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Privacy unincorporated Human Rights Treaties as Triggers for Judicial Review of Administrative Actions

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According to the dualist theory of the relationship between municipal law and international law, treaties must be transformed by legislation to have an effect on domestic law. It necessarily follows that the citizens cannot rely on the unincorporated treaties. However, in Common Law tradition, one of the recent trends in which unincorporated treaties have crept into domestic law is through the judicial review of administrative and executive actions. Becoming a signatory to a treaty has become a representation that gives rise to legitimate expectations even if the treaty signed is not transformed inside domestic law. Similarly, such treaties have to be also treated as relevant considerations, and in appropriate circumstances, mandatory considerations in administrative decision-making. The main reason for the judicial outreach is to ensure that the organ of the government that undertook the obligations – the executive - must not put the blame on the other organ – the legislature - in order to refrain from the obligation it has undertaken. Above all, the judicial willingness to refer to such treaties goes beyond the ultra vires doctrine provided as a justification for judicial review.

Keywords: *unincorporated treaties, dualism, judicial review.*

INTRODUCTION

Monism and Dualism provide vital theoretical foundations to analyze the state practices on the relationship between municipal and international law and the reception of the latter inside the system of the former. Dualism views international law and municipal law as distinct, each of which operates in its own domain. Hence, in dualist countries, there is a sharp divide between international law and municipal law, according to which a treaty ought to be transformed by legislation to have an internal effect. During the past three decades, however, the judicial approach towards unincorporated human rights treaties has been progressive that the judges have been willing to give reference to unincorporated treaties in cases that have a bearing on human rights. This is often termed 'creeping monism'.¹ One of the methods whereby the unincorporated treaties have been given reference is in the context of judicial review of administrative actions. The orthodox premise is that unincorporated treaties, at worst, are irrelevant considerations.² Only when the treaty is said to express the policy of the executive can it become a relevant consideration, and limiting the discretion in a manner compatible with unincorporated treaties would amount to back-door incorporation.³ Implicit in this reasoning is the principle of judicial deference to administrative decisions and dualist justification that unincorporated treaties do not form part of the domestic law and that no decision-maker under domestic law is bound by anything that is extraneous to it.⁴ However, this paper, relying on and reinterpreting the landmark decisions on this issue, put forward the argument that meaningful reading of the obligations arising out of ratification has made this position tenuous at best and outdated at worst.

¹ A. Waters, 'Creeping Monism: The Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties' (2007) 107 (3) Columbia Law Review

² *J Astaphan and Co (1970) Ltd v Attorney General of Dominica* DM [1997] CA 1

³ *R. v Secretary of State for the Home Department Ex p Brind* [1991] A.C. 696

⁴ *Simsek v Macphee* [1982] 148 CLR 636; *5 R. v Secretary of State for the Home Department Ex p Brind* [1991] A.C. 696 at 748; also *R. v Ministry of Defence Ex p. Smith* [1996] Q.B. 517

UNINCORPORATED TREATIES GIVE RISE TO LEGITIMATE EXPECTATION

The case stands for the proposition that legitimate expectation could arise out of ratification of *minister of State for Immigration and Ethnic Affairs v Teoh*.⁵ Much has been written about *Torah*, its implication on the relationship between municipal and international law, criticisms and limitations. Here the *Teoh* is cited to show an overall tendency it has propelled that requires a limitation on discretion arising out of ratification. In this case, the Australian high court held that the administrative decision-maker must exercise his statutory discretion in conformity with the relevant convention *viz* Child Rights Convention - an unincorporated treaty - because treaty ratification, objectively assessed,⁶ meant that individuals had a legitimate expectation that government officials would act in accordance with the treaty.⁷ The justification was that ratification of a treaty, in the absence of any legislative or executive expression to the contrary, is a positive statement by the executive that it will act in conformity with an obligation arising out of it,⁸ particularly when the instruments evidence internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights.⁹ The argument of whether legitimate expectation was the right ground to refer to the obligation was challenged in subsequent decisions,¹⁰ and this extension of legitimate expectation was expressly rejected in England¹¹ and has never been fully recognized in New Zealand nor in India.¹² *Teoh's* true success lies in the proposition that ratification per se is not simply an obligation undertaken to the international community alone as dualists would have it, but also to the citizens of the country as well.¹³ It implies that only if the international commitment is meaningless and participation in these instruments is “merely platitudinous or ineffectual”¹⁴ is

