Legal Fictions and Confusion as Strategies for Protecting Human Rights: A Dissenting View on Teoh's Case

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Introduction

Rarely does a judicial decision elicit as speedy a legislative repudiation as *Minister for Immigration and Ethnic Affairs* v *Teoh*[1] (hereinafter "*Teoh*"). Handed down by the High Court on 7 April 1995, the decision held that ratification of an international instrument could give rise to a legitimate expectation in administrative law, and thus impose certain obligations on administrative decision-makers as to the procedures they are required to follow. On the facts of the case, this meant that the interests of the applicant's seven children and step-children needed to be given greater weight by the Minister's delegate in considering whether to order his deportation, or alternatively the delegate needed to afford the applicant the right to be heard prior to adopting a different tack. On 10 May, a Joint Statement by the Attorney-General and the Minister for Foreign Affairs made clear the Government's intention to pass legislation which would reverse the effect of the decision, and such legislation was introduced in Parliament on 28 June.[2] The consensus in academic commentary on the decision and the Government's response appears to have been that such expedition is to be attributed at least in part to concern about the political and administrative costs of the decision.[3] No doubt both of these were

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1 (1995) 183 CLR 273.

2 Although the legislation lapsed at the close of that Parliament in January 1996, the point remains that the government's response was remarkably speedy.

3 See Anonymous, "Not Until We Say So" [August 1995] 30 *Australian Lawyer* 25 at 25; Ludbrook, 'Children Get a Look In ... Then the Door is Slammed in Their Faces' (1995) 20 *Alternative Law Journal* 247 at 247; Roberts, "Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court decision and the Government's reaction to it" (1995) 2 *Australian Journal of Human Rights* 135 at 144; Taggart, "Legitimate Expectation

factors, but in the quest to understand the fallout of the decision, it would be undesirable to overlook the extent to which the decision itself accorded with or departed from accepted constitutional and legal theory. It is one thing to say that the decision renders governmental decision-making more difficult - any number of measures calculated to safeguard the interests of the citizen could be argued to do so - but quite another to say that the decision compromises one of the most important features of our constitutional structure, being the investment of legislative power in Parliament. It can be argued that the decision did just that, by ascribing domestic legal consequences to the ratification by the Executive government of an international instrument. Viewed in this light, the decision can be seen as part of the recent trend in the High Court towards demonstrating concern for individual rights. So viewed, it also points up the dangers inherent in that approach.

The bulk of academic and professional commentary on the decision has been favourable,[4] on various grounds including the desirability of keeping domestic law in line with international law, particularly with that relating to human rights.[5] The same commentaries have correspondingly criticised the government's reaction to the decision, the strength of sentiment in that regard being reflected in some rather tendentious titles: "Seven little Australians and Government overreaction";[6] "Not until we say so";[7] "Children get a look in ... then the door is slammed in their faces".[8]

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and Treaties in the High Court of Australia" (1996) 112 *LQR* 50; Walker, "Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights" (1995) 25 *Western Australian Law Review* 238 at 241. The extent to which the fears of administrative inconvenience on which adverse reactions to the majority's decision have been based have been exaggerated has also been the subject of comment: Walker & Mathew, "Minister for Immigration v Ah Hin Teoh (Case Note)" (1995) 20 *Melbourne University Law Review* 236 at 246–7; Roberts, supra at 144–5; Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 *Adelaide Law Review* 213 at 256-57.

4 See generally Walker, *supra* note 3 at 240-241 and sources there cited; Walker & Mathew supra note 3 at 249.

5 Kirby, "The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'" (1995) *Western Australian Law Review* 30 at 48; Walker & Mathew, supra note 3 at 286; Pritchard, "The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice" (1995) 2 *Australian Journal of Human Rights* 3 at 36.

6 Churches, "Seven little Australians and Government overreaction" [September 1995] 33 *Law Society Journal* 51. It might be worth noting that this brief article was accompanied by a photo of Mr Teoh with five of the children in a bush setting, sitting on what looks to be a fallen tree. The text of Churches' article also contains some very strong and emotional language: the Joint Statement is referred to as an "edict" and a "ministerial ukase", and Churches wonders whether the legislation the Statement promised would be entitled the "*International Treaties (Window Dressing and We Crossed Our Fingers) Act*": at 52.

7 Anonymous, *supra* note 3. This article was accompanied by photos of each of the Ministers in question, including a very unflattering likeness of Senator Evans. Above the title, in capital letters, is the following text: "What is the effect on our decision-makers of the 920 treaties to which Australian is party? None, apparently." Yet the article itself, in its fourth paragraph, correctly contradicts this assertion: "the treaty provisions ... could quite properly be taken into account in the exercise of a discretion by a decision-maker under legislation".

8 Ludbrook, *supra* note 3.

This article goes against the tide of such opinion, arguing that reactions to the Government's action have failed to appreciate the situation in all its complexity and at times have been based on downright erroneous understandings of exactly what the statement meant. In advancing these arguments, I wish to emphasise that I applaud the outcome of the decision, and if it had the eventual effect of keeping the Teoh family together[9] I am very happy about that. My criticism is of the method by which the High Court reached its conclusions in the case.

Facts and procedural background

Mr Ah Hin Teoh arrived in Australia on a 6-month temporary entry permit in May 1988. In July of that year, he married an Australian citizen who had four children - one by a previous marriage and three by Mr Teoh's deceased brother. Mr Teoh and his wife proceeded to have three children together, born in January 1989, June 1990 and March 1992. Mr Teoh was convicted in November 1990 of six counts of importation and three counts of possession of heroin; the sentencing judge accepted that these offences were committed in the course of supplying his wife's addiction to the drug. (She had pleaded guilty to certain related offences in July 1990 and received an eighteen-month suspended sentence, then she was convicted of further offences in December 1991 and spent 10 months in prison.) Mr Teoh was sentenced to six years' imprisonment and became eligible for parole in July 1993.

He had applied for permanent residence status in February 1989. In January 1991 he had received a letter refusing that application; the Immigration Review Panel in July that year had recommended rejection of his application to reconsider that decision, and the Minister's delegate had accepted the Panel's recommendation the following day. In February 1992 an order had been issued for his deportation. He then made an application under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) for review of the delegate's decision refusing to reconsider his application for permanent residence status, and of the decision (by a different delegate) to order his deportation. He was unsuccessful at first instance, and successful before the Full Bench of the Federal Court. The Minister then appealed to the High Court.

The grounds of the original application for judicial review were failure to comply with the rules of procedural fairness (in failing to afford the opportunity to contradict the finding that he was not of good

[9] Of course, the immediate effect of the decision was to send the matter back to the Department so that the deportation decision could be made again. There was every possibility that even according greater weight to the interests of the children would still result in a decision in favour of deportation. See below, text accompanying notes 79-82.

character), failure to take proper considerations into account and application of a policy without regard to the merits of the case. Before the Full Court, two further grounds were added: failure to make appropriate investigations into the hardship to the wife and children if the decision to refuse permanent resident status were to stand and error of fact and law by the first instance court in finding that hardship to the wife had been taken into relevant consideration. The Immigration Review Panel's report had stated:

> "It is realised that Ms Teoh and family are facing a very bleak and difficult future and will be deprived of a possible breadwinner as well as a father and husband if resident status is not granted.
>
> However, the applicant has committed a very serious crime and failed to meet the character requirements for the granting of Permanent Residency. The Compassionate claims are not considered to be compelling enough for the waiver of policy in view of [Mr Teoh's] criminal record."[10]

The Full Court held that the delegate had not properly taken into account the effect of the break-up of the family in accepting the recommendation of the Panel. This assessment was supported in part by the provisions of the United Nations Convention on the Rights of the Child (hereinafter "the Convention"), which Australia had ratified in December 1990, and which had entered into force for Australia in January 1991 (that is, shortly after the refusal of Mr Teoh's application for permanent resident status but before the delegate's decision accepting the recommendation of the Immigration Review Panel).

