Chapter 18

Customary International Law in Domestic Courts: Imbroglio, Lord Denning, Stare Decisis

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1) THE THEORIES: APPARENT SIMPLICITY

René Provost said it well when he recently spoke of the "apparent simplicity of the idea of the application in domestic law of international norms." The key word here being "apparent," of course, because this matter is obviously nothing but, in Canada, in the United Kingdom and in many Commonwealth countries.2

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This is also true in the legally isolationist United States, as recently witnessed. The first fundamental problem is the existentialist self-doubt of the discipline of “international law.” Although the expression coined in 1789 by Bentham is relatively recent, the substance dates back to Vattel and Grotius, along with the very question of whether the “law of nations” is law at all. The actual sources of international legal norms (codified in the Statute of the International Court of Justice) continue to be debated by contemporary scholars, especially the constitutional and domestic law cases Lawrence v. Texas, 123 S.Ct. 2472 (2003), and Roper v. Simmons, 125 S.Ct. 1183 (2005). See also, generally, J. F. Murphy, The United States and the Rule of Law in International Affairs (Cambridge: Cambridge University Press, 2004); and, specifically, S. G. Calabresi & S. D. Zimdahl, “The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision” (2005): http://ssrn.com/abstract=700176; J. Ku, “Structural Conflicts in the Interpretation of Customary International Law” (2005) 45 Santa Clara L. Rev. 857; R. D. Glensy, “Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority” (2005) 45 Virginia J. Int’l L. 357; and J. Larsen, “Importing Constitutional Norms from a ‘Wider Civilization’: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation” (2004) 65 Ohio St. L.J. 1283.


cially customary international law.\(^1\) It is therefore in a context of lingering theoretical difficulties with the norms on the international plane that the uneasy situation concerning the relation between the international and the domestic legal realities must be considered.\(^2\)

Putting aside this initial problem, let us proceed on the premise that, indeed, international normativity exists. In such a scenario, is the conceptualisation of the international/national interface not straightforward, with the classic heuristic tools that are the "monist" theory for customs and the "dualist" theory for treaties?\(^3\) Simply put, the former postulates a non-ad hoc structural link between the international and the national legal spheres which, for customs, would mean that no implementation measure by a state is needed to give them legal effect domestically. From the national point of view, one speaks of the "adoptionist" model — or "incorporationist" model in British terminology — according to which international customary norms would be automatically part of the law of the land. On the other hand, dualism affirms the legal reality division between the international and the national which, for treaties, would mean that incorporation by means of individual state measure is required to allow them any domestic legal effect. From a national perspective, one speaks of the "transformationist" model, to the effect that treaty norms would not be part of the law of the country unless and until formally implemented.


This picture is not simple but simplistic, as monism and dualism have actually come to be seen, rightly so, as hiding more than explaining.¹⁴ Important among many questions unanswerable by these two theories are these: What is meant by domestic incorporation pursuant to the dualist logic? Is it still by means of implementing legislation,¹⁵ done either directly by reference in a statute or indirectly by legislative harmonization,¹⁶ or can it be seriously said that there are no less than ten ways to implement treaties,¹⁷ including on the basis of pre-existing domestic legislative norms?¹⁸ Is it intellectually honest to say

¹⁴ See, for instance, J. H. Currie, Public International Law (Toronto: Irwin Law, 2001) at 197.

¹⁵ The traditional proposition that domestic transformation of treaty norms needs to be done through legislation comes from the Labour Conventions case – that is, Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326, at 347, per Lord Atkin: “Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action” [emphasis added]. One author has suggested that implementation could be done by non-legislative means such as government policy measures: E. Brandon, “Does International Law Mean Anything in Canadian Courts?” (2001), 11 J. Environmental L. & Prac. 399, at 407. This proposition is clearly unsupported by case law and actually runs in the face of the three rationales behind the doctrine of transformation, namely separation of powers, federalism and democracy. For more detail on them, see S. Beaulac, “Arrêtons de dire que les tribunaux au Canada sont ‘liés’ par le droit international” (2004), 38 Rev. jur. Thémis 359, at 378-381.

¹⁶ This is the long-standing position, as recently summarised by R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont. & Vancouver: Butterworths, 2002), at 430. See also, for an analytical scheme of the persuasive force of international treaty norms based on these two techniques of legislative incorporation, S. Beaulac, “National Application of International Law: The Statutory Interpretation Perspective” (2003), 41 Canadian Y.B. Int’l L. 225.


that the domestic courts of a sovereign state are indeed "bound" by treaties, or is it more sound to view the role of such norms within the interpretative function constitutionally entrusted to the judiciary, more particularly in terms of the contextual argument of construction.