⁵ *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 128 ALR 353

⁶ *Ibid*

⁷ *Ibid*

⁸ Sanjay Patel, ‘Founding Legitimate Expectations on Unincorporated Treaties’ (2010) 15 (1) *Judicial Review* 74; Sivaji Felix, ‘Unincorporated Human Rights Treaties and Claims Based on Legitimate Expectations’ (2001) 13 *Sri Lanka J. Int'l L.*, 17

⁹ *Minister of State for Immigration and Ethnic Affairs* (n 5)

¹⁰ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326

¹¹ *Chundawadra v Immigration Appeal Tribunal* [1998] Imm AR 161; *Behluli v Secretary of State for the Home Department* [1998] Imm AR 407; *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326

¹² *Ye v Minister of Immigration* [2009] NZSC 76

¹³ *Minister of State for Immigration and Ethnic Affairs* (n 5)

¹⁴ *Ibid*

it possible to avoid the conclusion that the state has given an “express or implied assurance” that it will act in a particular way.¹⁵ That view would be outright preposterous as it means international obligations are not taken seriously.¹⁶

UNINCORPORATED TREATIES AS LIMITATIONS ON STATUTORY DISCRETION

The first proposition for it was made in *Tavita v Minister for Immigration*,¹⁷ where the Convention on Rights of Child had been ratified, but not incorporated, and the minister argued that in the absence of legislative transformation, he need not consider the convention. Court held that such an argument would make the obligation undertaken redundant and ornamental.¹⁸ Similarly, in England, in *R v Lyons*,¹⁹ Lord Bingham remarked that unincorporated treaties are legitimate sources in guiding the exercise of discretions.²⁰ However, these two cases only stand for the proposition that unincorporated treaties are relevant considerations. Dualists have simply countered that relevant is different from mandatory considerations (simply put, mandatory considerations are those that no decision-maker can ignore)²¹, and it falls within the discretion of a decision-maker to decide whether he has to give any relevance or not. Therefore, effectively bringing the relevance of unincorporated treaties into the premise of *R v Secretary of State for the Home Department, Ex. p Brind*,²² which states decision-makers are under no obligation to exercise discretionary powers conferred upon them in domestic law so as to comply with unincorporated international obligations. Regardless, subsequent decisions both in England and New Zealand paint a different picture. In *R (on the application of Hurst) v Commissioner of Police of the Metropolis*,²³ the issue involved was whether a coroner is required to give effect to the investigative obligation

¹⁵ Stephen Donaghue, ‘Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia’ (1995) 17 (2) *Adelaide Law Review*, 255

¹⁶ *C v Holland* [2012] NZHC 2155, 65-69

¹⁷ *Ibid*

¹⁸ *Ibid*

¹⁹ *R v Lyons* [2003] 1 AC 976

²⁰ *Ibid*

²¹ Claudia Geiringer, ‘Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law’ (2004) 21 *NZULR*, 72-74

²² *R v Secretary of State for the Home Department, Ex. p Brind* [1991] A.C. 696

²³ *R (on the application of Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13