Article 3(1) of the Convention provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The ratification of the Convention, according to Lee J, gave rise to a legitimate expectation in the Australian community that actions of the Commonwealth would be carried out in such a way as to adhere to its principles.[11] The substance of the delegate's failure so to adhere in this case was her failure to initiate appropriate inquiries and obtain appropriate reports about the potential effect on the children of Mr Teoh's deportation. This must be taken to mean that such a pro-active approach is the only one consistent with the interests of the child being "a primary consideration". Carr J adopted a similar approach to Lee J.

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[10] (1995) 183 CLR 273 at 281, quoted in judgment of Mason CJ and Deane J. The "character requirements" mentioned by the Panel were a matter of departmental policy, rather than legislative imposition.

[11] (1995) 183 CLR 273 at 282, per Mason CJ and Deane J.

The High Court's decision: ratification supports a "legitimate expectation"

The Full Court's line of reasoning was endorsed by a majority of the five-member High Court bench (Mason CJ and Deane, Toohey and Gaudron JJ; McHugh J dissented). There was never any question that legislation is needed before the provisions of an international agreement become part of Australian law.[12] The majority discussed briefly the potential use of the terms of an international agreement to which Australia is a party for clearing up an ambiguity in domestic law,[13] but there was no such ambiguity here. Their Honours also mentioned the use of international agreements to assist in the development of the common law,[14] but that was not the way the majority used the Convention in this case.[15]

Ratification of the treaty,[16] according to the majority, amounted to "a positive statement...to the world and to the Australian people that the executive government and its agencies will act in accordance with" it.[17] This statement forms the basis for a "legitimate expectation" that certain procedures will be followed or, in this case, that administrative decision-making will be made with certain principles in mind. In the words of Mason CJ and Deane J, the "positive statement" made by the government in ratifying the Convention "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'."[18] Once again, it was concluded that observing the terms of the Convention required the delegate to initiate inquiries as to the likely effect of the breakup of the family on the children, so the legitimate expectation had been defeated and the decision was bad in law.

The government's response

The decision of the High Court in *Teoh* made it clear that the "legitimate expectation" on which it was based could be defeated by a clear executive

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12 (1995) 183 CLR 273 at 286-87, per Mason CJ and Deane J. Gaudron J expressed general agreement with Mason CJ and Deane J as to the status of the Convention in Australian law: at 304.

13 (1995) 183 CLR 273 at 287, per Mason CJ and Deane J.

14 (1995) 183 CLR 273 at 287-88, per Mason CJ and Deane J.

15 Mason CJ and Deane J did suggest that "the principle enshrined in Art 3.1 may possibly have a counterpart in the common law" but did not pursue the matter as it had not been argued: (1995) 183 CLR 273 at 292.

16 This expression is used throughout the article as a generic term for international agreements.

17 (1995) 183 CLR 273 at 291, per Mason CJ and Deane J.

18 (1995) 183 CLR 273 at 291 (footnote omitted).

or legislative statement to the contrary.[19] Within five weeks of the decision being handed down, the Attorney-General and the Foreign Minister issued a joint statement in the following terms:

> "We state, on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law."[20]

The two Ministers cited, in support of their statement, the fact that Australia is presently a party to about 920 treaties, any of which might be relevant or raise an expectation in relation to any given administrative decision. The Ministers thus underlined the administrative costs of *Teoh*. They also expressed their desire "to retain the long-standing, widely accepted and well-understood distinction between treaty action undertaken by the Executive...and the implementation of treaty obligations in Australian law."[21]

A legislative refutation of the decision was introduced in Parliament within three months of the decision being handed down. The *Administrative Decisions (Effect of International Instruments) Bill* 1995 provided, in cl 4:

> "The fact that Australia is bound by, or a party to, a particular international instrument...does not give rise to a legitimate expectation, on the part of any person, that:
> (a) the decision will be made in conformity with the requirements of that instrument; or
> (b) if the decision is made contrary to any of those requirements, any person affected by the decision has been given notice and an adequate opportunity to present a case against the taking of such a course."

The Bill also contained a series of "for the avoidance of doubt" provisions, making it clear that cl 4 did not affect the incorporation of international instruments into domestic legislation, the provision in domestic law of remedies relating to international instruments or the status of international norms which would otherwise be relevant considerations in administrative decision-making. Even though the Bill was not passed into law, its introduction at least served as a further executive statement that

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[19] See (1995) 183 CLR 273 at 291 per Mason CJ and Deane J (ratification of a convention amounts to a "positive statement [which] 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" (emphasis added)).

[20] Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, *International Treaties and the High Court Decision in Teoh*, M44, 10 May 1995. The Statement is available on the World Wide Web at http://host.dfat.gov.au/pmb/releases_old/minfor/m44.html.

[21] *Ibid.*

the government did not wish any expectations to be raised by its ratification of any treaty. The words of the High Court made it clear that an executive statement would be sufficient to displace any expectation which might otherwise have arisen.[22]

The nature of the expectation

The Convention was not pleaded at first instance and there was no evidence that Mr Teoh had ever heard of it prior to the delegate's decision. He was thus held to have had a legitimate expectation based on something of which he had no knowledge. Mason CJ and Deane J stated:

> "It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation..."[23]

Toohey J said:

> "legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned. The matter is to be assessed objectively, in terms of what expectation might reasonably be engendered by any undertaking that the authority in question has given... . A subjective test is particularly inappropriate when the legitimate expectation is said to derive from something as general as the ratification of the Convention. For, by ratifying the Convention Australia has given a solemn undertaking to the world at large..."[24]

As McHugh J put it in his forceful dissent, the doctrine of legitimate expectations in the past had "helped to protect a person from the disappointment and often the injustice that arises from the unexpected termination by a government official of a state of affairs that otherwise seemed likely to continue".[25] Thus, according to McHugh J's view of the authorities, it had been implicit in the doctrine that the person who invoked it should have had knowledge of the matters on which the expectation is based, since the mischief it sought to avoid was a particular state of mind ("disappointment") in that individual. Allars, on the other hand, argues

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[22] See *supra* note 19, and note the use of the conjunction "or" in the italicised section. On the other hand, some commentators have expressed doubt about the efficacy of the Joint Statement in defeating expectations based on ratification of a treaty: Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law" (1995) 17 *Sydney Law Review* 204 at 239-41; Walker, *supra* note 3 at 242; Walker & Mathew, *supra* note 3 at 250.

[23] (1995) 183 CLR 273 at 291.