With respect to customs, if the international and the national are really one pursuant to the monist logic, how can domestic legal actors, such as judges, resort to such international norms domestically? Are legal counsel limited to the customs already discovered internationally or can they make a demonstration of the constituting elements of such norms in a domestic court? How realistic is this scenario in terms of resources and costs? If a custom has yet to be discovered internationally but has been recognised as such by courts of another jurisdiction, say Australia, is relying on this legal norm in Canada an argument of international law or of comparative law? For a custom to enjoy automatic domestic legal effect, must there be evidence of that particular state’s implicit consent to it by means of practice and opinio juris? What effect, if any, does

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22 On how it is a better strategy to use international treaties as a contextual argument of construction, instead of referring to a presumption of legislative intent, known as the presumption of conformity with international law, see S. Beaulac, “Le droit international comme élément contextuel en interprétation des lois” (2004), Canadian Int’l Lawyer 1; and S. Beaulac, “Recent Developments on the Role of International Law in Canadian Statutory Interpretation” (2004), 25 Statute L. Rev. 19.


24 This is an important aspect of the issue discussed by R. Provoost, supra, note 1, at 575–578, who opined that the difficulty with the state-specific consensual basis of customary international legal norms explains in large part why Canadian courts prefer to
the codification of a custom into a treaty have in relation to the national application of the legal norm? What is the story with jus cogens, peremptory customary international law from which there can be no derogation?

This enumeration of queries, which is far from exhaustive, explains the suggestion in the title of the chapter that the situation with respect to the national application of customs is beyond problematic and confusing. It is nothing short of an imbroglio, really. The following discussion attempts to address one major flaw in the reasoning that led to the general belief that customs obey the logic of monism but, ironically, it might very well create more uncertainties and chaos. The argument is quite straightforward, namely that the most allegedly authoritative British case law (relied upon also in some Commonwealth countries) for the proposition that customary international law is automatically part of the law of the land is fundamentally wrong. The proposed analysis must be understood, however, having in mind the traditional basic tenets of our international relations system and of our international law system.

3) THE INTERNATIONAL TENETS: WESTPHALIA

The matrix within which international affairs are conducted and in which international law operates is based on the Westphalian model of international relations, at the centre of which is the “idée-force” of state sovereignty. The resort to treaty-based international law arguments, which raise no question of voluntary acceptance of the norms.


26 At a symposium organised by the Department of Justice of Canada at McGill University, Montreal, on 15–16 June 2005, on issues relating to the relationship between international and domestic law, Stephen Toope expressed the opinion during the discussion that the jus cogens nature of some customary international legal norms should have no influence whatsoever on their use by the courts. The present author finds this position untenable and must strongly object to the suggestion that legal norms which the international community considers of the utmost importance should not be recognised as such when they are considered at the domestic level. In fact, the decision of the Supreme Court of Canada in Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, at para. 61–65, is a recent example where the jus cogens character of the legal norm at issue (that is, the prohibition against torture) was recognised and given weight in the consideration of the international law argument. On this aspect of the case, see S. Beaulac, “The Suresh Case and Unimplemented Treaty Norms” (2002), 15 Rev. québécoise d. int’l 221.

27 That is, “idea-force.” See A. Fouillée, L’évolutionnisme des idées-forces (Paris: Félix Alcan, 1890), at XI.

28 Of course, Westphalia is an “aetiological myth” (that is, a myth of origin), created by international society to explain the whens, wheres and hows of its becoming and
international reality consists of a community of sovereign states, which are independent from one another and have their own wills and *raisons d’être* as corporate-like representatives of the people or peoples living on their territories. This model involves an international realm that is distinct and separate from the internal realm. John Currie explained thus: “Public international law is not so much an area or topic of the law as it is an entire legal system, quite distinct from the national legal systems that regulate daily life within states.”

As far as the relation between international law and domestic law is concerned, there is no inherent link because the two systems are distinct and separate — “public international law exists outside and independent of national legal systems.”

Dwelling on these issues, Justice LeBel of the Supreme Court of Canada (extra-judicially, with Gloria Chao) pointed out: “At the heart of the debate is the tension between the democratic principle underlying the *internal legal order* and the search for conformity or consistency with a developing and uncertain *external legal order.*” Appositely, Karen Knop schematically explained that “domestic law is ‘here’ and international law is ‘there.’”

