

## CONSTITUTION FEDERAL

### Incorporation of International law

- **International law and domestic law; theories**

#### Monism (incorporation) automatic

The rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act in parliament

**Trendtex Trading v Central Bank of Nigeria (1977) 1 QB 529**; Lord Denning MR, UK

**USA**: has clause that treaties part of supreme law, self-executing (human rights, cannot become law automatically) and non-self-executing

**Spain**: international treaties once validly ratified and officially published=internal law

#### Dualism (transformation/incorporation)

International law and nation states are separate legal systems, so that development of IL have no direct effect for domestic purposes unless proper law making authority has transformed the rule to domestic law

**Australia**: parliament to transform

**UK**: European Court of Human Rights; EU system; Brexit? What will happen with HR?

- **Effect of International law in Australia; practice**

#### 1) Is international law part of Australian law

1. Customary International law: incorporation, only CL status does not over ride statute

Therefore, quite weak, hard to prove which rules have become customary

2. Treaties: transformation; UN have collection body, easy to prove

**Kioa v West (1985) 159 CLR 550**; do not have the force of law unless given that effect by statute;

1. Non-binding International Legal Materials

**Maloney v The Queen [2013] HCA 28**; Liquor Act (QLD), M fined \$150 for possession of alcohol, and argued prohibition were inconsistent with rights of equality, Racial discrimination Act 1975 (Cth) implementing International Convention on the Elimination of All Forms of racial Discrimination. Failed, although the findings are some what wrong

**Gerhardy v Brown (1985) 159 CLR 70**; human rights are a fundamental freedoms and inalienable rights independent of legal regime which governs it. Free and equal in dignity and rights. The law was held to be outside the power conferred by s51(xxxix)

**Kruger v Commonwealth (stolen generation case) (1997) 190 CLR 1**; Claims of genocide, but The Legislation; Aboriginals Ordinance 1918(NT) pre dated The genocide Convention Act 1949(cth) giving parliament approval to ratify the Convention on the Prevention and Punishment of the Crime of Genocide (12/1/51) but has yet to form part of domestic law. The AO1918 did not describe definition of genocide, but powers to act in the best interest of the aboriginal population. Held international law is not a higher law. Conservative judgment

# Federal Incorporation Constitutional Questions Involved

**Sabine Zange**



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