[24] (1995) 183 CLR 273 at 301; footnotes omitted.

[25] (1995) 183 CLR 273 at 311.

that for some time prior to the decision in *Teoh*, legitimate expectations had been found on the basis of governmental actions about which the applicant for judicial review was not necessarily aware.[26] On this view, "expectation" does not mean a state of mind of any particular individual but is rather a compendious term encompassing four types of situations which "might not immediately be understood to involve affectation of an interest" but which "ultimately amount to this".[27]

If Allars is correct, at the very least we could say that the use of the term "expectation" to describe an "interest" is somewhat misleading, and unfortunate for that reason.[28] Furthermore, on closer examination of the four grounds Allars describes,[29] one might get the impression that legitimate expectation has in the past overwhelmingly been applied in situations where there is some kind of direct relationship between the government and an individual. Only the fourth, a "published, considered statement of government policy creat[ing] an interest in an individual affected by the policy", does not require a direct dealing or communication between the government and the individual. There is little authority cited for the principle which Allars claims is demonstrated by the fourth situation,[30] so perhaps McHugh J's view of legitimate expectation as a state of mind of an individual was not as outlandish as Allars' argument would suggest.

If McHugh J was correct in this regard, there is much to be said for his Honour's conclusion that "If the doctrine of legitimate expectations were now extended to matters about which the person affected has no knowledge, the term 'expectation' would be a fiction so far as such persons were concerned."[31] Indeed, the same conclusion could be reached simply

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[26] Allars, *supra* note 22 at 221-25 (they are: "(i) An interest is generated in an individual who has a legal right or liberty of a nature which suggests that in the absence of special or unusual circumstances the individual will continue to enjoy the right, or liberty, benefit [sic], or will not be deprived of it without a hearing[;] (ii) Where a representation or undertaking is made by an administrator to an individual ...[;] (iii) The existence of a regular practice of government in its dealing with an individual ...[;] (iv) The existence of a published, considered statement of government policy": *id* at 223). See also Churches, *supra* note 6 at 52 (impliedly criticising McHugh's view as a narrow and mechanical "view of a requirement of fair governmental behaviour"); Donaghue, *supra* note 3 at 254-55.

[27] Allars, *supra* note 22 at 222. See also Kidd, "Can International Law Protect our Civil Rights? The Australian and British Experience Compared" (1995) 18 *University of Queensland Law Journal* 305 at 309.

[28] But see Donaghue, *supra* note 3 at 256 (arguing that it is preferable to have a fictional construct of an expectation rather than to favour "the well-educated or the wealthy").

[29] See *supra* note 26.

[30] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 20-1; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 659. Taggart points out, furthermore, that in basing a legitimate expectation on ratification of a treaty, the majority in *Teoh* "was not prepared to accept what has hitherto been thought to be the logical and legal consequence" of the "orthodoxy" that unincorporated treaty obligations cannot constitute mandatory relevant considerations in administrative law. Thus the members of the Court have "stretch[ed] legitimate expectation doctrine to do by procedural means what they were unwilling to do by the substantive means of mandatory relevant considerations": Taggart, *supra* note 3 at 53.

[31] (1995) 183 CLR 273 at 314.

on the basis of the word itself: "expectation". As suggested above, and Toohey J's statement[32] notwithstanding, an expectation is a state of mind, not an abstract aspect of the relationship between the Executive government and the general population. The latter description would apply to a duty or obligation, but that was not what was found here - at least, not independently of the expectation. It is extremely difficult to resist the conclusion that McHugh J was correct in saying that this expectation was no more than a fiction.

It is no bad thing to reject the proliferation of fictions in the law. If a particular course is deemed desirable, then presumably there are reasons for that. As a matter of sound judicial method it is incumbent on courts to articulate those reasons and open them to scrutiny within the legal and political communities and, where there is sufficient interest, in the general population. Fictions allow judges to avoid this kind of articulation, and potentially to mask the possible deficiencies in their reasons for adopting a particular course.

One would also be justified in feeling a more general and less legalistic concern, at the very use of any premise other than reality for the development of law: think of the fiction of *terra nullius* that was discarded in *Mabo* v *Queensland (No 2)*.[33] It stated, in effect, that Australia's indigenous peoples did not exist, with the result that Australia was classified a "settled" colony and thus received the bulk of British law at the time of colonisation. In the early days of the colony, that might have seemed like a perfectly harmless and tantalisingly convenient premise on which to proceed, but, as the Court finally admitted in *Mabo*, the fiction has caused considerable pain, offence and injustice in the years since then. We cannot be entirely confident that the fiction adopted by the majority in *Teoh* will not cause some unforeseen mischief in years to come.

The nature of the "statement" made by ratification

A further fiction is to be found in the assertion by the majority in *Teoh* that ratification amounts to a positive statement to the Australian community, as well as the international community. McHugh J argued convincingly:

> "The ratification of a treaty is...by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law, but, by ratifying the Convention, the Executive government does not give undertakings to its citizens or residents."[34]

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[32] See text accompanying note 24 above.
[33] (1992) 175 CLR 1.
[34] (1995) 183 CLR 273 at 316. See also Taggart, *supra* note 3 at 51.

It can confidently be stated that the Executive government, in entering into a treaty, does not intend thereby immediately to take on any liabilities with respect to the people of Australia. Moreover, the very fact that the majority left the Executive the opportunity to annul the decision - not to mention the fact that the Executive took that opportunity - only serves as further support for the proposition that the imputation to the Executive of an intention to observe the terms of the Convention is a fictional judicial construct. It might be suggested that the majority was merely being consistent here: ignoring the state of mind both of the individuals who knew nothing of the treaty and of the Executive government in entering into the treaty!

Given the unsatisfactory nature of the fictions on which the decision is based, one might consider what the real reasons might have been that recommended this course to the majority. Some hint was given in the judgment of Toohey J, where his Honour quoted a New Zealand decision describing as "unattractive" an argument which "apparently impl[ied] that New Zealand's adherence to the international instruments has been at least partly window-dressing".[35] Toohey J himself commented:

> "certainly a submission by a decision-maker that no regard at all need be paid to Australia's acceptance of international obligations by virtue of ratification of a convention is unattractive."[36]

In similar vein, Mason CJ and Deane J stated: "ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act".[37] Thus the decision seems to have been motivated by a concern to give some substantive content to otherwise meaningless executive acts.

If this is the motivation for the Court's decision, it is quite puzzling. For it surely runs counter to the true intentions of the Executive - if they had intended that ratification would amount to a statement giving rise to a legitimate expectation that the terms of the Convention would be applied in administrative decision-making, they would have ensured that those terms were applied and this case would never have arisen. In fact, the Executive did not even need to ratify the treaty to achieve that result. The terms of the treaty can be applied in administrative decision-making whether or not there exists any international obligation (provided they are consistent with the terms of the legislation, as they were held to be in this case).[38]

But most importantly, it would seem in some sense to be problematic, from the point of view of the separation of powers, for the judiciary to

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[35] *Tavita* v *Minister of Immigration* [1994] 2 NZLR 257 at 266, quoted in (1995) 183 CLR 273 at 300.

[36] (1995) 183 CLR 273 at 301.

[37] (1995) 183 CLR 273 at 291.

