despite the fact that a state operating from a written constitution is in a very different position to one that functions *via* an unwritten constitution.

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35 (1937) 301 US 324.
36 Ibid at 331.
37 *United States v Pink* 315 US 552, at 565.
38 See text accompanying n 31.
39 Colonial Laws Validity Act, 1865. See eg 9 Halsburys Statutes of England 2nd 874, at pp 875-6 Orders in Council applying the Extradition Acts 1870-1935 between foreign powers and the United Kingdom and other parts of the Empire.

At the time of federation the theory of the Crown as a one and indivisible legal entity undoubtedly influenced the imposition of a general restraint on the Crowns power within Australia. 'The first step in the examination of the Constitution is to emphasize the primary legal axiom that the Crown is ubiquitous and indivisible in the Kings Dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive, and judicial power is exercisable by different agents in different localities . . . in accordance with the common law, or the statute law there binding on the Crown.'[40]

Whatever may have been the justification for adopting a British constitutional convention in the days of Empire, Australia has long been an independent international actor. Remaining formal links with the United Kingdoms legal structure were severed with the passage of the Statute of Westminster Adoption Act of 1942[41] and the Australia Acts of 1986.[42] The question of whether treaties require implementing legislation to be internally effective should be answered in terms of the Australian Constitution.

This should depend on the terms of the particular constitution. For example, the decision in *Attorney-General for Canada v Attorney-General for Ontario*, is by its own terms of little relevance to Australia. The Judicial Committee in that case determined that under the Canadian Constitution the provinces had a large say in the internal implementation of treaties. In this context treaties of the Dominion government could not be considered self-executing in the provinces. The Australian Constitution, on the other hand, grants the power to legislate for external affairs to the Commonwealth, which does not need the legislative assistance of the states for the internal implementation of a treaty falling properly within that power.

The deletion of references to treaties in covering clause 5 and section 51(xxix) made the internal status of treaties unclear insofar as the Constitution is concerned. Section 75(i) of the Constitution gives the High Court original jurisdiction in all matters arising under any treaty. This could be taken to mean that a treaty was thought to have an independent internal effect without the need for implementing legislation. This is to some extent supported by sections 76 and 77. Section 76(ii) allows the Parliament to confer original jurisdiction on the High Court in any matter arising under any laws made by the Parliament, and section 77 permits the Parliament to define the jurisdiction of the federal and state courts with regard to any matter arising under sections 75 or 76. Thus matters arising under a treaty and matters arising under legislation are clearly distinguished. It could be argued that section 75 refers merely to the interpretation of treaties arising indirectly through suits dependent on legislation or some other head of power; or to the internal effect of treaties occurring by virtue of the Crowns prerogative.[43] The difficulty with this is that section 75 is not so limited. It refers to 'All matters' and 'any treaty', not some matters or treaties dependent on the Crowns prerogative. Apart from section 75, the Constitution is silent on the status of treaties

40 Amalgamated Society of Engineers v Adelaide Steamship Co. (1920) 28 CLR 129 at 152.
41 No 56 of 1942.
42 No 142 of 1985.
43 Quick and Garran apparently adopted this view of s75. See, *The Annotated Constitution of the Australian Commonwealth* (1901) at pp 769-770; McNair, *Law of Treaties* supra n 3 at 89-94.

domestically. Reading sections 75 and 77 together, it falls within the power of the Commonwealth to confer jurisdiction on the courts to hear all matters arising under any treaty. These sections, therefore, can be read as empowering the legislature to abandon the rule in *Walker v Baird*, at least insofar as matters 'arising' under a treaty are concerned.[44] If the rule is a common law principle, as suggested by the present Chief Justice,[45] rather than one mandated by the Constitution, then the power to abolish the principle lies with the parliament in any event. Should it do so? In order to answer this it is necessary to examine the problems that the principle gives rise to in the Australian context.

III. THE IMPACT OF *WALKER v BAIRD* ON TREATY IMPLEMENTING LEGISLATION.

There are few matters these days that could not be the subject of international agreement. This has caused some members of the High Court concern as an expansive reading of the external affairs power could cause serious inroads on the power of the states.[46] For this reason, where the legislation did not obviously relate to a matter external to Australia, some judges believed the presence of a binding *bona fide* treaty or a binding rule of customary international law to be necessary for the constitutional validity of legislation domestic in its impact but reliant on the external affairs power for its validity.[47]

More expansive interpretations have, however, considered that such legislation may also be supported by matters of genuine international concern expressed by treaties, draft conventions, resolutions of international organization, the writings of publicists and other indicia of international concern.[48] But here a limitation has been imposed. Where there is international concern and a treaty giving effect to that concern to which Australia is a party, implementing legislation must conform to the treaty:

> 'The law must conform to the treaty and carry its provisions into effect. The fact that the power may extend to the subject matter of the treaty before it is made or adopted by Australia, because the subject matter has become a matter of international concern to Australia, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it.'[49]

Domestic legislation must, therefore, implement the treaty; the international concern cannot be viewed as granting a separate head of power.

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44 See Art 3 s 2(1) of the United States Constitution and 28 USC s 1331 for United States legislation.