The continuing distinct and separate reality within which our modern state system is conceptualised, explains two fundamental principles of international law. The first one is that, from an international point of view, a sovereign state cannot invoke its internal law — including its constitutional structure — to

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30 It follows that the suggestion that the legislative power of a sovereign state has the competence to “violate” international law is completely nonsensical because, in addition to being a fundamentally flawed inquiry for countries of the British-type constitutional system based on the supremacy of Parliament, this statement wrongly assumes some kind of inherent connection between the international plane and the national level — see G. van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002), at 55 ff.


33 K. Knop, *supra*, note 21, at 504.

34 There is absolutely no doubt that the Westphalian model of international relations, governed by the Vattelinian legal structure, continues to represent our system’s paradigm, in spite of the globalisationist claim of the progressive end of the sovereign state. *Contra*, see P. Allott, *The Health of Nations – Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002).

justify a breach of its international obligations. Indeed, such an argument is impossible because these norms and duties are part of two distinct and separate legal systems. The second core principle of international law flowing from the international/internal divide relates to the administration of the relationship between the two systems. John Currie referred to this feature as the “international-national law interface” and wrote that the relationship “will depend on legal rules that determine, as a matter of law, how one legal system treats another.” Like many other Commonwealth countries, Canada’s rules of reception bring into play constitutional norms, which are unwritten; they come from the British parliamentary tradition through the preamble to the Constitution Act, 1867, which provides that Canada shall have “a Constitution similar in principle to that of the United Kingdom.”

4) LORD DENNING IN TRENDTEX: THE REVERENCE

Stephen Toope once wrote that, in Canada, “[w]e know for certain that we do not know whether customary international law forms part of the law of Canada.” However, this does not represent the majority view in the country where, along with the highly influential piece by Ronald St. John Macdonald,

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36 The basic authority for this proposition is the arbitration decision in the Alabama Claims case (United States/United Kingdom) (1872), Moore, Arbitrations, i. 653. This rule was codified in section 27 of the Vienna Convention on the Law of Treaties, supra, note 25.


38 See, for instance, the Australian situation with the Commonwealth of Australia Constitutional Act, 63 & 64 Victoria, c. 12 (U.K.), and the decision of the Australian High Court in Minister for Immigration and Ethnic Affairs v. Teoh (1995), 183 C.L.R. 273, at 286–287.

39 As Lamer C. J. confirmed in Re Provincial Court Judges [1997] 3 S.C.R. 3, at 68, “the general principle [is] that the Constitution embraces unwritten, as well as written rules.”

40 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, Appendix II, No. 5.


most international law scholars opine that the adoptionist model (or incorporationist model) applies.\textsuperscript{43} The Canadian law on the matter was in such a mess,\textsuperscript{44} Toope once scorned, that he felt forced to use British precedents in his public international law course, including what he called the “marvelous contribution”\textsuperscript{45} of Lord Denning in \textit{Trendtex Trading Corp. Ltd. v. The Central Bank of Nigeria}.\textsuperscript{46} “Because we are told that our constitution [Canada’s] is modeled in principle on that of the United Kingdom,” wrote Toope with a tinct of colonised complex, “I prefer to rely upon Lord Denning’s pronouncement that customary law is automatically incorporated within our domestic law.”\textsuperscript{47}

That Lord Denning in \textit{Trendtex} is revered in such a way by Toope is a bit troubling and, from a Canadian perspective, completely unjustified. Neither the Supreme Court of Canada\textsuperscript{48} nor any lower court in this country\textsuperscript{49} — except in


\textsuperscript{46} [1977] 1 Q.B. 529 [hereinafter “\textit{Trendtex}”].

\textsuperscript{47} S. J. Toope, \textit{supra}, note 45, at 37.

\textsuperscript{48} See the cases in footnote 44, \textit{supra}.

one somewhat incongruous case,\textsuperscript{50} that quoted the key passage but in the context of treaty law – has ever paid any attention whatsoever to this precedent for the issue of the national application of international customary law.\textsuperscript{51} Even in Great Britain, it has only been relied upon in a few subsequent cases to justify the adoptionist model for customs.\textsuperscript{52} Merely three such references occurred in our Commonwealth counterparts, Australia\textsuperscript{53} and New Zealand.\textsuperscript{54} The latest instance in Britain is \textit{R. v. Jones and others},\textsuperscript{55} where the Court of Appeal was asked whether the crime of aggression at international law was a crime in domestic law and thus a justiciable issue in courts; this question was answered by the negative, a conclusion that is under appeal at the House of Lords, judgment pending.