[38] (1995) 183 CLR 273 at 285 per Mason CJ and Deane J.

take it upon themselves to invest executive acts with meaning. It is difficult to imagine how perceptions of executive acts can become of legitimate concern to the High Court. If those acts are mere cynical public relations exercises - and particularly if that is how they are intended - it may be positively damaging for the judiciary to seek to give them some content, for such a course could obscure the true nature of the Executive's motivations from the public gaze at election time. Thus if the judiciary gives executive acts an effect which was not intended, this could be argued to upset the democratic process. It might be said that with this type of decision the Court is merely correcting executive misfeasance and obviating the need for any election-time scrutiny of the government's act. However, this would involve the Court in deciding what meaning the Australian public thinks an executive act *should* have, which, at the very least, would appear to be rather paternalistic. There are mechanisms for Australians to make their own voice heard on such matters, and the Court should leave those processes to run their course.

The ease with which the government was able to overcome the effect of *Teoh* is, in my opinion, further evidence of the unsatisfactoriness and unreality of the decision. It merely serves to remind us that the decision is based on the imputation of a particular meaning and intention to an executive act. Moreover, this was an imputation which the Court should have realised was really quite unrealistic. The Court would do better in future to desist in any approach which requires the making of such imputations.

Did ratification change the law?

The majority insisted that the effect of the decision was not to make the Convention part of Australian law. Much of the academic commentary on the decision echoes that sentiment.[39] On closer examination, however, this would appear to be a judgment call. The Convention did impose an obligation on administrative decision-makers which did not apply prior to ratification; it will be recalled that the delegate in this case was required, on the basis of the terms of the Convention, to initiate inquiries about the effect on the children of refusal of Mr Teoh's application for permanent resident status. It was open to her to decide not to adhere to the terms of the Convention, but if she made that choice she had a duty to inform the applicant and give him an opportunity to attempt to persuade her otherwise.[40] Thus there is ground for having reservations about the

[39] See Allars, *supra* note 22; Donaghue *supra* note 3 at 252–53; Walker, *supra* note 3 at 240-41 and sources there cited; Walker & Mathew *supra* note 3 at 242 (referring to it as "a less than legal right") and 247-48. Cf Taggart, *supra* note 3 at 53 (discussed *supra* note 30).

[40] (1995) 183 CLR 273 at 291-92 per Mason CJ and Deane J; at 298 per Toohey J.

claim that this decision did not make the Convention part of Australian law. It is splitting hairs to say that the delegate was not compelled to adhere to the terms of the Convention;[41] she was compelled to take certain action if she proposed not so to adhere. This compulsion was a legal one, enforced by a court, which would not have existed but for the ratification of the treaty.[42]

Further, in considering the question whether the decision in *Teoh* made the treaty part of Australian law, we need to address from a practical point of view the argument that the right was "only" a procedural one. Taggart makes some useful observations on this issue:

> "in the unlikely event that a decision-maker should make a rod for its own back [by rejecting the Convention principle, thereby necessitating a hearing on the issue], what would one realistically expect to hear from the children or their representative other than that the decision maker *really* should apply the Convention principle? This seems to be a process without a point, and at some cost, no doubt."[43]

In other words, the effect of the decision in practice was bound to be that the Convention would be applied. This is surely a consideration relevant to the issue of whether the decision made the Convention part of Australian law. An honest assessment of that issue should surely take into account the practical effect of the decision as well as the legal theory underlying it.

If it is correct to say that *Teoh* gave the Convention a legal effect in Australian domestic law, the decision involved a derogation from the well-accepted principle that legislation is required before an international instrument becomes incorporated into Australian domestic law (referred to from now on as "the incorporation principle").[44] As the majority insisted, the actual terms of the Convention had not become binding as such. It cannot be said, therefore, that the decision left no room for the requirement of legislative action to incorporate those terms into domestic law. But as long as courts are enforcing certain requirements against

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[41] (1995) 183 CLR 273 at 291 per Mason CJ and Deane J.

[42] See Donaghue, *supra* note 3 at 258 (conceding that *Teoh* made the treaty part of Australian law, but arguing that this is not problematic because the reasons underlying the incorporation principle did not apply in these circumstances); Ludbrook, *supra* note 3 at 247 (conceding that the decision gave the Convention a "legally binding affect [sic]").

[43] Taggart, *supra* note 3 at 52 (emphasis in the original). See also the comments of Mr Peter Bayne before the Senate Legal and Constitutional References Committee, quoted in Twomey, "*Minister for Immigration and Ethnic Affairs v Teoh* (Case Note)" (1995) 23 *Federal Law Review* 348 at 352: "If there is no act of the legislature or the executive or if there is no action of the executive which displaces the convention, then *as a matter of practical effect decision makers will have to have regard to the terms of the convention in order to determine whether they should give a hearing* to a person in respect of whom they propose not to apply the convention" (emphasis added).

[44] (1995) 183 CLR 273 at 286-87 per Mason CJ and Deane J; at 298 per Toohey J; at 315 per McHugh J.

decision makers which arise from ratification of the Convention, the incorporation principle can no longer be stated as counsel for the Minister had stated it, and Toohey J himself accepted it:

> "treaties (other than treaties terminating a state of war) do not impose obligations on individuals or invest individuals with additional rights or otherwise affect the rights of individuals under Australian law except insofar as the treaty is effectuated by statute."[45]

This decision clearly invested Mr Teoh with a right arising out of the treaty[46] - that is, the right to be informed if the delegate proposed not to proceed in accordance with the terms of the treaty and to make representations on that subject. It imposed a corresponding obligation on the delegate. The point might be raised that the above statement of the incorporation principle refers to "individuals" and that that does not cover persons acting on behalf of the government, but this, it is submitted, would be an overly technical reading, and there is no obvious reason to treat governments and individuals on a separate footing in this context. Thus the incorporation principle has clearly been changed - or, in Taggart's words, "effectively finessed"[47] - by this decision.

The incorporation principle derives either from the common law or from our governmental structure as laid down in the Constitution itself.[48] There is some difficulty with the latter proposition, as strict separation of powers between the Executive and the Legislature is not really a sensible argument in the context of responsible government. There may, however, be some future in an argument that distinguishes between legislative and executive functions, rather than personnel, and advocates that to change the law the former (unless arising out of a prerogative) must be carried out through the parliamentary process or at the very least subjected to parliamentary scrutiny and review.[49] The treaty-making process, as we know it, does not answer either of these descriptions, and so on the theory of distinguishing between legislative and executive functions it should not be enabled to change the law. Such an argument, arising as it does from our constitutional structure, leads us to the conclusion that the incorporation principle cannot be changed by judicial decision.

To the extent that the incorporation principle is part of the common law, it is certainly open to being altered by the judiciary. However, once again, it would have been preferable if the majority had been candid about

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[45] (1995) 183 CLR 273 at 298. Toohey J said that the principle thus stated was supported by "an abundance of authority": ibid. See also Donaghue *supra* note 3 at 223.

[46] See Taggart, *supra* note 3 at 53.

[47] *Id* at 52.

[48] Donaghue has essayed what appears to be an argument that reliance on the former source, deriving as it does from the British (unitary) constitution is "unfortunate": Donaghue, *supra* note 3 at 217 and 225. As the argument is not developed in any detail there it will not be addressed here.