45 See text accompanying n 31.

46 *Koowarta v Bjelke Petersen* supra n 29 at 637, per Gibbs C J 637, at 659 per Wilson J; see also the comment by Dawson J in *Richardson v Forestry Commission* (1988) 62 ALJR 158 at 179.

47 See *Commonwealth v Tasmania* (1983) 57 ALJR 450, at 477 per Gibbs C J; at 513 per Wilson J; at 568 per Dawson J.

48 See *R. v Burgess; Ex parte Henry* (1936) 55 CLR 608, at 687 per Evatt and McTiernan JJ; Murphy J in *Commonwealth v Tasmania* supra n 47 at p 506. See also Mason J at p 653 and Murphy J at p 654 in *Koowarta* supra n 29.

49 Mason J in *Commonwealth v Tasmania* supra n 47 at 489. See also Murphy J at 506 and Gibbs C J in Koowarta supra n 29 at 638.

Judges have differed as to the degree to which the domestic legislation must mirror the external instrument to be constitutionally valid. Some judges would give the Commonwealth great latitude in implementation;[50] others have required the domestic legislation to closely echo the provisions of the international instrument for the former to be valid.[51]

Tying the validity of domestic legislation to the existence, and perhaps continued existence, of a treaty raises questions as to the status of implementing legislation if a change in the status of the treaty occurs. External affairs (using the term to encompass customary international law, treaty law and other indicia of international concern) are subject to flux. For example, states may draft a treaty but it may never become internationally binding because of lack of signatories or ratification.[52] International instruments can be altered expressly by the parties.[53] The meaning of a provision may be altered by the subsequent practice of the parties;[54] or, if it is a multilateral treaty, by the practice of a majority of the parties.[55] Moreover, the international obligations of states may change for all practical purposes by reason of an interpretive international judicial decision.[56] Finally, a treaty may be denounced by a state and cease to be binding on that state.[57]

What is said here regarding treaties, applies equally to customary international law and international concerns generally. Since the Second World War human rights principles have moved from the hortatory to what are now widely viewed as binding obligations.[57] Similarly, what is not of

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50 See Burgess supra n 48 at 659-660 per Starke J, and 688 per Evatt and McTiernan JJ.

51 '[P]rovisions will be valid only if they conform to, and carry into effect the provisions of the Convention.' Gibbs C J in *Gerhardy v Brown* (1985) 59 ALJR 311 at 317. In *Burgess* supra n 48 the court declared the legislation invalid for minor deviations from the treaty. The scrutiny that the court has traditionally given to language deviating from the treaty wording indicates that legislation should, unless impracticable, adopt treaty language. See comments by Latham C J in *Burgess* at pp 645-646.

52 Australia is party to various multilateral treaties that are not in force as of May 22nd 1989. See egs The 1930 Special Protocol Concerning Statelessness, UKTS 112 (1973); 13 ILM 1; 1975 Agreement Establishing a Financial Support Fund of the OECD, 14 ILM 979; 1980 Agreement Establishing the Common Fund for Commodities, UN Doc TD/IPC/CF/Conf. 24; 1986 Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, IMO Doc LEG/Conf 6/66; 1986 Agreement on the Reconstruction of the Commonwealth Agricultural Bureaux as CAB International, UKTS 59 (1987). 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Treaties listed in Bowman and Harris, *Multilateral Treaties, Index and Current Status* (1984), and *Sixth Cumulative Supplement* (1989).

53 Art 39 Vienna Convention on the Law of Treaties, UN Doc A/CONF 39/27, (1969).

54 Ibid Art 31.3(a). See also McGinley, 'Practice as a Guide to Treaty Interpretation', (1985) 9 Fletcher Forum 211.

55 While Art 40.4 of the Vienna Convention on the Law of Treaties requires all states to agree to an amendment, the practice of states and the decisions of the International Court diverge somewhat from this view. See Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959); McGinley, supra n 54 at 215-216.

56 Under Art 59 of its Statute decisions of the International Court bind only parties and then only insofar as that case is concerned. An interpretive decision of the Court is bound to have great weight with the Court itself as with parties before the Court. See eg *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene* [1984] ICJ 3, at 9. See also McGinley, 'Intervention in the International Court: the Libya/Malta Continental Shelf Case' (1985) 34 ICLQ 671 at 689-672.

57 Art 54 Vienna Convention on the Law of Treaties.

58 See H Lauterpacht, *International Law and Human Rights* 145-60 (1973); Schwelb, 'The International Court of Justice and the Human Rights Clause of the Charter', (1972) 66 AJIL 337.

international concern today may become so tomorrow and vice versa. One merely needs to look to current concerns over the environment, terrorism, international resources and human rights to see how international concerns can shift in emphasis.[58] Developing customary international law can alter treaty obligations[60] and a switch in international focus[61] or technical developments[62] can make an international law or treaty a dead letter.