5) LORD DENNING IN \textit{TRENDTEX: THE CHALLENGE}

What is viewed as so extraordinary in the reasons Lord Denning gave in \textit{Trendtex} is the detailed analysis of the “two schools of thought” concerning the domestic utilisation of customs, namely the doctrine of incorporation (that is,

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\item This is a material fact that could not be silenced by the unconditional advocates of the adoptionist model for international customary law. See, for example, G. van Ert, \textit{supra}, note 30, at 158.
\item \textit{[2004] 4 All E.R. 955.}
\end{itemize}
adoption) and the doctrine of transformation. After considering each of them in turn and asking which is the correct one, he held:

Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inerably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court—as to what was the ruling of international law 50 or 60 years ago—is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change—and apply the change in our English law—without waiting for the House of Lords to do it.\textsuperscript{56}

Most clearly, therefore, the only reason behind Lord Denning’s conclusion that the adoptionist model (or incorporationist model, as called in Britain) should prevail with respect to customary law is the doctrine of stare decisis. Indeed international law knows no stare decisis, but English law does. Hence the monist logic is warranted for customs because, otherwise, changes in international law would not be reflected in domestic law.

This reasoning based on stare decisis is the fundamental flaw in Lord Denning’s decision in Trendtex. Two criticisms: The first personal; the second substantive. How can his Lordship’s statement about stare decisis enjoy credibility when his disregard for precedent is commonly known. Cassell & Co. Ltd. v. Broome,\textsuperscript{57} the cause célébre on punitive damages,\textsuperscript{58} drives the point home. In that case, not only did Lord Denning cavalierly disregard the recent precedent by the House of Lords in Rookes v. Barnard,\textsuperscript{59} but he audaciously invited the lower courts to ignore it.\textsuperscript{60} Beyond this credibility problem, however, there is a substantive one that destroys the stare decisis argument in Trendtex.

\textsuperscript{56} Trendtex, supra, note 46, at 554.

\textsuperscript{57} [1972] A.C. 1027 (H.L.).

\textsuperscript{58} On this issue and, particularly, the said episode by Lord Denning, see S. Beaulac, “A Comparative Look at Punitive Damages in Canada” (2002), 17 Supreme Court L. Rev. (2d) 351, reprinted in S. Beaulac et al. (eds.) The Joy of Torts – Essays in Honour of Mr. Justice Allen M. Linden (Markham, Ont.: LexisNexis Butterworths, 2003), 351; and S. Beaulac, “Les dommages-intérêts punitifs depuis l’affaire Whiten et les leçons à en tirer pour le droit civil québécois” (2002), 36 Rev. jur. Thémis 637.

\textsuperscript{59} [1964] A.C. 1129 (H.L.).

\textsuperscript{60} See the judgment at the Court of Appeal, Broome v. Cassell, [1971] 2 Q.B. 354 (C.A.), at 384, per Lord Denning: “This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by Rookes v. Barnard are so great that the judges should direct the juries in accordance with the law as it was understood before Rookes v. Barnard. Any attempt to follow Rookes v. Barnard if bound to lead to confusion.”
Simply put, perhaps because of Lord Denning in fact\(^{61}\) – or maybe in spite of or unrelated to him – the doctrine of *stare decisis* is not at all what it used to be in the common law systems of the UK, Canada and other Commonwealth countries.\(^{62}\) The old 19th century directive which even bound the House of Lords to its own previous decisions, as stated in *London Street Tramways Co. Ltd. v. London County Council*,\(^{63}\) is now long gone. It has been replaced by the *Practice Statement (1966)*,\(^{64}\) where their Lordships proposed “to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.”\(^{65}\) This new approach to legal precedents at the country’s highest instance had an obvious trickling down effect on the lower courts, where the doctrine of *stare decisis* is known perhaps more in its breach than in its adherence.\(^{66}\) It has also influenced, most certainly, judicial decision-making all over the Commonwealth.\(^{67}\)

At the Supreme Court of Canada, the strict doctrine of *stare decisis* was also professed in the early 20th century with *Stuart v. Bank of Montreal*\(^{68}\) but, before the end of the 1950s, started its progressive relaxation.\(^{69}\) Since *Watkins v.*

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\(^{61}\) See H. Carty, “Precedent and the Court of Appeal: Lord Denning’s view explored” (1981), 1 Legal St. 68.


\(^{63}\) [1898] A.C. 375 (H.L.).

\(^{64}\) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77.

\(^{65}\) *Ibid.*


\(^{68}\) [1909] 41 S.C.R. 516.