[49] See *Victorian Stevedoring and General Contracting Co Pty Ltd* v *Dignan* (1931) 46 CLR 73.

the change that it was bringing about. Moreover, there is a strong argument that the incorporation principle should not be changed at all, given the wide-ranging nature of its constitutional implications. The ratification of treaties is an exercise of executive prerogative, and thus not subject to any kind of formal review. Historically, it was considered important as an incident of responsible government that an exercise of that kind of power should not change the law,[50] for it would allow the monarch to circumvent the will of the people as expressed through parliament.[51] It might be said that similar concerns apply today when the Executive enjoys such great power, and the Parliament is practically helpless in overcoming the will of the Executive.[52] It would only tend to enhance this power if the Executive were able to bring about a change in the law through an exercise of prerogative power, without having to go through such safeguards as do exist in parliament (especially the Senate) or submit itself to the added exposure and electoral liabilities associated with the legislative process. An assessment of the implications of the *Teoh* affair from the point of view of democracy should also note that, somewhat ironically, perhaps, the Joint Statement has triggered widespread debate and criticism of the government — an outcome which must surely be welcomed in a democracy, and which the decision in *Teoh* itself would have forestalled.[53]

Of course, the irony here is that the obligation imposed by the treaty was an obligation on the Executive itself. It was an obligation which was not inconsistent with such legislative expression as there had been of a preference for how this type of decision was to be made,[54] so the assumption of such an obligation was a course which was open to the Executive. Thus the outcome of *Teoh* might be defended on the basis that it really only amounted to the Executive taking on a responsibility of its own accord.[55] Such an argument, however, would bring us back to the fact that the circumstances of this case clearly demonstrated that that had not been the intention of the Executive in ratifying the treaty. If it had known that such a responsibility would be the consequence, it might not have ratified the treaty.[56] The ascription of another intention to the act of ratification

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[50] See Donaghue, *supra* note 3 at 225.

[51] This is something different from the argument that by entering into international agreements the government is ceding national sovereignty: see Donaghue, *supra* note 3 at 213; Walker & Mathew, *supra* note 3 at 248. I join with those commentators in the view that such arguments are practically devoid of merit, not least because, under a system of responsible government, Australia's elected representatives exercise the choice whether to join any international instrument.

[52] This fact makes Donaghue's attempted distinction between the British and Australian Constitutions less convincing: see Donaghue, *supra* note 3 at 217.

[53] Ludbrook, *supra* note 3; Walker & Mathew, *supra* note 3 at 236.

[54] See (1995) 183 CLR 273 at 285 per Mason CJ and Deane J.

[55] See Walker & Mathew, *supra* note 3 at 246. Twomey suggests that "most treaties are intended to be implemented, and are in fact implemented, by way of Executive action, rather than by legislation": Twomey, *supra* note 43 at 354.

[56] The implications of this proposition are discussed infra, text accompanying notes 76-77.

smacks of unreality at best, and probably breaches the separation of powers. The *Teoh* decision is really best understood as an instance of imposition by the *judiciary* of a responsibility on the Executive.

The general concept of reasonableness

There is nothing particularly new about such an imposition. The history of the development of common law principles of administrative law is a story of repeated instances of imposition of judicially-formulated rules on administrative decision-makers. The judgment of Gaudron J could be seen as another step in this process. While her Honour expressed general agreement with the observations of Mason CJ and Deane J concerning the status of the Convention in Australian law, she also found a more modest[57] way of reaching the same result, saying:

> "Quite apart from the Convention or its ratification, any reasonable person who considered the matter would, in my view, assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare. Further, they [sic] would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker."[58]

While there are generally some difficulties associated with the importation of a concept of reasonableness into judicial decision-making - that is, that it leaves a fair amount of room for application of the judge's own opinions and values - it is submitted that in this instance the judge's conclusion about what is reasonable is virtually unassailable. This leaves unanswered the question whether the course taken by the delegate in fact complied with the requirements of using the best interests of the child as "a primary consideration" - and that is a question on which reasonable minds might differ - but one would be hard-pressed to find anyone who would dissent from the proposition that the interests of children should be taken into account as at least "a primary consideration" wherever possible, and certainly in the context of administrative decision-making. There is certainly a long tradition of such an approach in the common law.

It is submitted that Gaudron J's approach is preferable to that of reliance on the Convention. The ascription to the Convention of the status of an "undertaking" to the Australian people, with the result that

[57] In thus describing Gaudron J's approach, I differ from other commentary which considers that approach more radical: see Allars, *supra* note 22 at 225-226; Taggart, *supra* note 3 at 50-51.

[58] (1995) 183 CLR 273 at 304.

administrative decision-makers are expected to act in accordance with its terms, was unsatisfactory for the reasons outlined above: it was really a fiction and it probably breached the separation of powers. Gaudron J's approach, on the other hand, merely followed the time-honoured tradition of judicial development of standards of behaviour for administrative decision-makers. Its line of reasoning was transparent and it did not depend on dubious assertions about the meaning of executive acts. It merely reminded members of the Executive that in the exercise of statutory powers they are bound by general common law standards of decency and reasonableness.

On this basis one might take issue with Allars' assessment of the precedential importance of the various judgments in *Teoh's* case: as the title of her article suggests, she sees the approach of Mason CJ and Deane and Toohey JJ as a "small step for legal doctrine".[59] On the other hand, she argues that "Gaudron J made a major doctrinal leap".[60] The basis for this statement is three-fold: the "common law human right of a child as a citizen to have his or her best interests taken into account ... was a novel one",[61] "the question arises whether other citizens, at least those who are vulnerable as children are, may also have common law human rights"[62] and Gaudron J's "statement is ambiguous as to the source of the expectation in this case"[63] That is, it might come from common law or from a non-incorporated convention, and "[i]f legitimate expectations conflict, their sources may be important."[64] With respect, it is submitted that the fact that a judgment raises further questions does not make it "a major doctrinal leap". What does amount to such a leap is a development which upsets a major feature of our constitutional structure, such as a the balance of power between the Executive and the Legislature.

The status of the *Teoh* principle subsequent to the change in government

The status of the principle enunciated in *Teoh* after the election in March 1996 was not clear. Was the Joint Statement in some sense 'vacated' by the change in government which occurred as a result of that election? If not,

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[59] See also Roberts, *supra* note 3 at 143; Twomey, *supra* note 43 at 273; Walker & Mathew, *supra* note 3 at 245–6.

[60] Allars, *supra* note 22 at 225.

[61] *Ibid.*

[62] *Ibid.*

[63] *Id* at 226. The statement being referred to appears at 183 CLR 305 and commences: "Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations."

[64] *Ibid.*

can an expectation created by one government's ratification of a treaty be enforced against a new government? The difficulties one encounters in answering these questions have resonances in the confusion over whether the decision caused the Convention to change Australian law or simply the relationship between the government and the people. As such they provide further evidence of the unsatisfactory nature of the decision in *Teoh*.