What then is the relationship of the international instrument to the domestic legislation that it produces? In the United Kingdom (unless Parliament otherwise decrees)[63] the validity of domestic legislation does not depend on the treaty or international concern which it is intended to implement.[64] Changes in the international instrument or international state of affairs have no impact on the local law.[64] In the United States federal legislation must be supported by an appropriate constitutional head of power.[66] Constitutionally valid self-executing treaties, however, become law of the land on entry into force.[67] Similarly, amendments or denunciations of an international instrument reflect themselves on the domestic law of the United States.[68] Because of *Walker v Baird* Australia falls between these systems. On the one hand, as with the United States, federal legislation implementing a treaty, if it cannot be supported by some other power, will depend for its validity on the external affairs power.[69] On the other, the courts have followed the United Kingdom practice of requiring legislation to implement all non-prerogative treaties.[70] The cases indicate that the initial validity of legislation is tied closely to the international instrument it is intended to implement. However, the nature of the on-going relationship of the legislation to its international counterpart is unclear. If a treaty is altered or abrogated, is the domestic legislation on which it is based constitutionally intact?

(a) Legislation based on treaties not in force

The situation arises in which Australia negotiates a treaty but then either does not sign or ratify it;[71] or signs and ratifies a treaty which needs a

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59 See Friedmann, *The Changing Structure of International Law* (1964) at 152-186; Kunz, *The Changing Law of Nations* (1968) at 3-45.

60 Brownlie, *Principles of Public International Law* (3rd ed) at 623.

61 Limitations on the right of states to engage in war made much of customary and treaty law regarding neutrals obsolete.

62 The classical example of this is the change in the status of a states airspace following the invention of the aircraft. Technological improvements in machines from long range trawlers to space satellites and their receivers can be expected to have a profound effect on international law.

63 *H. P. Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

64 Dicey, *Law of the Constitution* (10th Ed) liii (Wade).

65 *Duke v Reliance Systems Ltd* (H L (E)) [1988] AC 618 at 638 per Lord Templeman. The courts will of course attempt to read statutes so as not to conflict with the United Kingdoms international responsibilities.

66 *Missouri v Holland* (1920) 252 US 416.

67 Art 6 United States Constitution; *US v Belmont* (1937) 301 US 324.

68 Head Money Cases 112 US 580 (1884). See also *Committee of United States Citizens Living in Nicaragua v Reagan*, 859 F 2nd 929 at 936 (DC Circ 1988).

69 *Burgess* supra n 48 at 636.

70 *Burgess* supra n 48 at 644 'as a general rule, a treaty cannot affect the private rights under municipal law of British subjects.' (Latham CJ) See also *Bradley v Commonwealth* supra n 1 at 514 per Barwick CJ and Gibbs J.

71 Eg The Convention on the Regulation of Antarctic Mineral Resource Activity, Document AMR/SCM/88/78 (June, 2 1988), 27 ILM 868 (1988). For Australian negotiation and ratification practice see Doeker supra n 3 Chapts 5 and 6.

number of accessions for it to become internationally operative.[72] In each of these cases the Commonwealth might enact legislation intended to become immediately operative although internationally there is no binding instrument. At the time of the constitutional challenge the instrument may have become binding or may still not be binding.

The former situation occurred in *The King v Burgess; Ex Parte Henry*[73] The Air Navigation Act received the Royal assent on December 2, 1920, and was proclaimed to commence on March 28, 1921. The Air Navigation Regulations made under the Act were to become operative on February 11, 1921. The Paris Convention on Aerial Navigation, which the legislation was intended to enact, was opened for signature on the 13th October 1919 and was ratified by Australia on the 1st June 1922. The charge against Henry for breach of the regulations was brought in 1934. During the interim, various amendments were made to the Convention.

Counsel appearing for the appellant Henry argued that even if the Commonwealth had power to make the regulations, the power did not exist prior to the date of ratification of the treaty. Mitchell K C, arguing for the Commonwealth, accepted the proposition that except where the Commonwealth had power, there was no subject matter for the Act to operate on until the Convention was ratified. Latham C J, and Dixon J, considered the legislation unconstitutional, as it was not made with the purpose of carrying out the Convention. They did not, therefore, deal with whether the Commonwealth had power to legislate before the Convention was ratified.[74]

Evatt and McTiernan JJ, similarly found that the legislation was not enacted with the purpose of carrying out the Convention. However, they would not have struck down the legislation because the treaty had not been ratified. They considered that the external affairs power permitted the Commonwealth to enact legislation giving effect to draft treaties or recommendations.[75] Mr. Justice Starke, the only judge who found the divergences between the treaty and the legislation insignificant, did not deal with the ratification issue. As His Honour upheld the constitutional validity of the legislation enacted prior to Australia's ratification of the Convention, it might be assumed that he would have adopted a similar position to that of Evatt and McTiernan J J. The language of the judgment, however, does not clearly point to this position. His Honour believed that the external affairs power must be construed liberally.[76] But speaking of the power conferred by the regulations on the Minister, he said:

> 'The power is, in my judgment, compatible with the convention, and, if exercised bona fide and *for the purpose of carrying out international obligations* — as must be assumed — gives that flexibility in administration that is desirable and even necessary in relation to an international agreement.'[77]

This appears to assume that Australia was internationally obligated at the time the legislation was enacted.