Olafson\textsuperscript{70} and R. v. Salituro\textsuperscript{71} at the turn of the 1990s, the issue has ceased to be about bindingness of precedents and is now centred on the framework within which courts can adapt and develop common law rules. In the latter case, Iacobucci J. wrote: "Blackstone's static model of the common law has gradually been supplanted by a more dynamic view. This Court is now willing, where there are compelling reasons for doing so, to overturn its own previous decisions."\textsuperscript{72} He offered these edicts: "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country;"\textsuperscript{73} but they should limit themselves "to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."\textsuperscript{74} These remarks are apposite to alleviate Lord Denning's concerns that, because of \textit{stare decisis}, domestic legal norms based on international customary law could not change over time.

The new reality of the weaker role for \textit{stare decisis} in common law jurisdictions goes a long way to justify putting aside Trendtex as a precedent for the proposition that customs may be used domestically pursuant to the adoptionist (or incorporationist) model and its monist logic. Indeed, it is not true anymore (assuming it once was) that the rigidity of the doctrine means that an old legal precedent will stand in the way of allowing judge-made-law to evolve. Similarly, it is not true nowadays – nor, arguably, was it already when Trendtex was decided in 1977 – that customary law at the international level that was nationally applied by means of case law cannot see changes in its legal norms be given domestic effect because of strict precedents. "International law knows no rule of \textit{stare decisis},"\textsuperscript{75} as Lord Denning put it; national law in common law countries, for its part, knows a considerably watered-down such doctrine. Customary international law evolves over time, no doubt, but so does the national judge-made-law that gives it legal effect domestically, according to the contemporary version of \textit{stare decisis}.

What happens then if Lord Denning's reasoning in Trendtex, based on \textit{stare decisis}, is fundamentally wrong? In terms of positive law, it shatters the authority of the case and allows back the traditional, and more accurate, British case law on the national application of international customary law. One such instrumental case is \textit{Chung Chi Cheung v. The King},\textsuperscript{76} where Lord Atkin declared: "It must always be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its

\textsuperscript{70} [1989] 2 S.C.R. 750.
\textsuperscript{71} [1990] 3 S.C.R. 654.
\textsuperscript{72} \textit{Ibid.}, at 665.
\textsuperscript{73} \textit{Ibid.}, at 670.
\textsuperscript{74} \textit{Ibid.}
\textsuperscript{75} Trendtex, supra, note 46, at 554.
\textsuperscript{76} [1939] A.C. 160 (P.C.).
principles are accepted and adopted by our own domestic law." This passage was read by Lord Denning in Trendtex as rejecting the adoptionist (or incorporationist) model for customs and as requiring implementation by means of legislation. This interpretation is totally unfounded; it is not what Lord Atkin stated and it is crucial in these concluding remarks to address this point.

The suggestion that, if not applied nationally pursuant to the monist logic, customs have to be incorporated through legislation is based on a complete misconception of this international law source, as well as on a fundamental misunderstanding of the incorporationist model and, with it, the dualist logic. Customary law is on the international plane, in a way, what common law is in a domestic jurisdiction, namely unwritten legal norms. Just like conventional law is internationally, in a way, what statutory law is domestically, namely written legal norms. Now, bearing in mind that the Westphalian paradigm postulates two distinct and separate legal realities which need to be bridged somehow, the following propositions appear logically sound: Common law, and its unwritten national legal norms, is the proper vehicle to incorporate unwritten international legal norms found in customs. Statutory law, with its written national legal norms, is the proper vehicle to transform written international legal norms found in treaties.

In the end, recalling that the dualist theory is essentially about requiring a state measure to link the international and the national, there is no difficulty in seeing that customs know a faith similar to treaties. The state measure to transform a treaty is accomplished by the legislator, with an implementing enactment establishing the statutory rule, while the state measure to incorporate a custom is done by the judicial branch of government, with a decision identifying the common law rule. The remaining question, which will have to wait for another day, is whether this process ought to be viewed still through the prism of the adoptionist (or incorporationist) model. Is it not really an application of the transformationist model, the only difference being the type of state measure that gives domestic effect to international law? Could this conceptualisation mean less chaos, less of an imbroglio situation, as regards the national application of customary legal norms? One can only speculate as to what Lord Denning would answer.

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77 *Id.* at 167.
78 *Supra*, note 46, at 554.
79 This point was made by F. Rigaldies & J. Wochrling, "Le juge interne canadien et le droit international" (1980), 21 C. de D. 293, at 305–306.