If the whole mechanism of legitimate expectations based on ratification of an international convention is a creature of the operation of law, the change in government should make no difference. The legal personality of the government does not change simply because its personnel and policies change. The new government would be bound by the utterances of its predecessors, just as it is bound by contracts which pre-date the change in government.[65]

On the other hand, it is possible to understand the principle in *Teoh* as a matter of concrete reality rather than law: the new government did not ratify the Convention, so its installation might be sufficient to defeat the expectation. Or, conversely, the new government has not repudiated the *Teoh* principle, so perhaps the principle has been revived.

Certainly the judgments of the majority strongly suggest that their Honours intended the principle as one based on concrete reality rather than on the legal nature of the government's act in ratifying the treaty. If, as a matter of concrete reality, a new group of individuals comes into government, and that group had nothing to do with the ratification of the treaty, it becomes even harder to argue that people can legitimately expect the government to act as if it is bound by the Convention. This argument would apply even if, as a matter of international law, the new government is in fact so bound, for the legitimate expectation arises from the "statement" made to the Australian people by the act of ratification, and not from Australia's status of being bound by the treaty.

On the other hand, it is possible to argue that not only is the "expectation" a legal fiction but its operation is one of law in the sense that it imposes a legal obligation on the decision-maker. If one accepts either of those arguments, and considering that ratification survives the change in government, one should regard the status of the "expectation" - be it in existence or defeated by the Joint Statement - as unchanged on a change of government. For, as mentioned above, the legal obligations of the government do not change as a result of changes in its personnel or political complexion.

All the same arguments apply to the effect of the Joint Statement: if it was sufficient to defeat the expectation, that operation was either a matter

[65] Walker draws analogy between ratified treaties and government contracts: Walker, "Treaties and the Internationalisation of Australian Law", paper delivered at "The Mason Court and Beyond", Conference, Melbourne, 10 September 1995, quoted in Twomey, supra note 43 at 273. See also Walker & Mathew, *supra* note 3 at 248.

of concrete reality (there was no longer any expectation in fact) or of law (there was no longer any expectation in law). If the former, we now have a government which has not made any such statement, so perhaps the expectation has revived. Perhaps it might be suggested that the Joint Statement can only operate in concrete reality if the expectation itself is a matter of concrete reality. And if the expectation is a matter of concrete reality it has already been defeated by the change in government. There is some attraction in such an argument, but ultimately we cannot be entirely sure.

If we could be sure whether the expectation were a matter of fact or law, that is, if we could be sure whether the *Teoh* doctrine enables ratification of a treaty to change the law, we could come up with an answer to this dilemma. As matters stand, however, we cannot. We can only conclude, therefore, that the uncertainty over the post-election status of the doctrine needs to be added to the list of unsatisfactory consequences of the decision, and in particular of its fictional nature.

Did the finding of an expectation nevertheless enhance "integrity in government"?[66]

Some people might feel that, even accepting all of the above argument, the decision in *Teoh* is still welcome on the grounds that its likely outcome is to give us better, more sincere government. The decision prevents the Executive from "having its cake and eating it" by scoring the international points from ratification but not taking the trouble to initiate legislation or incurring the electoral liabilities associated with loosening policies such as that relating to criminal deportations. As Allars says:

> "The question is whether Australia can have one policy about its domestic administration for international consumption when in reality its domestic policy is very different. The majority judges impliedly rejected this view as incompatible with integrity in government."[67]

In other words, the view is taken that a government which ratifies a treaty, and then does not treat those affected by administrative decisions as if they have a legitimate expectation of being dealt with in accordance with the terms of the treaty, is in some sense acting dishonestly, committing some kind of fraud either upon the Australian people or upon the international community.

This paints an unnecessarily critical picture of the government's position. There can be no fraud against the Australian people if those people, by and large, have no knowledge of the ratification, and if (as can be

[66] The phrase is taken from the title of Allars' article, *supra* note 22.
[67] *Id* at 235.

expected) those who do know are also aware of the time-honoured practice of waiting for legislation before treating the treaty's provisions as binding in domestic law. The Australian people, in such a situation, are not getting any less than they bargained for. Nor does it make any sense to suggest anything in the nature of fraud against the international community, whose members also can be taken to know that Australian law requires legislation to incorporate the terms of a treaty and are therefore getting no less than they bargained for either.

If the argument were that a government which behaves as the Australian government did towards Mr Teoh clearly has no intention of ever incorporating the treaty into domestic law, that would be another matter. Such an argument would amount to an accusation of out and out bad faith. But then, in such a situation, there would still be strong grounds to argue that any fraud or dishonesty being committed is being committed against the international community, and not against the Australian people. As such, it is really of no concern to our courts, and, once again, the only proper avenue for redress, if Australians are bothered by this kind of cynicism on the part of their government, is through democratic processes.

A related argument is that the decision in *Teoh* has, in Allars' words, "introduced an indirect but effective measure of accountability" in the exercise of the government's treaty-making power.[68] That may be true, but to argue that it was proper and desirable for the High Court to introduce such accountability is to overlook the reasons why (as Allars herself noted in the same paragraph) the exercise of the treaty-making power is non-justiciable. Mason J (as he then was) said in *The Commonwealth v Tasmania (The Dams Case)*:

> "Whether the subject-matter as dealt with by the convention is of international concern, whether it will yield, or is capable of yielding, a benefit to Australia, whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the executive government for determination. The Court should accept and act upon the decision of the executive government and upon the expression of the will of Parliament in giving the legislative ratification to the treaty or convention."[69]

Surely those same reasons would support the rejection of *any* role for the High Court in making the government "accountable" for its exercise of the power. It is curious that the irony of interpreting Mason CJ's

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[68] *Id* at 237.

[69] (1983) 158 CLR 1 at 125-26. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 229 per Mason J (reviewing an executive decision as to whether a treaty is beneficial for Australia would be "a course bristling with problems for the Court"). So far as I am aware, these sentiments have not been challenged in any subsequent High Court decision.

judgment in *Teoh* as an attempt to impose such "accountability" on the government, after his Honour's strong statement in *The Dams Case*, appears to have been lost on such learned commentators.[70]

Another problem is a tendency of commentary to exaggerate the extent of the Joint Statement's repudiation of *Teoh*.[71] For example, Roberts says that "the Government [has] announce[d] that the ratification of the very instruments that define the relevant human rights *have no domestic significance* in themselves".[72] There was no such announcement in the Joint Statement, and indeed the Statement explicitly recognised the other ways in which international obligations can become relevant in domestic law (for example, "to resolve an ambiguity in legislation" and to "provide guidance on the development of the common law"). Pritchard says: "the Government has *actively sought to prevent* Australian administrators and tribunals from importing the growing body of human rights jurisprudence into domestic practice".[73] Again, there was nothing in the Joint Statement which attempted to discourage decision-makers from taking international standards into account. It merely stated that there is no expectation that decision-makers will do so. In fact, taking the ratification of a treaty "into account in the exercise of a discretion by a decision-maker under legislation" was one of the situations the Ministers listed at beginning of the statement as legitimate consequences in domestic law of the ratification of a treaty.