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72 Eg Protocol Relating to an Amendment to the 1944 Convention on International Civil Aviation,(May 2, 1984) ICAO Doc 9436, 23 ILM 705. See also treaties listed in n 52.
73 Supra n 48.
74 Ibid at 655 per Latham CJ; and at pp 669,675 per Dixon J.
75 Ibid at 687.
76 Ibid at 660.
77 Ibid at 663. (Emphasis added).

Whether the external affairs power could be fed by a treaty that did not impose obligations was considered in the *Tasmanian Dams* case.[78] Two of the dissenting judges, Gibbs C J and Wilson J believed that where legislation concerned matters solely domestic, the external affairs aspect must be supplied by way of an international obligation to enact such legislation. They would, therefore, have rejected legislation based on treaties or international instruments not binding on Australia if that legislation did not 'relate to other nations or to things external to Australia'.[79] If the legislation did have such a relationship then presumably it would be valid regardless of the status of international instrument on which it was based.

Dawson J (also in dissent) agreed that the subject matter of a law may cause it to fall within the external affairs power even though it was not made pursuant to an international obligation[80]. If the legislation did not fall within that category then His Honour was prepared to uphold the legislation if the instrument on which it was based reflected an adequate international concern. This concern he considered to be indicated by the existence of binding obligations and by their nature - whether a failure to abide by them would affect Australia's relations with other states. The latter determination was drawn from the language of the international instrument and the setting in which it was adopted.[81] It follows from this that a treaty imposing an obligation on Australia would not *ipso facto* validate legislation if the obligations did not reflect an appropriate international concern. By the same token United Nations resolutions and draft conventions may reflect sufficient international concern that, although not part of customary international law, they may be of such immediate relevance in international relations so as to support domestic legislation of a purely internal kind.[82]

Of the majority Justice Brennan adopted a similar position to that of the dissent. His Honour found it difficult to see how Australia's failure to abide by an international obligation would not be a matter of international concern; but if there was no international obligation, 'it would be necessary to determine whether the subject affects or is likely to affect Australias relations with other international persons, an enquiry of some difficulty'.[83] Mason J thought that Australia's entry into a treaty established the international concern whether or not the instrument imposed an obligation.[84]

As Justice Murphy would validate legislation based on recommendations or requests of United Nations Organizations he would probably have upheld legislation premised on a treaty not in force if it reflected appropriate international concern.[85] Similarly Deane J thought that 'a law which procured or ensured observance within Australia of the spirit of a treaty or compliance with an international recommendation or pursuit of an international objective would properly be characterized as a law with

78 *Commonwealth v Tasmania* supra n 47.
79 Ibid at pp 474, 477-478 per Gibbs C J; at 513 per Wilson J.
80 Ibid at 563.
81 Ibid at 567.
82 Ibid at 567. See also Wilson J at 518.
83 Ibid at 527.
84 Ibid at 486.
85 Ibid at 506.

respect to external affairs notwithstanding the absence of any potential breach of defined international obligations'.[86]

All of the justices, therefore, would support legislation relating to matters external to Australia even though the legislation was implementing a treaty that was not binding on Australia. If the legislation was seen to have purely internal effect, Gibbs C J and Wilson J required an external obligation; the other judges did not require a binding obligation, but did, in varying degrees, require the treaty to reflect an international concern.

Linking the constitutional validity of legislation to an international concern reflected by a treaty can cause problems. A treaty may during the negotiation stage reflect an international concern. Later, however, the treaty may languish because the other states show no intention of ratifying the instrument. This is not an uncommon situation in international relations.[87] Multinational treaties frequently provide that they will come into force only after a requisite number of states have ratified the treaty.[88] States that have signed but not ratified the treaty are obliged not to work to defeat its objects and purposes.[89] Unless the treaty otherwise provides, those states that have ratified the treaty during the interim period are bound by its terms.[90]

During an interim period, there would presumably be sufficient international concern reflected by the creation of the document for the domestic legislation to be constitutionally valid. But what is the situation if the legislation was enacted and it appears that the treaty probably will not come into force? The answer will depend on the breadth given to the concept of an international concern. If the treaty is of value to those states that have acceded to it, then it would still reflect an international concern.[91] On the other hand, if the treaty is of little or no value without widespread participation, this might be viewed as an indication of lack of international concern.[92]

In the United States treaties (including executive agreements) are subject to the Constitution.[93] The focus of judicial concern, however, has been to limit restraints on the Executive in the conduct of the foreign relations of the United States.[94] 'There is no principle either in international law or in United States constitutional law that some subjects are intrinsically 'domestic' and hence impermissible subjects for an international

86 Ibid at 545.

87 See eg *The Unperfected Treaties of the United States 1776-1925* Vols I-VII (Wictor); Bowman and Harris supra n 52.

88 Eg The 1982 United Nations Convention on the Law of the Sea, UN Doc A/Conf 62/122; 21 ILM 1261 by Art. 308 comes into force twelve months after the 60th acceptance. On January 1, 1989, 37 states were party to the Convention. See Bowman and Harris, Sixth Cumulative Supplement: ibid at 155.