under Article 2 of the ECHR when holding an inquest into a death that occurred before the incorporative Human Rights Act 1998 was implemented. Though the house was divided on the issue, Lord Mance indicated that the proposition that it is entirely a matter of discretion whether or not the values engaged by international obligations have any relevance or operate as any sort of guide is unattractive and untenable.²⁴ If the matter stated in the obligation is “obviously material to a decision on a particular project”, then anything short of direct consideration could make the decision illegal or irrational.²⁵ Similarly, in *R v Secretary of State for the Home Department, ex p Venables*,²⁶ Lord Bingham opined that it is a presumption that Parliament would not intend for any discretionary power to be conferred by statute that could be exercised in a manner contrary to the UK’s treaty obligations, even where the treaty obligation postdates the legislation granting the discretion.²⁷ These two cases indicate that, although the position is far from settled,²⁸ England is inclining towards a mandatory consideration of unincorporated treaty obligations. That said, what is most apparent is the entrenchment of the view that the executive who ratified the treaty cannot simply ignore it by relying on legislative lethargy. That is, the organ that undertaken the obligation first-hand cannot simply ignore it by throwing the blame on the legislature. While England oscillates, New Zealand courts have extended the administrative law concept of presumption of consistency towards international obligations to unincorporated treaties based on the foundations of *Tavita*. The presumption of consistency with international obligations demands that the legislation be read consistently with the settled rules of international law.²⁹ The extension means that the executive and administrative bodies must take decisions that are consistent with unincorporated treaties unless there is a robust countervailing reason for not doing so.

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ *R v Secretary of State for the Home Department, ex p Venables* [1997] 3 WLR 23 [1998] AC 407

²⁷ *Ibid*

²⁸ Stephan C. Neff, *International Law and Domestic Legal System* (Oxford University Press 2011) 620

²⁹ Dan Meager, ‘The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)’ (2012) *New Zealand Law Review*, 465-486

In *New Zealand Airline Pilots' Association v Attorney-General*,³⁰ it was held that a delegated authority's discretion in the statute could be limited along the line of international obligations as the presumption of conformity demands the statutes to be interpreted in such a manner. Going further, in *Puli'uvea v Removal Review Authority*,³¹ where, in an immigration issue that implicated the welfare of a child, the relevant minister, although had considered the impact his decision could have on the child, argued that the child's welfare need not be a 'primary' consideration as the fact of unincorporated nature of Child Rights Convention made any effect it could have on domestic law minimal. Court, however, held that the welfare of a child is a 'primary' consideration as propounded in CRC. Finally, the matter became settled in *Zaoui v Attorney-General (No 2)*,³² where the issue of deportation was involved, and the minister had decided to deport the person on the statutory ground that his presence would be a threat to national security. However, there was a substantial risk that the person would be subjected to torture. Court held that in terms of the Convention on Torture which was ratified but not incorporated, the discretionary power must be read subject to the convention.³³ The developments indicate that presumption of consistency has enabled the court to hold that the ratified unincorporated treaties are not only mandatory considerations but any deviation from a value set out therein must be justified by a strong relevant consideration that outweighs it.³⁴ This implies that a simple nod in the treaty's direction will be insufficient to satisfy the obligation. A genuine evaluation of the substance in the unincorporated treaty is warranted. Judiciary could have simply relied on the principles of deference and comity to defer to executive and legislative about how treaty obligations should be performed and thereby avoided any controversy. Rather, these evaluations of exercise of discretion have been impelled by the judiciary's view on taking human rights obligations seriously.³⁵

³⁰ *New Zealand Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA)

³¹ *Puli'uvea v Removal Review Authority* [1996] 14 FRNZ 322 (CA)

³² *Zaoui v Attorney-General (No 2)* [2005] NZSC 38

³³ *Ibid*

³⁴ John F Burrows, *Statute Law in New Zealand* (3rd edn., LexisNexis 2003) 341 – 343; Claudia Geiringer (n 20)

³⁵ Claudia Geiringer (n 20); Huang [35] and *Ye v Minister of Immigration* [2008] NZCA 291, Glazebrook J. *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550