Such statements as those of Roberts and Pritchard only compound a major difficulty with the arguments against the government's reaction to *Teoh*, which is that they tend to be based on an over-simplifying assumption. The assumption is that there exist only two possible states of mind for a government: hopeless duplicity or hypocrisy on the one hand and, on the other, intention to treat itself as immediately bound under domestic law to act in accordance with the treaty.[74] A close reading of the Joint Statement makes it clear that the Government wished to take a middle course: yes, it had every intention of fulfilling its international obligations, but it was also committed to following established processes - that

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70 But see Justice Kirby's 1996 Sir Anthony Mason Lecture, entitled "AF Mason - From *Trigwell* To *Teoh*", www.hcourt.gov.au/mason.htm (describing and discussing the changes observable in Sir Anthony's judgments over his years on the Court).

71 See Anonymous, *supra* note 3 as discussed above at note 7.

72 Roberts, *supra* note 3 at 146 (emphasis added).

73 Pritchard, *supra* note 5 at 37 (emphasis added).

74 See, for example, Churches, as discussed *supra* note 6; Donaghue, *supra* note 3 at 255 ("Only if the view is taken that international commitments are meaningless ... is it possible to avoid the conclusion that the Commonwealth has given an 'express or implied assurance' that it will act in a particular way"); Roberts, *supra* note 3 at 146 ("*Teoh's Case* resulted in the ratification of international treaties and instruments by the Executive finally having some relevance to Australian citizens rather than *purely being an act of grandstanding on the international stage*" (emphasis added)); Walker & Mathew, *supra* note 3 at 236 ("the statement exposes the federal government's professed commitment to human rights as mere rhetoric") and at 250 (interpreting the Joint Statement as an attempt to "minimis[e] ... the potential impact of human rights treaties").

is, legislative processes - in doing so. Once again, it does need to be recognised that it was open to the Executive, on this occasion, unilaterally to take it upon itself to act in the way that the High Court ultimately required of it. In other words, legislation was not legally necessary in order to introduce the duties which the Court thought the Convention introduced. However, it is a little harsh, in my view, to reproach the government for preferring to leave all changes in the status quo - especially in such a sensitive area as criminal deportation - for the legislative process. This does not necessarily make the government dishonest or lacking in integrity. It might simply make it cautious, or even prudent. The Government's stance is certainly capable of being interpreted as motivated primarily by a concern to maintain the balance of power between the Executive and the Legislature, rather than by callousness or lack of regard for human rights.[75]

Supporters of human rights who criticise the government's action[76] may have overlooked the distinct possibility that the ultimate effect of *Teoh* would be that the government would simply enter into fewer treaties.[77] If the decision has its major impact in the area of human rights, we can expect the major consequence to be that Australia will ratify fewer human rights treaties. This will severely restrict the Commonwealth's power to legislate on human rights, for we do not need to be reminded that there is no human rights power in the federal Legislature and nearly all Commonwealth human rights legislation is based on the attraction of the external affairs power by international obligations. Therefore it is not advocates of minority rights who should be applauding *Teoh's* case, but anyone who favours restricting the reach of the external affairs power. These two groups are surely almost completely mutually exclusive, the former generally finding themselves at the left end of the political spectrum, the latter at the right.[78]

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[75] In making this suggestion I hasten to recognise that one significant difference between this article and the commentary to which it responds is that this is being published after the change to a conservative government. I suspect that many supporters of human rights now have a slightly different view of the previous government and, seeing the extent to which recognition of human rights has been wound back under the new government, might feel quite nostalgic for the days when the Joint Statement was the worst they had to complain about. I would therefore hope that those who supported *Teoh* and opposed the Joint Statement will understand my opposite position as one informed at least partly by the benefit of hindsight!

[76] For example Walker and Mathew, who believe that the decision "could potentially strengthen Australia's adherence to its human rights obligations": Walker & Mathew, *supra* note 3 at 236. See also *id* at 249 (arguing *Teoh* provides a mechanism for enforcing Human Rights obligations).

[77] See Kirby, *supra* note 5 at 43-44; Kidd, *supra* note 27 at 310. But *cf* Roberts, *supra* note 3 at 144 n 53. Another probable outcome is an intensification of the pressure to introduce legislative and/or State involvement in the ratification process, which reform would have the same ultimate effect of fewer treaties being ratified. See Donaghue, supra note 3 at 228–33.

[78] See Walker, *supra* note 3 at 242-43 (noting the Coalition's "traditional hostility to international law generally and, more particularly, international human rights treaties.") It is worth noting that the Liberal/National Party Coalition, then in Opposition, supported

This leads to the more general question of whether the decision in *Teoh* is desirable because of its effects on human rights. In considering this question, I will leave aside the question whether the importance of enhancing the rights of one individual outweighs the importance of the governmental traditions and doctrines with which the decision interfered. I do not believe the latter question arises, because the effect of the decision on Mr Teoh was both minimal and contingent. I make that claim in ignorance of whether or not Mr Teoh's deportation was ultimately ordered, for the first point I would like to make is that however favourable the result, the same could have been achieved without having recourse to the fictional construct built on ratification of the Convention. As discussed above, one member of the majority found similar rights of children in the common law.[79] This means that the international law elements of the decision had only a minimal effect in practice. Also, we need to bear steadily in mind that, legally speaking, the only effect of the Court's decision was to require the deportation decision to be made again, under circumstances where greater weight was given to the children's interests or Mr Teoh was given the opportunity to argue (in the face of the decision-maker's stated inclination to the contrary) that the terms of the Convention should be adhered to.[80] Admittedly, that did give Mr Teoh another chance, and possibly a better chance, of a decision in his favour. But it was only a chance. In short, as many champions of the decision have insisted, the right was only a procedural one, and any beneficial effect on Mr Teoh's situation was contingent on the decision-maker still reaching a favourable conclusion. I have argued, contrary to the assertions of those other commentators,[81] that the recognition of such a right nevertheless changed Australian law.[82] At the same time, contrary to those who would support the decision on the basis of its salutary implications for human rights, I would argue that those implications are so minimal as to be practically illusory.

As a supporter of minority rights, I would like to see the High Court do something which will have a clear beneficial effect, if it insists on interfering with time-honoured constitutional doctrines. This brings me back

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the government's "anti-*Teoh*" bill on the ground that it limited the effect of international human rights obligations and was generally in keeping with those parties' traditionally cautious stance in relation to use of the external affairs power. See House of Representatives Proceedings, Thursday 21 September 1995, 1451-82. The Coalition might have done better to recognise that the decision would provide them with an excuse when they came to power for failing to ratify human rights treaties.

79 See *supra* notes 57-59 and text accompanying.

80 I note, in passing, that there is something a little odd about granting a procedural right to Mr Teoh in the name of his children's rights under the Convention. Surely it would have been preferable to allow the children separate representation.

81 Walker refers to it as a "weak right" and insists on the distinction between a "substantive legal right" and a "procedural right to natural justice": Walker, *supra* note 3 at 240-41. See also Roberts, *supra* note 3 at 143–44; Walker & Mathew, *supra* note 3 at 242.

82 See *supra* text accompanying notes 40-43.

to the point I made earlier about the desirability of candour in judicial decision-making. If it was concern for the rights of the Teoh children that underlay the majority's approach, their Honours could and should have said so, rather than hiding behind the fictitious façade of a legitimate expectation. Then they might at least have been able to do some substantive good.

"A primary consideration"?