89 Art 18 Vienna Convention on the Law of Treaties.

90 Ibid Art 16.

91 The view adopted by Mason J (as he then was) in the *Dams* case. See supra text accompanying n 84.

92 Apparently the position of Dawson J in the *Dams* Case. See supra text accompanying n 79.

93 *Missouri v Holland* 252 US 416 (1920).

94 See eg *United States v Rene Martin Verdugo-Urquidez* No 88-1353 (1990). Fourth Amendment does not apply to search and seizure by U.S. agents of property owned by non-resident alien located in foreign country.

agreement'.[95] A treaty must be a *bona fide* international act with other international entities and not a 'unilateral act dressed up as an agreement'.[96]

For a treaty to be internally operative it must be binding on the United States,[97] and be capable of self-execution.[98] If the treaty is made with the advice and consent of the Senate, it becomes internally binding once the Senate has approved and the President has ratified or otherwise given official assent.[99] If the Senate has imposed conditions for ratification the treaty cannot have internal effect until those conditions are met.[100] If the treaty is not in force internationally because the requisite conditions for entry have not been met the treaty will not be internally operative unless the President gives it provisional application.[101]

(b) Legislation based on treaties subsequently terminated

This deals with the situation where a treaty has been expressly or impliedly terminated but there has been no repeal of the implementing legislation. States, after appropriate notice, can ordinarily withdraw from treaties.[102] Furthermore, a new treaty between the parties may impliedly repeal an inconsistent prior treaty.[102] In the case of a bilateral treaty, withdrawal by one party will have the effect of terminating the treaty.[103]

Two situations can be envisaged: the executive enters into a treaty and implements legislation and subsequently withdraws from the treaty without repealing the legislation; the other is where the other state withdraws from the treaty. The first situation may give rise to questions regarding whether a bona fide treaty exists. The purpose may have been to support the domestic legislation *via* the treaty and having done this, avoid international responsibilities by withdrawing from the treaty. It may be, however, that the executive is unable or unwilling to secure repeal of the domestic legislation. For example, a government opposed to human rights or environmental policies that are now in vogue, may wish to render such legislation nugatory without the difficulties of repealing the legislation. There may be, for

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95 *Restatement Foreign Relations Law of the United States* (3rd 1987) [hereinafter cited as *Restatement]* 302 Reporters Note 2 at 156 citing *Nationality Decrees in Tunis and Morocco (Great Britain v France)*, PCIJ ser B No 4 26 (1923) and *De Geofroy v Riggs* 133 US 258 (1890).

96 Ibid *Restatement*.

97 Ibid *Restatement* 111 Comment b at 43: 'A rule of international law or a provision of an international agreement derives its status as law in the United States from its character as an international legal obligation of the United States'.

98 In order to determine if a treaty is self executing the court looks to the intention of the parties as evidenced by:

> '(1) the language and purposes of the agreement as whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute'. *Frolova v USSR,* 761 F2d 370 (7th Circ 1985) at 373.

99 Supra n 95 *Restatement* 312 Comment j at 174. See also Whitman, 14 *Digest of International Law* 113-114 (1970) for the necessity of a Presidential proclamation for individuals claiming under the treaty.

100 *Power Authority v Federal Power Commission*, 247 F2nd 538 (DC Cir 1957).

101 Supra n 95 *Restatement* 302 Comment h at p 175. The extent of the power of the President to give a treaty provisional application is unclear. See United States *Digest* Ch 51 (1980); 74 AJIL 931.

102 Arts 54 and 56 Vienna Convention on the Law of Treaties.

103 Ibid Art 59.

example, numbers of its own members willing to vote with the opposition to prevent repeal.

If the treaty coexists with an international concern the legislation could presumably sustain its constitutional validity through that concern. A court holding this way would of course have to ignore the clear intention of the executive manifested by its withdrawal from the treaty. On the other hand, to hold that the executive could by withdrawing from a treaty effectively abrogate domestic legislation would be to give to the executive powers it is not commonly thought to have under the doctrine of *Walker v Baird.*

The second situation, withdrawal by the other state, creates the same difficulties, only here they are exacerbated by the fact that the annulling action would not be that of the Australian executive, but that of some foreign power, perhaps acting on behalf of private interests. Thus, if some individual were able to convince a foreign state with whom Australia has bilateral relations to withdraw from a treaty implemented by federal legislation, we would have the result that outside forces could deprive domestic legislation of its constitutional validity.

If the treaty on which the legislation was based has ceased to exist, a legislative intent could be implied that the implementing legislation be no longer operative. This approach was considered in relation to the defence power by Dixon J, in *Hume v Higgins*.[104] The case concerned a conviction under the Defence (Transitional Provisions) Act of 1946.[105] The appellant argued that because of changed circumstances it was beyond the constitutional competence of the Commonwealth to keep the offence operative under the defence power. Dixon J, recognized that the argument involved 'the tacit assumption that a law validly adopted in the exercise of the legislative power of the Commonwealth with respect to defence may by a change of events lose its constitutional efficacy, quite independently of the intention of the legislature, whether express or implied'.[106] His Honour thought that if parliament indicated a life span for the relevant legislation it would not be possible to infer a further intent that the legislation should only operate while it was supported by some external situation. It can be implied from this that absent such a life span an implied termination is permissible.