Indian experience too inclines towards a presumption of consistency. In the *Chinnappa v Union of India*,³⁶ the issue involved the construction of the Conservation Act of 1980, which read ‘no forestland or any portion thereof could be used for a non-forest purpose except with the approval of the central government’. In deciding the extent of the discretion, the court heavily drew from the Convention on Biological Diversity which India had acceded to but was not transformed by legislation and held that the presumption of conformity requires regard must be had to international conventions and norms, and by corollary, it was necessary for the Government to keep in view the international obligations while exercising discretionary powers under the statute unless there are compelling reasons to depart from it.³⁷ The court concluded that sustainable development and precautionary principles enumerated in the convention must be mandatory considerations and can only be overridden if there is a strong reason to do so. It is settled that the principle of reference permits, in the absence of statutory indications, what weight ought to be given to consideration, even if it is mandatory, falls under the sphere of discretion of the decision-maker. However, in both *Hurst* (per Lord Mance) and *Puli'uvea*, implied in the court's reasoning was that if the decision-maker fails to accord the necessary degree of consideration, the decision could be reviewed under *Wednesbury* unreasonableness. Astonishingly, the requirement of strong countervailing factors to overcome the treaty obligations as required under *Chinnapp* and *Zaoui* indicates that the norms in unincorporated treaties impliedly require the discretion to be exercised in certain directions. If so, it would mean that proportionality could be a viable ground for judicial review because if the countervailing factor does not justify the departure from the norm, the decision would be disproportionate. Indeed, several recent Supreme Court decisions in the United Kingdom seem to be mindful of this.³⁸ Then, all this means that far from being irrelevant consideration, the unincorporated treaties and norms therein are forming strong constraints on statutory discretions. A closer peek would show that this interconnection, for better or worse, is transforming administrative law – part of domestic law which the dualist has claimed international law is incapable of doing – by remodelling the traditional

³⁶ *Chinnappa v Union of India* (2001) Writ Petition (Civil) No. 202/1995

³⁷ *Ibid*

³⁸ *DA and DS v Secretary of State for Work and Pensions* [2019] UKSC 21

understanding of the margin of appreciation to the new realities created by the imperatives of unincorporated human rights treaties. In any event, if the courts review the exercise of discretion in favour of an unincorporated treaty, much to the dismay of dualists, it is, in fact, reviewing a domestic decision against the standards of international law.

THE RECEPTION AND THE FOUNDATION OF JUDICIAL REVIEW

More radically, the current trends seem to be transforming the foundations behind the judicial review, at least in countries like England and New Zealand, where it is based on the justification that the judiciary acts as Parliament's agent in reviewing administrative decisions. When courts review a decision on the basis of unincorporated treaties, they are doing so without the approval of Parliament, for, by their namesake, 'unincorporated treaties' have not gotten legislative assent. Then it seems the court's authority is arising from the combined effect of unincorporated treaty obligations and its role as guardians of human rights enumerated in New Zealand's Bill of Rights Act³⁹ and UK's Human Rights Act, respectively. It will be a lethal blow to the traditional dualist narrative as the extension of the judiciary's authority over judicial review is being partially impelled by the 'judicial construction' of unincorporated international treaty obligation that is not part of the law of the land.⁴⁰

CONCLUSION

The experience shows that, although the legitimate expectation in *Teoh* has met several obstructions, in the overall impact, the role of unincorporated treaties in administrative discretion is growing beyond anything envisaged by the dualist in *R v Secretary of State for the Home Department Ex p Brind*. Three trends could be ascertained based on the cases cited. First, and the most obvious, is that the unincorporated human rights treaties are capable of generating legitimate expectations. Second, the expansion of the Common Law presumption of consistency to include unincorporated treaties means that the administrative and executive bodies have not only to consider the unincorporated treaties as a relevant consideration but

³⁹ PA Joseph, 'Constitutional Review Now' (1998) *New Zealand Law Review*, 85

⁴⁰ Philip Joseph 'The Rule of Law: Foundational Norm' (Richard Ekins) *Modern Challenges to the Rule of Law* (LexisNexis 2011) 47

also take decisions that are consonance with it unless there is a strong countervailing reason for not doing so. Third, the judicial willingness to review administrative actions against the unincorporated treaties goes beyond the agency concept which states that when the courts oversee the exercise of such power, they are simply discharging the presumed will of the legislature.