A further issue relating to the majority's decision is whether their Honours were correct in finding that the delegate did not treat the interests of the seven children as a primary consideration. The effect of the delegate's decision on the children was quite obvious: if Mr Teoh was required to leave the country, the children would either stay behind, in which case they would be deprived of a father or step-father, or follow him overseas, in which case they would be deprived of the opportunity to grow up in the country of their citizenship. The delegate appeared to assume that the children would remain behind. She clearly took that fact into account, stating, it will be recalled, in her report that they were "facing a very bleak and difficult future and [would] be deprived of a possible bread-winner as well as a father and husband if resident status [was] not granted." She found, however, that this consideration did not carry sufficient weight to support the "waiver of policy in view of [Mr Teoh's] criminal record."[83]

There are two ways of understanding the delegate's report. Either she took the conviction and the potential effect of Mr Teoh's deportation on the children and weighed them against each other, or she took the conviction as a factor weighing heavily against approval of the application and then considered whether the effect on the family outweighed it. The difference is a subtle one, but it can make all the difference here. To Mason CJ and Deane J, the delegate appeared to take the latter approach - that is, she appeared to proceed on an assumption that the conviction was conclusive. On such an approach, there is a heavier burden on the compassionate considerations than if they are simply being weighed against the implications of the conviction. The adoption of that approach meant, in their Honours' view, that the interests of the children had been treated as a secondary consideration, rather than as a primary one. Their Honours relied particularly on the phrase "waiver of policy" to reach this conclusion.[84] Toohey J agreed that the delegate appeared "to have treated the policy requirement that applicants for the grant of resident

[83] (1995) 183 CLR 273 at 281.
[84] (1995) 183 CLR 273 at 292.

status be of good character as the primary consideration."[85] Once again, however, McHugh J was convincing in dissent:

> "In the context of an application for resident status, [Article 3(1)] cannot require any more than that the delegate recognise that the interests of the children are best served by granting the parent resident status. But that does not mean that those interests must be given the same weight as the bad character of the applicant. The use of the word "a" indicates that the best interests of the children need not be *the* primary consideration."[86]

His Honour concluded that the delegate did treat the children's interests as "a primary consideration" in this sense. It is submitted that, while there is much to be said for the approach of the majority on this point, McHugh J's approach is preferable. It does not require the same sort of technical wrangling between the definite and indefinite articles (ie if something else is *the* primary consideration the children's interests cannot be *a* primary consideration), but rather requires an assessment of whether enough weight has been given to the children's interests. This is an approach which is more susceptible of flexible application in the multitude of different circumstances in which it will be required to be applied.

The High Court and individual rights

Much has been made in recent years of a perceived increase in the concern of the High Court for the protection of individual rights. For example, a line of cases beginning with *Nationwide News Pty Ltd v Wills*[87] and *Australian Capital Television v Commonwealth*[88] and has developed the idea of a freedom of political communication, implied from the nature of the representative democracy set up by the Constitution, which can render invalid state or federal legislation.[89] In my opinion, there has been a

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[85] (1995) 183 CLR 273 at 303.

[86] (1995) 183 CLR 273 at 320 (emphasis in original).

[87] (1992) 177 CLR 1.

[88] (1992) 177 CLR 106.

[89] Other cases generally perceived to be part of this trend include *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (recognition of Aboriginal native title); *Leeth v Commonwealth* (1992) 174 CLR 455 (minority view recognising equality of federal offenders throughout the Commonwealth); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (restricting ability of parliament to pass laws for executive detention); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (expanding defences in defamation on ground of freedom of communication); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 (ditto); *Cunliffe v Commonwealth* (1994) 182 CLR 272 (limited recognition of freedom to provide information to prospective immigrants); *Grollo v Palmer* (1995) 184 CLR 348 (upholding power of federal and some other judges to issue warrants for telecommunication interception devices, on grounds that their independence provides a better safeguard for civil liberties); *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577 (limiting ability of State judges to order preventive detention).

tendency to exaggerate this supposed trend and its importance, but it is certain that *Teoh* can be seen as evidence of some kind of interest in individual rights on the part of the Court, and more importantly a willingness to interpret the facts and materials before it in such a way as to find such an interest in the acts and words of others. Discussion above has explained the difficulties associated with the attribution by the Court of meaning to executive acts: it can actually prevent the Executive from achieving the results they set out to achieve, thus in effect amounting to a usurpation of executive power by the judiciary.

It is tempting, especially if one agrees with the outcome of the Court's decision, to reject this argument in favour of an explanation based on the rule of law: there is nothing improper about a court developing standards of legality for executive action, and that is really all that was happening here. It is not so easy, however, to explain this particular decision in those terms, for the majority decision (leaving aside the additional comments of Gaudron J) purported to involve not the development of such standards, but merely the enforcement of standards which the Executive had imposed on itself. This, as has been demonstrated, involved the imputation to the Executive of an intention which it clearly did not have. And, ironically, its ultimate effect was to enhance executive power, by enabling that branch to import standards into Australian administrative practice - if not Australian law - without the need for any consultation with parliament.

It is essential to our system that there be some limit to the power of judges to check executive action - the rule of law is one thing, but surely everyone would agree that judicial omnipotence is only another form of tyranny. It is suggested that judicial attribution of meaning to executive acts, even if the goal is such a worthy one as the protection of individual rights, tips the balance too far in favour of the judiciary. Conversely, there must be a limit on the capacity of the judiciary to alter the balance of power between the Legislature and the Executive, especially in favour of the latter. Whichever way one looks at *Teoh* and its aftermath, one has no choice but to conclude that from a constitutional point of view the decision was an ill-considered one.

Conclusion

It might be said that we would be better off with a system which brought treaties into effect as part of domestic law immediately upon ratification.[90] Under such a system, Australia would surely become party to a good

[90] Introduction of such a system would undoubtedly also involve reform of the treaty-making process - a result which would, as Taggart suggests, be preferable to "clinging to an increasingly outmoded conception of national sovereignty": Taggart, *supra* note 3 at 54.

deal fewer treaties - a result which many on the political right and in state governmental affairs would no doubt see as desirable. However, that is not the system that we have, and for law to be made by an unreviewable executive act is something so foreign to our legal and governmental traditions that it ought not to be introduced without substantial public discussion.

This is the problem with the use of judicial power to protect individual rights: such discussion is not provided for in the judicial process[91] and, moreover, there is very little to guide a court which is relying on implications and attributions of meaning to the acts of others, as our High Court has been "forced" to do, in the absence of a Bill of Rights. These types of decisions should as far as possible be kept in a realm in which we all have the opportunity to participate. It is recognised that this might mean that some individuals' or groups' problems are passed over in the short term, but if the legal system is to be used to correct social or other injustices it should be on the basis of clearly established principles and criteria. Quite often, open-minded judges can achieve salutary results for disempowered minorities via the application of well-established legal standards such as reasonableness - as Gaudron J did in *Teoh* - and where at all possible the judiciary should stick to such mechanisms. Otherwise, we risk ending up with the kind of fictitious and unsatisfactory decision that the High Court handed down in *Teoh*.

[91] On the other hand, Justice Michael Kirby has suggested that the decision in *Teoh* led to increased debate on the relationship between international and domestic law and on the non-involvement of parliament in the ratification process: Kirby, *supra* note 5 at 48.