This approach would, at least theoretically, avoid the idea that a foreign power could nullify Australian legislation by withdrawing from a bilateral treaty on which legislation was based. The implied legislative intent would be that the legislation would have the same life span as the treaty.

In the United States the termination of the international obligation also terminates the treaty as domestic law of the United States, but that is an incidental consequence when an international legal obligation lapses for any reason. In the same sense, a foreign state 'repeals United States law' when it denounces . . . (a) treaty'.[107]

(c) Legislation based on treaties subsequently altered

Treaty obligations may be altered directly or indirectly. The usual practice of states wishing to alter their international obligations is for the parties to

104 Ibid Art 70.
105 (1949) 78 CLR 116.
106 No 77 of 1946.
107 Ibid at 130.

enter into a subsequent amending treaty expressly altering the terms of the first treaty.[108] Indirect amendment can occur through entry into another treaty dealing with the same subject matter but without direct reference changing obligations under the first treaty.[109] A treaty may also be effectively amended by the practice of the parties or of the practice of one party and the acquiescence of the other.[110] Also, if the treaty is multinational it can be amended, for all practical purposes, by the interpretive resolutions of the majority of member states.[111] A treaty may also be interpreted by an international tribunal in a manner inconsistent with domestic views of its meaning.[112] A newly emerged norm of customary international law may also alter Australia's treaty obligations.[113]

In these cases, the legislation should be amended by those responsible for ensuring that Australia's domestic legislation reflects its international responsibilities. This might not always be the case nor might it always be possible to know when these obligations have changed particularly when the treaty has been altered indirectly.

If a treaty is expressly or impliedly altered by a subsequent treaty but no remedial legislation is passed to implement the change the question is again raised of the status of the original legislation. If the legislation is to be tested from the time of enactment, as the doctrine of *Walker v Baird* suggests it should, then the legislation would still be valid. On the other hand, if the external affairs power is to be considered similar to the defence power,[114] subject to expansion and contraction, then the legislation would be tested from the time of challenge and may be invalid as no longer reflecting an external affair.

Various High Court judgments have correlated the external affairs with the defence power.[115] These statements, however, have focused on the need to test domestic legislation against the external situation to determine its validity. It does not follow that the external affairs power is ambulatory in nature. It may be sufficient to view the legislation from the external situation at the time of enactment.

Dawson J, in the *Lemonthyme* case[116] considered the possibility of changes on the international level and its relationship to the municipal law:

> 'If, as the majority in the *Tasmanian Dams* case has held, it is international concern which ultimately marks out those matters which fall within the external affairs power, then it may be observed that power also embraces a range of matters

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108 Supra n 95 *Restatement* 339 Reporters Notes 1 at 228.
109 Art 39 Vienna Convention.
110 Art 30 Vienna Convention.
111 The International Law Commission's final draft provided treaties may be modified by the subsequent practices of the parties. Art. 38 Yrbk ILC(1966) ii 236. This was rejected by the Conference. Official Records, First Session see pp 207-15. The distinction between interpreting and altering can be one of semantics. See Brownlie, supra n 60 at 623. McGinley supra n 54 at 220-226.
112 See eg the *Advisory Opinion in the Certain Expenses of the United Nations* [1962] ICJ 151 at pp 159-60; *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ 6 at 134.
113 See *Duke v Reliance Systems Ltd* supra n 65.
114 See Brownlie, supra n 60 at 623.
115 S 51(vi). See also *Hume v Higgins* supra n 105.
116 See *Koowarta v Bjelke-Petersen* supra n 29 at 465-466 per Stephen J, and at 659 per Wilson J.
117 *Richardson v Forestry Commission* supra n 46.

> which may expand and, at least theoretically, contract from time to time. The application of the power will vary, not because the means necessary or appropriate to effectuate some purpose contained in the power change according to circumstance as the case with a purposive power such as the defence power, but because a particular subject matter may with the passage of time come to answer or cease to answer a description which brings it within the ambit of that power'.[118]

Mason J, in the *Tasmanian Dams* case cited with approval Justice Stephens' comment in Koowarta that, 'the content of the external affairs power must be determined by what is generally regarded *at any particular* time as a part of the external affairs of the nation'.[119] These statements together with the requirement imposed by some judges, that if there is a treaty the legislation cannot go outside its provisions,[120] suggest that the legislation will be tested with regard to the external situation at the time of challenge.

It could also be argued that a law implementing a pre-existing but now changed treaty can no longer be a law with respect to external affairs. The doctrine in *Walker v Baird* would prevent the court giving effect to the amending treaty except to the extent of implying a legislative intention to repeal those parts of the legislation inconsistent with the amending treaty. The extent to which the remaining legislation will be constitutionally valid will depend on how closely the court will require the legislation to mirror the treaty obligations.

If the change in treaty obligation should occur through a newly emerged norm or peremptory norm[121] of customary international law it could be argued that the legislation should survive on the basis that customary international law cannot abrogate the clear meaning of a statute.[122] On the other hand, the negation of a treaty obligation by a newly emerged rule of international law could mean that the legislation no longer refers to an existing external affair.

As indicated above a treaty can also be changed as a result of subsequent interpretive practices. Australia might have expressly participated in the practice. However, an interpretive practice may alter treaty obligations of a

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118 Ibid at 179.

119 Supra n 47 at 485. (Emphasis added).

120 See text accompanying n 49 Barwick. C J, in *Airlines of NSW Pty Ltd v New South Wales[No 2]* (1965) 113 CLR 54 at 86 said, '. . . where a law is to be justified under the external affairs power by reference to the existence of a treaty or convention, the limits of the exercise of the power will be set by the terms of that treaty or convention.'

121 Art 53 of the Vienna Convention on the Law of Treaties. See also *Committee of United States Citizens Living in Nicaragua v Reagan* 859 F2nd 929 (DC Cir 1988) where plaintiffs argued that aid to the Contra forces after the Nicaragua decision *(Military and Paramilitary Activities in and against Nicaragua (Nicar v US) Merits*, (1986) ICJ 14 was a breach of a principle of jus cogens which principle superseded the US Constitution. Dismissed on this point on the basis that adherence to an ICJ judgment rendered under a disputed assertion of compulsory jurisdiction is not required as a matter of *jus cogens.*

122 *Polites v The Commonwealth* (1945) 70 CLR 60.

state which has failed to object to the practice.[123] State practice is not always an easy thing to establish. There may, however, be a decision of an international tribunal establishing an interpretation which may be different from that of the municipal court. To what extent will the international interpretation govern the interpretation of the domestic legislation?

In *Duke v Reliance Systems Ltd*,[124] it was argued that a United Kingdom statute should be construed in a manner which gives effect to a subsequently issued European Community directive as construed by the European Court of Justice. Lord Templeman speaking for the House said:

> 'Of course a British court will always be willing and anxious to conclude that United Kingdom law is consistent with Community law . . . .But the construction of a British Act of Parliament is a matter of judgment to be determined by British courts and to be derived from the language of the legislation considered in the light of the circumstances prevailing at the *date of enactment*'.[125]

His Lordship also stated that there was no authority for the

> 'proposition that the court of a member state must distort the meaning of a domestic statute so as to conform with Community law which was not directly applicable'.[126]

If the legislation mirrored the treaty, it would appear that interpretive practices or decisions could be used in construing the meaning of the domestic legislation. On the other hand, if the international interpretation deviated from what the local court considered the clear meaning of the provision the international interpretation would not be used in construing the domestic legislation. This would mean that the domestic legislation no longer corresponds with or implements the international instrument which may in turn mean that the legislation is invalid.

The Commonwealth Acts Interpretation Act makes no reference to practice as an interpretive tool. Section 15AA of the Act provides that constructions promoting the purposes or objects of the act are to be preferred. If the purpose of the act is to implement domestically Australia's international obligations, then the same interpretation given to the international instrument should presumably be given to the domestic legislation-dl-thereby giving effect to the act's purpose.

In the United States an amending self-executing treaty would replace a prior treaty as federal law on the basis of an application of the maxim *leges posteriores priores contraries abrogant*.[127] There is some authority for the proposition that subsequent customary international law is subordinate to all statutes whenever enacted.[128] Whether this principle would apply to a

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123 In the *Corfu Channel Case (UK v Albania)* (1949) ICJ 4 at 25, Albania's failure, in its counter-memorial, to challenge the courts' power to fix the amount of compensation was used in interpreting the Special Agreement as not precluding the court from fixing the amount of damages. In the *Asylum Case (Colom v Peru)*, (1950) ICJ 266 at 286. Colombia's failure to raise the Havana Convention in diplomatic correspondence was used to show that Colombia did not construe the convention as applicable.

124 Supra n 65.

125 Ibid at 640.

126 Ibid at 641.

127 The *Chinese Exclusion Case*, (1888) 130 US 190 at 194; *Whitney v Robertson*, (1888) 124 US 190, 194.

128 *Tagg v Rogers* 267 F2d 664 at 666 (DC Cir 1959); *Committee of US Citizens Living in Nicaragua v Reagan* supra n 121.

treaty is questionable. The treaty derives its internal force as an international obligation of the United States, and if it ceased to have that status through the emergence of a new principle of customary international law, it is difficult to see how it would retain its internal effectiveness.

In *Saks v Air France*[129] the United States Supreme Court was prepared to look at the practical construction of a treaty adopted by the other parties to aid its own interpretation. By the same token an interpretation by an international tribunal in a case to which the United States is not a party will be given 'due weight.' Because such interpretations are ordinarily not binding on the United States in international law, they will not be binding on the United States.[130] 'The United States and its courts and agencies, however, are bound by an interpretation of an agreement of the United States by an international body authorized by the agreement to interpret it'.[131]

In each of the three situations dealt with above the question is the same: what is the impact on Australian legislation premised on a changed international state of affairs? Because of the adoption of *Walker v Baird* by the Australian courts the position remains cloudy. There is not the separation of treaty and legislation that exists in the United Kingdom;[132] nor is there the direct relationship that exists for self-executing treaties in the United States. There is a relationship between the treaty and its implementing legislation but what that relationship is and from what point of time it is to be tested remain unclear.

A treaty cannot operate directly, but once legislation is enacted to implement it, the status of the legislation will depend on the scope given to the external affairs power, and the time at which that legislation is to be tested against the power. Depending on the approach taken by the court the change in the international instrument may not affect the legislation or cause the legislation to become invalid. In either case the determination may not reflect Australia's international obligation, which in turn could be deleterious to Australia's relations with other states.

(ix) Conclusion.

The concept of self-executing treaties has gained acceptance in Europe and Japan as well as in the United States.[133] The process saves time and goes some way towards ensuring that a state lives up to its international commitments. International instruments concerned with human rights, international trade, and the environment are proliferating. They deal with issues and concerns of global importance. Artificial barriers which separate what the state does internationally from what it does internally impose one more obstacle in the way of resolving these problems.

The increasing interdependence of states and the rapid communication of

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129 (1985) 470 US 392 at 404.

130 *Restatement* supra n 95, 325 Reporters Note 4 at 201.

131 Ibid citing eg *Matter of International Bank for Reconstruction and Development*, 17 FCC 450 at 461 (1953).

132 The fact that a treaty is not incorporated into British law does not mean that it cannot come in by some other channel such as a principle of conflicts law: see *Maclaine Watson & Co v Dept of Trade* (CA) [1988] 3 WLR 1033.

133 For a discussion of the different approaches to self-executing treaties. See Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis' , (1985/86) 26 Vir JIL 627.

ideas and facts will force the problems that international law is trying to deal with into the domestic arena. The courts are going to have to face these problems and the international documents that address them. This in turn will cause an erosion of the *Walker v Baird* doctrine. Recently, following the collapse of the International Tin Council, Kerr L J said, 'in the present peculiarly international context one should in any event not shrink from adopting a liberal approach to the right to consider unincorporated treaties in order to interpret our consequential domestic legislation.'[134]

The direct incorporation of treaties gives the courts flexibility in dealing with issues of international concern. The relationship of international law to municipal law is a pragmatic one. Law is, after all, a practical science. Judges naturally prefer working with principles and rules that are concrete and with which they are familiar. Appeals to international law frequently fail, not on doctrinal theories regarding the relationship of international law to municipal law, but on the absence, vagueness or impracticality of the rule of international law appealed to. As the global community becomes more socially and economically interdependent and integrated the international order must produce concrete rules to deal with the multitude of global problems. Municipal courts are part of the international judicial order and they must assist in the implementation of international rules as well as in their development. In the absence of a concrete rule one hopes that the Australian courts will adopt the robust approach of Nourse L J in the *Tin Council* case:

> 'An uncertain question of international law is one which cannot be settled by reference either to an opinion of the International Court of Justice or to some usage, custom or general principle of law recognized by all civilized nations. The authorities show that where it is necessary for an English court to decide such a question, and whatever the doubts and difficulties, it can and must do so; being guided by municipal legislation and judicial decisions, treaties and conventions and the opinions of international jurists; and, where no consensus is there found by those opinions which are most nearly consistent with reason and justice'.[135]

Things in Australia however do not bode well. In *Jago v Judges District Court of NSW*[136] on the issue of whether there was a right to a speedy trial after referring to Magna Carta and the Habeas Corpus Act of 1679 Kirby P said:

> 'A more relevant source of guidance in the statement of the common law of this State may be the modern statements of human rights found in international instruments, prepared by experts, adopted by organs of the United Nations, and ratified by Australia and now part of international law'.[137]

The other judges, however, preferred Magna Carta, an approach not surprising in a jurisdiction where there is still no clear High Court

134 *Maclaine Watson & Co v Dept of Trade* supra n 132 at 1076.
135 Ibid at 1118.
136 Supra n 1.
137 Ibid at 569.

authority for the proposition that customary international law is part of Australian law.[138]

Finally, support is sometimes given to the legislative requirement for the implementation of treaties on the basis that such a procedure is more democratic.[139] The executive should not be able to enact legislation *via* treaties without parliamentary endorsement. This argument would be stronger in the United States where the practical separation of powers between the President and Congress is greater than in Australia, where the Prime Minister's control of the lower house is effectively a precondition to office.[140] Apart from this, it can be seen that requiring legislative action to implement treaties may not avoid the problem of undemocratic conduct. Through its control over external affairs the Executive may, by alteration and termination of treaties, effectively repeal legislation without legislative sanction. However, the legislature could require the Executive to keep it informed of its treaty activities[141] or to require legislative approval for the domestic implementation of particular treaties under the external affairs power.

138 Ibid.

139 See Solomon, Trick or Treaty . . . Government by External Affairs, The Weekend Australian Oct 7-8, 1989 at 23.

140 In this regard it is significant that attempts in the United States to prevent treaties having direct effect without act of Congress have failed through insufficient Congressional support. See Bishop, *International Law* (3rd ed 1971) at 112.

141 The Case Act requires the President to communicate to Congress the texts of Executive agreements, 1 USC§ 112(b).